# HANDLING THE DWI CASE IN NEW YORK

## SUBSTANTIVE LAW AND PROCEDURE

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CHAPTER 55

# NEW DMV REGULATIONS AFFECTING REPEAT DWI OFFENDERS

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## § 55:1 In general

Starting in approximately 2011, a series of high publicity cases involving repeat DWI offenders led to a campaign to keep these drivers off the road. In this regard, certain politicians attempted to pass legislation that would greatly increase the driver's license revocation periods for repeat DWI offenders. However, the proposed legislation was not enacted.

Dissatisfied with the Legislature's lack of action on this issue, Governor Cuomo directed DMV to enact harsh new administrative regulations that would render the need for legislative action moot. Stated another way, when the Legislature could not agree on how to best address the issue of repeat DWI offenders -- and/or could not agree as to whether the existing treatment of repeat DWI offenders was inadequate -- the executive branch of government bypassed the Legislature and took matters into its own hands.

The new DMV regulations ordered by Governor Cuomo took effect on September 25, 2012. However, starting in February of 2012 DMV stopped processing the applications for relicensure of thousands of individuals whose driver's licenses were currently revoked and who either (a) had 3 or more DWI-related convictions/incidents within the new 25-year look-back period, or (b) had 5 or more DWI-related convictions/incidents within their lifetimes. In this regard, DMV intentionally delayed the applications for relicensure of thousands of individuals who were eligible for immediate relicensure under existing laws, existing regulations and the DMV policy that had been in effect since at least January of 1986. The purpose of the delay was to prevent repeat DWI offenders from being relicensed prior to the enactment of the harsh new regulations ordered by the Governor -- so that

the (as yet non-existent) regulations could subsequently be retroactively applied to their applications for relicensure.

This Chapter discusses the new DMV regulations, as well as various potential challenges thereto.

## § 55:2 Summary of pre-existing DMV policy

Prior to the enactment of its new regulations, DMV had a policy regarding repeat DWI offenders that had been in effect since at least January of 1986. See Appendix 53 ("Letter from Department of Motor Vehicles Regarding Multiple Offenders"). Unless the person (a) was underage, (b) had refused to submit to a chemical test, or (c) was a commercial driver -- and as long as the person provided proof of alcohol/drug treatment -- the policy was as follows:

1. *2nd offenders* -- if the person was eligible for the Drinking Driver Program ("DDP"), the license would be restored upon successful completion thereof. Otherwise, license restored at the conclusion of the minimum statutory revocation period.

2. *3rd offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 18 months.

3. *4th offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 24 months.

4. *5th offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 30 months.

5. *6th and subsequent offenders* -- license only restored upon Court order.

Pursuant to this policy, DWI-related convictions/incidents were only taken into account if they occurred within a 10-year period. In this regard, prior to the enactment of the new regulations, 15 NYCRR § 136.1(b)(3) provided as follows:

> History of abuse of alcohol or drugs. A history of abuse of alcohol or drugs shall consist of a record of *[2] or more incidents, within a 10 year period*, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether

such incident was committed within or outside of this state.

(Emphasis added).

Thus, for example, if a person was convicted of his or her 6th DWI, but had no DWI-related convictions/incidents within the past 10 years, the person was treated as a 1st offender for purposes of the above policy -- and is still treated as a first offender for purposes of all existing DWI statutes. See, e.g., VTL §§ 1193(1)(a), 1193(1)(c)(i), 1193(1)(c)(ii), 1193(1)(d)(2), 1193(1)(d)(4)(i), 1193(1)(d)(4)(ii), 1193(2)(b)(12)(a), 1193(2)(b)(12)(d), 1194(2)(d)(1) & 1198(3)(a). See also PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3). See generally VTL § 201(1)(k); CPL § 160.55(5)(c) (records pertaining to a VTL § 1192-a finding are required to be sealed after 3 years or when the person turns 21, whichever is longer).

## § 55:3 Effective date of new regulations

The effective date of the new DMV regulations is September 25, 2012. Critically, unlike new laws -- which generally only apply to offenses committed on or after the effective date thereof -- the new regulations are being applied retroactively. In fact, the new regulations were applied to applications for relicensure that were received in February of 2012 (as these applications were intentionally not decided until after the new regulations took effect).

## § 55:4 Summary of new regulations -- Key definitions

The new DMV regulations contain the following key definitions:

1. "*Dangerous repeat alcohol or drug offender*" --

   (a) any driver who, within his or her lifetime, has [5] or more alcohol- or drug-related driving convictions or incidents in any combination; or

   (b) any driver who, during the 25 year look back period, has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has [1] or more serious driving offenses during the 25 year look back period.

   See 15 NYCRR § 132.1(b).

2. "*Alcohol- or drug-related driving conviction or incident*" (hereinafter "DWI") -- any of the following, not arising out of the same incident:

   (a) a conviction of a violation of VTL § 1192 (or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs);

   (b) a finding of a violation of VTL § 1192-a (*i.e.*, the Zero Tolerance law);

   (c) a conviction of a Penal Law offense for which a violation of VTL § 1192 is an essential element; or

   (d) a finding of a refusal to submit to a chemical test pursuant to VTL § 1194.

   See 15 NYCRR §§ 132.1(a) & 136.5(a)(1).

3. "*High-point driving violation*" -- any violation for which 5 or more points are assessed on a person's driving record.

   See 15 NYCRR §§ 132.1(c) & 136.5(a)(2)(iii).

4. "*Serious driving offense*" (hereinafter "SDO") -- any of the following, within the 25-year look-back period:

   (a) a fatal accident;

   (b) a driving-related Penal Law conviction;

   (c) conviction of 2 or more high-point driving violations; or

   (d) 20 or more total points from any violations.

   See 15 NYCRR §§ 132.1(d) & 136.5(a)(2).

   The new regulations do not define what would constitute a "driving-related Penal Law conviction." In this regard, however, DMV Counsel's Office advises that a driving-related Penal Law offense is one in which the operation of a motor vehicle is an essential element. Thus, for example, a DWI that is plea bargained to Reckless Endangerment would not constitute a driving-related Penal Law conviction.

5. "*25-year look-back period*" -- the time period 25 years prior to, and including, the date of the revocable offense.

   See 15 NYCRR §§ 132.1(e), 136.1(b)(3) & 136.5(a)(3).

6. "*Revocable offense*" -- the violation, incident or accident that results in the revocation of a person's driver's license and which is the basis of the application for relicensure.

   See 15 NYCRR § 136.5(a)(4).

   Upon reviewing an application for relicensure, DMV will review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if the offense had been committed immediately prior to the date of the revocable offense.

   See id.

   For purposes of this definition, "date of the revocable offense" means the date of the *earliest* revocable offense that resulted in a license revocation that has not been terminated by DMV.

   See id.

6. *License with "A2 problem driver restriction*" -- a driver's license that is treated like a restricted use license, see VTL § 530; 15 NYCRR § 135.9(b), and which will be revoked for the reasons that would lead to the revocation of a probationary license (*i.e.*, (a) following too closely, (b) speeding, (c) speed contest, (d) operating out of restriction, (e) reckless driving, or (f) any two other moving violations).

   See 15 NYCRR §§ 3.2(c)(4) & 136.4(b)(3); VTL § 510-b(1); DMV website.

   If the revocable offense leading to the issuance of a license with an A2 problem driver restriction was DWI-related, an ignition interlock device ("IID") requirement will be imposed.

   See 15 NYCRR §§ 3.2(c)(4), 136.4(b)(1)-(3) & 136.5(b)(3)-(4).

## § 55:5 Summary of new regulations -- Key provisions

The sections that follow summarize the key provisions of the new DMV regulations.

## § 55:6 New regulations only apply to repeat DWI offenders

The new regulations only affect repeat DWI offenders. There are no changes to the rules applicable to first offenders.

## § 55:7 New regulations generally only apply where person's license is revoked

A critical aspect of the new regulations is that they generally only apply where the defendant's driver's license is revoked (as opposed to suspended). This is because license suspensions do not trigger either a full record review or the need to submit an application for relicensure, whereas license revocations trigger both.

Thus, a conviction of DWAI (as opposed to DWI) can now mean the difference between a 90-day license suspension and a lifetime license revocation. In this regard, however, it must not be forgotten that there are several circumstances in which a DWAI conviction results in a license revocation. See Chapter 46, *supra*. See also Chapters 14 & 15, *supra*.

In addition, 15 NYCRR Part 132 is the primary exception to the rule that the new regulations only apply where the defendant's driver's license is revoked. Part 132 applies to "dangerous repeat alcohol or drug offenders" who are convicted of high-point driving violations (which violations generally do not, in and of themselves, even lead to a license suspension -- let alone a revocation). See §§ 55:14 & 55:15, *infra*.

## § 55:8 DMV's definition of "history of abuse of alcohol or drugs" now utilizes 25-year look-back period

Prior to September 25, 2012, DMV defined "history of abuse of alcohol or drugs" as:

> A history of abuse of alcohol or drugs shall consist of a record of *[2] or more incidents, within a 10 year period*, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether such incident was committed within or outside of this state.

15 NYCRR former § 136.1(b)(3) (emphasis added).

Pursuant to the new regulations, the look-back period in 15 NYCRR § 136.1(b)(3) is now 25 years.

### § 55:9 Second offenders

Under the old rules, unless a person (a) was underage, (b) had refused to submit to a chemical test, or (c) was a commercial driver, successful completion of the DDP would terminate any outstanding license suspension/revocation period. See VTL § 1196(5). In other words, successful DDP completion generally allowed the person to apply for reinstatement of his or her full driving privileges. In this regard, it was possible for second or third offenders to re-obtain their full licenses back in as little as 7-8 weeks.

Pursuant to the new regulations, a person who has a second DWI-related conviction/incident within the past 25 years can still obtain a conditional license (if eligible under the old rules), but can no longer re-obtain his or her full license back prior to the expiration of the minimum suspension/revocation period (*i.e.*, successful DDP completion no longer terminates a license suspension/revocation for second offenders). See 15 NYCRR §§ 134.10(b), 134.11 & 136.5(b)(5).

### § 55:10 Third offenders no longer eligible for conditional license

Under the old rules, a person was generally eligible for a conditional license approximately every five years. In this regard, a person was ineligible for a conditional license if the person, among other things, (a) had a prior VTL § 1192 conviction within the past 5 years, (b) had participated in the DDP within the past 5 years, or (c) had 2 prior DWI-related convictions/incidents within the past 10 years. See VTL § 1196(4); 15 NYCRR § 134.7; Chapter 50, *supra*.

Pursuant to the new regulations, a person who has 3 or more DWI-related convictions/incidents *within the past 25 years* is ineligible for a conditional license. See 15 NYCRR § 134.7(a)(11)(i).

### § 55:11 It is often now necessary to obtain person's lifetime driving record

A person's publicly available DMV driving abstract only goes back 10 years; and non-DWI-related convictions/incidents do not even remain on an abstract for nearly that long. However, the new DMV regulations apply to offenses/incidents going back a minimum of 25 years -- and sometimes forever.

As a result, it is now often necessary to obtain a person's full, lifetime driving record before giving the person advice on

how to proceed in a pending matter. At the present time, it appears that the only way to obtain such records is to file a FOIL request with DMV. See Form MV-15F.

### § 55:12 New lifetime revocation #1 -- Person has 5 or more lifetime DWIs and is currently revoked

15 NYCRR § 136.5(b)(1) provides that:

> (b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:
>
> (1) the person has [5] or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.

In other words, pursuant to the new regulations a person with 5 or more lifetime DWI-related convictions/incidents whose driver's license is currently revoked for any reason will *never* be relicensed.

### § 55:13 New lifetime revocation #2 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-year look-back period and is currently revoked

15 NYCRR § 136.5(b)(2) provides that:

> (b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *
>
> (2) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has [1] or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.

In other words, pursuant to the new regulations a person with 3 or 4 DWI-related convictions/incidents and 1 or more SDOs within the 25-year look-back period whose driver's license is currently revoked for any reason will *never* be relicensed.

## § 55:14 New lifetime revocation #3 -- Person has 5 or more lifetime DWIs and is convicted of a high-point driving violation

15 NYCRR § 132.1(b) provides, in pertinent part, that:

> "Dangerous repeat alcohol or drug offender" means:
>
> (1) any driver who, within his or her lifetime, has [5] or more alcohol- or drug-related driving convictions or incidents in any combination.

15 NYCRR § 132.2 provides that:

> Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an [ALJ], prior to such proposed revocation taking effect. The provisions of Part 127 of this Chapter shall be applicable to any such hearing.

15 NYCRR § 132.3 provides that:

> The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the [ALJ] shall take into account a driver's entire driving record. Unless the [ALJ] finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

In other words, pursuant to the new regulations a person with 5 or more lifetime DWI-related convictions/incidents who is convicted of a traffic infraction carrying 5 or more points will be *permanently* revoked unless the person requests a hearing at

which he or she establishes that "there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect."

The reason why a license revocation pursuant to 15 NYCRR Part 132 is a lifetime revocation is that, once revoked, the person is subject to 15 NYCRR § 136.5(b)(1). See § 55:12, *supra*.

Notably, not long after Part 132 was enacted cell phone and texting infractions were added to the list of high-point driving violations. See 15 NYCRR § 131.3(b)(4)(iii). Thus, under the new regulations a cell phone ticket can lead to a permanent, lifetime driver's license revocation.

### § 55:15 New lifetime revocation #4 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-year look-back period and is convicted of a high-point driving violation

15 NYCRR § 132.1(b) provides, in pertinent part, that:

> "Dangerous repeat alcohol or drug offender" means: * * *
>
> (2) any driver who, during the 25 year look back period, has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has [1] or more serious driving offenses during the 25 year look back period.

15 NYCRR § 132.2 provides that:

> Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an [ALJ], prior to such proposed revocation taking effect. The provisions of Part 127 of this Chapter shall be applicable to any such hearing.

15 NYCRR § 132.3 provides that:

> The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the [ALJ] shall take into account a driver's entire driving record. Unless the [ALJ] finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

In other words, pursuant to the new regulations a person with 3 or 4 DWI-related convictions/incidents and 1 or more SDOs within the 25-year look-back period who is convicted of a traffic infraction carrying 5 or more points will be *permanently* revoked unless the person requests a hearing at which he or she establishes that "there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect."

The reason why a license revocation pursuant to 15 NYCRR Part 132 is a lifetime revocation is that, once revoked, the person is subject to 15 NYCRR § 136.5(b)(2). See § 55:13, *supra*.

Notably, not long after Part 132 was enacted cell phone and texting infractions were added to the list of high-point driving violations. See 15 NYCRR § 131.3(b)(4)(iii). Thus, under the new regulations a cell phone ticket can lead to a permanent, lifetime driver's license revocation.

### § 55:16 New lifetime revocation #5 -- Person revoked for new DWI-related conviction/incident while on license with A2 problem driver restriction

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period may be eligible for a restricted use license containing a so-called "A2 problem driver restriction." In this regard, 15 NYCRR § 3.2(c)(4) provides:

> A2-Problem driver restriction. The operation of a motor vehicle shall be subject to the driving restrictions set forth in section 135.9(b) and the conditions set forth in section 136.4(b) of this Title. As part of this restriction, the commissioner may require a person assigned the problem driver restriction to install an ignition interlock

> device in any motor vehicle that may be operated with a Class D license or permit and that is owned or operated by such person. The ignition interlock requirement will be noted on an attachment to the driver's license or permit held by such person. Such attachment must be carried at all times with the driver license or permit.

Both 15 NYCRR § 136.5(b)(3) and 15 NYCRR § 136.5(b)(4) provide that:

> If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

### § 55:17 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a DWI-related conviction/incident -- Statutory revocation + 5 more years + 5 more years on an A2 restricted use license with an IID

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period, and whose license is currently revoked for a DWI-related offense, will serve out the minimum statutory revocation period *plus* 5 more years, after which the person may be granted a license with an A2 problem driver restriction (with an IID requirement) for an additional 5 years.

Specifically, 15 NYCRR § 136.5(b)(3) provides, in pertinent part:

> (b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *
>
> (3)(i) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least [5] years after which time the person may submit an

> application for relicensing. *Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law*. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of [5] years and shall require the installation of an [IID] in any motor vehicle owned or operated by such person for such [5]-year period.

(Emphasis added).

### § 55:18 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a non-DWI-related conviction/incident -- Statutory revocation + 2 more years + 2 more years on an A2 restricted use license with no IID

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period, and whose license is currently revoked for a *non*-DWI-related offense, will serve out the minimum statutory revocation period *plus* 2 more years, after which the person may be granted a license with an A2 problem driver restriction (with no IID requirement) for an additional 2 years.

Specifically, 15 NYCRR § 136.5(b)(4) provides, in pertinent part:

> (b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *
>
> (4)(i) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least [2] years, after which time the person may submit an application for relicensing. *Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law*. After such waiting period, the

> Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of [2] years.

(Emphasis added).

## § 55:19 Applicability of new regulations to person who is "permanently" revoked pursuant to VTL § 1193(2)(b)(12)

Prior to the enactment of the new DMV regulations, VTL § 1193(2)(b)(12) already provided for 5- and 8-year permanent license revocations for repeat DWI offenders. See Chapter 46, *supra*. The new regulations consider these revocation periods to be the minimum statutory revocation periods for purposes of 15 NYCRR § 136.5(b)(3).

Thus, under the new regulations, where a person is subject to a 5- or 8-year waivable "permanent" revocation pursuant to VTL §§ 1193(2)(b)(12), at the end of the 5- or 8-year minimum statutory period DMV will now either:

(a) impose a *lifetime license revocation*; or

(b) pursuant to 15 NYCRR § 136.5(b)(3), add 5 more years to the revocation (for a total of 10 or 13 years with no driving privileges whatsoever), after which the person may be granted an A2 restricted use license with an IID requirement for an additional 5 years.

See 15 NYCRR §§ 136.10(b), 136.5(b)(1), 136.5(b)(2) & 136.5(b)(3).

In this regard, 15 NYCRR § 136.10(b) provides as follows:

> (b) Application after permanent revocation. The Commissioner may waive the permanent revocation of a driver's license, pursuant to [VTL §] 1193(2)(b)(12)(b) and (e), only if the statutorily required waiting period of either [5] or [8] years has expired since the imposition of the permanent revocation and, during such period, the applicant has not been found to have refused to submit to a chemical test pursuant to [VTL §] 1194 and has not been convicted of any violation of section 1192 or section 511 of such law or a

violation of the Penal Law for which a violation of any subdivision of [VTL §] 1192 is an essential element. In addition, the waiver shall be granted only if:

(1) The applicant presents proof of successful completion of a rehabilitation program approved by the Commissioner within [1] year prior to the date of the application for the waiver; provided, however, if the applicant completed such program before such time, the applicant must present proof of completion of an alcohol and drug dependency assessment within [1] year of the date of application for the waiver; and

(2) The applicant submits to the Commissioner a certificate of relief from civil disabilities or a certificate of good conduct pursuant to Article 23 of the Correction Law; and

(3) The application is not denied pursuant to section 136.4 or section 136.5 of this Part; and

(4) There are no incidents of driving during the period prior to the application for the waiver, as indicated by accidents, convictions or pending tickets. The consideration of an application for a waiver when the applicant has a pending ticket shall be held in abeyance until such ticket is disposed of by the court or tribunal.

### § 55:20 Legal challenges to the new DMV regulations

At the present time, the new DMV regulations are being vigorously challenged on numerous grounds. Some of the issues being raised are set forth below.

### § 55:21 The Legislature has preempted the field of DWI law in a manner that limits the discretion of other branches of government to expand the scope of the DWI laws

The issue of whether the new DMV regulations are a good idea is arguably irrelevant. Rather, the issue is whether, under the Constitution, the executive branch of government can engage in

inherently legislative activity on an issue that the Legislature has been unable to reach agreement upon.

The Court of Appeals has *repeatedly* made clear both (a) that the Legislature has given significant thought to the topic of DWI-related offenses, and has enacted "tightly and carefully integrated" statutes covering these offenses, see People v. Prescott, 95 N.Y.2d 655, 659 (2001), and (b) that, as a result, creative attempts to expand the scope of the relevant statutes are inappropriate -- *even if such interpretation of the laws would otherwise be valid*. See, e.g.:

1. People v. Rivera, 16 N.Y.3d 654 (2011) (defendant whose driver's license is revoked for DWI and who commits a new DWI while on a conditional license cannot be prosecuted for the felony of AUO 1st, in violation of VTL § 511(3), but rather can only be prosecuted for the traffic infraction of VTL § 1196(7)(f));

2. People v. Ballman, 15 N.Y.3d 68 (2010) (VTL § 1192(8) does not allow an out-of-State DWI conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a new DWI charge from a misdemeanor to a felony);

3. People v. Litto, 8 N.Y.3d 692 (2007) (the term "intoxicated" in VTL § 1192(3) only applies to intoxication caused by alcohol -- not, as the People claimed, to intoxication caused by *any* substance);

4. People v. Prescott, *supra* (a person cannot be charged with *attempted* DWI); and

5. People v. Letterlough, 86 N.Y.2d 259 (1995) (condition of probation that defendant would have to affix a fluorescent sign stating "CONVICTED DWI" to the license plates of any vehicle that he operated is illegal).

In Prescott, the Court of Appeals specifically stated, *inter alia*, that:

> In addition to criminal penalties, [VTL §] 1193 further imposes mandatory minimum periods for license suspension or revocation. These sanctions, like the criminal penalties, are correlated to the specific nature and degree of the section 1192 violation.
>
> The Legislature placed great significance on the enforcement of specific statutory penalties for drunk driving. . . . Thus, *the Legislature has made it clear that the courts*

> *must look to section 1193 for the appropriate penalties and sentencing options for drunk driving offenses*.

95 N.Y.2d at 660-61 (emphasis added) (citations omitted). See also Letterlough, 86 N.Y.2d at 269 ("While innovative ideas to address the serious problem of recidivist drunk driving are not to be discouraged, the courts must act within the limits of their authority and cannot overreach by using their probationary powers to accomplish what only the legislative branch can do"); VTL § 510(3)(a) (DMV's discretionary authority to suspend or revoke a driver's license -- *or to deny a license to an unlicensed person* -- pursuant to VTL § 510 does not apply to violations of VTL § 1192).

### § 55:22 The new DMV regulations conflict with existing statutes -- Generally

It is axiomatic that an administrative regulation that conflicts with a statute is illegal. See, e.g., Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 649 (1976) ("In conclusion, the . . . regulations are invalid for lack of legislative authorization, [as well as] for inconsistency with applicable State statutes"); Sciara v. Surgical Assocs. of Western New York, P.C., 104 A.D.3d 1256, 1257 (4th Dep't 2013) ("it is well established that, in the event of a conflict between a statute and a regulation, the statute controls"). The new DMV regulations conflict with existing statutes -- both directly and implicitly -- in multiple key respects.

### § 55:23 The new regulations conflict with VTL § 1193(2)(b)(12)

Perhaps the most direct conflict between the new DMV regulations and existing law is the conflict between VTL § 1193(2)(b)(12)(b) and 15 NYCRR Part 132, 15 NYCRR § 136.5(b) and 15 NYCRR § 136.10(b). Several existing statutes directly address the issue of repeat DWI offenders. Specifically, there are three "permanent" driver's license revocations: (a) one that is truly *permanent*; see VTL § 1193(2)(c)(3), (b) one that is waivable after 5 years; see VTL §§ 1193(2)(b)(12)(a)/(b), and (c) one that is waivable after 8 years. See VTL §§ 1193(2)(b)(12)(d)/(e).

VTL §§ 1193(2)(b)(12)(a)/(b) provide for a 5-year "permanent" driver's license revocation where a person either:

(a) has 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years; or

(b) has 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years.

VTL §§ 1193(2)(b)(12)(a)/(b) make clear that a driver's license cannot be "permanently" revoked -- even for 5 years -- unless the person has at least 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years, or at least 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years. Since 15 NYCRR Part 132 and 15 NYCRR § 136.5(b) contain multiple greater-than-5-year license revocations that are triggered by as few as 3 DWI-related convictions/incidents *over a period of 25 years*, they appear to irreconcilably conflict with VTL §§ 1193(2)(b)(12)(a)/(b).

Simply stated, where a person's DWI-related driving record would not result in a 5-year license revocation under the "permanent" revocation statute targeting repeat DWI offenders, it would seem that DMV cannot lawfully enact administrative regulations that trump the statute and impose a greater-than-5-year license revocation on the person. Yet the new DMV regulations do exactly that. Thus, if the new DMV regulations are legal, then VTL §§ 1193(2)(b)(12)(a)/(b) are "superfluous, a result to be avoided in statutory construction." People v. Litto, 33 A.D.3d 625, 626 (2d Dep't 2006), aff'd, 8 N.Y.3d 692 (2007).

In addition, VTL § 1193(2)(b)(12)(b) provides that:

> (b) *The permanent driver's license revocation required by clause (a) of this subparagraph shall be waived by the commissioner after a period of [5] years has expired since the imposition of such permanent revocation*, provided that during such [5]-year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] while operating a motor vehicle and has not been convicted of a violation of any subdivision of [VTL § 1192] or section [VTL § 511] or a violation of the penal law for which a violation of any subdivision of [VTL § 1192] is an essential element *and either*:
>
> (i) that such person provides acceptable documentation to the commissioner that such person has voluntarily enrolled in and successfully completed an appropriate rehabilitation program; *or*
>
> (ii) that such person is granted a certificate of relief from disabilities or a certificate of good conduct pursuant to [Correction Law Article 23].

> Provided, however, that the commissioner may, on a case by case basis, refuse to restore a license which otherwise would be restored pursuant to this item, in the interest of the public safety and welfare.

(Emphases added).

VTL § 1193(2)(b)(12)(b) clearly provides that even where a person has 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years (or 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years), DMV is generally *required* to immediately waive the "permanent" revocation after 5 years. Nonetheless, under the new DMV regulations everyone who has 3 or more DWI-related convictions/incidents within the past 25 years will receive a greater-than-5-year -- and in some cases *lifetime* -- driver's license revocation (unless the current revocation is not DWI-related and the person does not have an SDO on his or her driving record).

Thus, the new DMV regulations impose a greater-than-5-year license revocation on both:

(a) people who are ineligible for a 5-year revocation under VTL § 1193(2)(b)(12); and

(b) people who fall within VTL § 1193(2)(b)(12) but are statutorily entitled to a waiver after 5 years.

With regard to the latter group, despite the 5-year waiver requirement in VTL § 1193(2)(b)(12)(b), new regulation 15 NYCRR § 136.10(b) provides that after 5 years DMV will either:

(a) impose a non-waivable *permanent* lifetime license revocation (if the motorist also has 1 or more SDOs within the past 25 years). See 15 NYCRR § 136.5(b)(2); or

(b) impose *an additional* 5-year "waiting period" (with no driving privileges), *plus* another 5 years with restricted driving privileges *and* a mandatory IID requirement for the entire time. See 15 NYCRR § 136.5(b)(3).

15 NYCRR § 136.10(b) irreconcilably conflicts with VTL § 1193(2)(b)(12)(b) in yet another way. Specifically, although VTL § 1193(2)(b)(12)(b) expressly provides that a 5-year "permanent" license revocation generally must be waived as long as the motorist:

(1) has *either* completed treatment *or* obtained a certificate of relief from disabilities (or a certificate of good conduct); *and*

(2) has not been found guilty of violating VTL § 511, VTL § 1192, VTL § 1194 or a VTL § 1192-related Penal Law offense during the revocation period;

new DMV regulation 15 NYCRR § 136.10(b) provides that the revocation will only be waived:

(a) after *another 5 years*; *and*

(b) only if the motorist:

(1) has completed treatment; *and*

(2) has obtained a certificate of relief from disabilities (or a certificate of good conduct); *and*

(3) isn't denied relicensure pursuant to 15 NYCRR § 136.4 or 15 NYCRR § 136.5; *and*

(4) hasn't been found guilty of violating VTL § 511, VTL § 1192, VTL § 1194 or a VTL § 1192-related Penal Law offense during the revocation period; *and*

(5) hasn't driven during the revocation period -- as indicated by accidents, convictions or pending tickets.

In the event that these additional requirements are met and *10 years* has elapsed, DMV will then impose *an additional 5 years* with restricted driving privileges *and* a mandatory IID requirement for the entire time. See 15 NYCRR § 136.5(b)(3).

The new DMV regulations appear to illegally conflict with VTL § 1193(2)(b)(12) in still more ways. For example, VTL §§ 1193(2)(b)(12)(d)/(e) provide for an 8-year, waivable "permanent" driver's license revocation where a person has 5 DWI-related convictions (and/or chemical test refusal findings) within 8 years. This statute provides a clear legislative determination that 5 DWI-related convictions (and/or chemical test refusal findings) should generally result in an 8-year driver's license revocation -- and should only result in such a lengthy license revocation if the convictions occur within a time frame of 8 years.

Simply stated, where a person's DWI-related driving record would not result in an 8-year license revocation under the

"permanent" revocation statute targeting repeat DWI offenders, it would seem that DMV cannot lawfully enact administrative regulations that trump the statute and impose a greater-than-8-year license revocation on the person. Yet the new DMV regulations impose a permanent lifetime license revocation where a person has 5 DWI-related convictions/incidents over the course of his or her entire lifetime. See 15 NYCRR § 136.5(b)(1). See also 15 NYCRR Part 132. Thus, if DMV's new regulations are legal, then VTL §§ 1193(2)(b)(12)(d)/(e) are also "superfluous, a result to be avoided in statutory construction." Litto, 33 A.D.3d at 626.

Notably, in order for a person to be subject to a 5-year license revocation pursuant to VTL § 1193(2)(b)(12)(a)(i), at least one of the person's DWI-related convictions must be for a crime; and in order for a person to be subject to a 5-year license revocation pursuant to VTL § 1193(2)(b)(12)(a)(ii), *at least two* of the person's DWI-related convictions must be for crimes. In other words, under the statute it is not enough to merely have 4 DWI-related convictions within 8 years. Rather, at least two of the convictions must be for crimes.

By contrast, the new DMV regulations contain no requirement that *any* of the person's DWI-related convictions be for a crime. In addition, Zero Tolerance law (*i.e.*, VTL § 1192-a) findings do not count as DWI-related offenses for purposes of VTL § 1193(2)(b)(12), but they do count for purposes of the new DMV regulations. See 15 NYCRR §§ 132.1(a) & 136.5(a)(1).

In sum, VTL § 1193(2)(b)(12) provides clear statutory limits regarding (a) when a driver's license can be "permanently" revoked, (b) what offenses can be counted for purposes of "permanent" revocation, and (c) for how long a "permanent" revocation can continue. The new DMV regulations appear to directly and irreconcilably conflict with this statute.

### § 55:24 The 5-year IID portion of the new regulations conflicts with VTL § 1198, PL § 65.10(2)(k-1) and case law

The 5-year IID portion of 15 NYCRR §§ 3.2(c)(4), 136.4(b)(2) and 136.5(b)(3) conflicts with existing statutes and case law. In this regard, PL § 65.10(2)(k-1) makes clear that an IID can be mandated:

> *[O]nly* where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or [the PL] of which an alcohol-related violation of any

> provision of [VTL § 1192] is an essential element. The offender shall be required to install and operate the [IID] *only* in accordance with [VTL § 1198].

(Emphases added).

In People v. Levy, 91 A.D.3d 793, 794 (2d Dep't 2012), the Appellate Division, Second Department, held that "County Court improperly directed . . . that the defendant install an [IID] on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)."

In addition, in People v. Letterlough, 86 N.Y.2d 259, 268 (1995), the Court of Appeals made clear that:

> A recent enactment authorizes courts to order a defendant, as a condition of probation, to install an "ignition interlock device" that attaches to the vehicle's steering mechanism and ignition (Vehicle and Traffic Law § 1198). . . . Clearly, no such legislative initiative would have been necessary if this type of condition could have been imposed by the courts on a case-by-case basis under Penal Law § 65.10's existing catch-all provision.

Levy makes clear that an IID requirement can only be imposed where there is express statutory authorization therefor; and Letterlough makes clear that such a requirement cannot be imposed under a generic, "catch-all" provision simply because a Court or an administrative agency thinks it is a good idea.

To make matters worse, 15 NYCRR § 136.5(b)(3) mandates the imposition of a 5-year IID requirement on individuals who could not lawfully be subjected to an IID pursuant to either PL § 65.10(2)(k-1) or VTL § 1198 (e.g., individuals who have only been convicted of violating VTL § 1192(1) or VTL § 1192(4), or who have only been found guilty of refusing to submit to a chemical test in violation of VTL § 1194 or of underage drinking and driving in violation of VTL § 1192-a).

In addition, the Legislature has declared that the cost of an IID is a fine. See VTL § 1198(5)(a). It is axiomatic that DMV has no authority to impose -- as opposed to collect -- fines or fees. See Matter of Redfield v. Melton, 57 A.D.2d 491, 495 (3d Dep't 1977). Thus, it appears that the IID portion of the new DMV regulations also constitutes an illegal fine.

## § 55:25 The 25-year look-back portion of the new regulations conflicts with numerous statutes

The Legislature has repeatedly made clear that (unless there was physical injury or the motorist is a commercial driver) the relevant look-back period for DWI-related offenses is never more than 10 years. See, e.g., VTL §§ 1193(1)(a), 1193(1)(c)(i), 1193(1)(c)(ii), 1193(1)(d)(2), 1193(1)(d)(4)(i), 1193(1)(d)(4)(ii), 1193(2)(b)(12)(a), 1193(2)(b)(12)(d), 1194(2)(d)(1) & 1198(3)(a). See also PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3).

For example, a prior DWI conviction can only be used to elevate the level of a new DWI charge from a misdemeanor to a felony if the prior conviction was within 10 years of the new offense. See, e.g., VTL §§ 1193(1)(c)(i) & 1193(1)(c)(ii). Thus, a person who is charged with DWI 10 years and 1 day after being convicted of a previous DWI is treated as a first offender. See, e.g., People v. Smith, 57 A.D.3d 1410 (4th Dep't 2008) (class D felony DWI reduced to class E felony DWI because one of defendant's two predicate DWI convictions was 10 years and 3 days old, and it thus could not be counted).

Similarly, a prior DWI conviction can only be used to elevate the level of a Vehicular Assault/Vehicular Manslaughter charge if the prior conviction was within 10 years of the current offense. See, e.g., PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3).

A DWAI charge is only a misdemeanor -- as opposed to a traffic infraction -- if the defendant has two prior VTL § 1192 convictions within the past 10 years. See VTL § 1193(1)(a).

A chemical test refusal is only treated as a repeat offense if the motorist has a prior refusal or DWI-related conviction within the previous 5 years. See VTL § 1194(2)(d)(1).

For purposes of issuing a post-revocation conditional license, "the commissioner shall not deny such issuance based solely upon the number of convictions for violations of any subdivision of [VTL § 1192] committed by such person within the ten years prior to application for such license." VTL § 1198(3)(a).

Records pertaining to a VTL § 1192-a finding are required to be sealed after 3 years or when the motorist turns 21, whichever is longer. See CPL § 160.55(5)(c). See also VTL § 201(1)(k) ("Upon the expiration of the period for destruction of records pursuant to this paragraph, the entirety of the proceedings concerning the violation or alleged violation of [VTL § 1192-a] . . . from the initial stop and detention of the operator to the

entering of a finding and imposition of sanctions . . . shall be deemed a nullity, and the operator shall be restored, in contemplation of law, to the status he occupied before the initial stop and prosecution").

Finally, for purposes of "permanent" driver's license revocation, DWI-related convictions are only relevant for, at most, 8 years. See VTL § 1193(2)(b)(12).

Simply stated, the Legislature has repeatedly and unequivocally made clear, over a period of decades, that (unless there was physical injury or the motorist is a commercial driver) DWI-related convictions/incidents that are more than 10 years old are too remote in time to be relevant -- even in vehicular homicide cases. In changing from a 10-year to a 25-year (and in some cases lifetime) look-back period, the new DMV regulations would appear to conflict with well over a dozen statutes.

### § 55:26 The new regulations violate the separation of powers doctrine

Article III, § 1 of the New York State Constitution provides that "[t]he legislative power of this state shall be vested in the senate and assembly." See also Matter of Medical Soc'y of State v. Serio, 100 N.Y.2d 854, 864 (2003). The new DMV regulations are clearly legislative in nature. Indeed, the Governor's press release that accompanied the announcement of the new regulations expressly states that "[u]nder current law, drivers who are convicted of multiple alcohol or drug related driving offenses cannot permanently lose their licenses." The Governor's press release also states that "'[w]e are saying "enough is enough" to those who have chronically abused their driving privileges and threatened the safety of other drivers, passengers and pedestrians.'" See id. In the release, DMV Commissioner Fiala is quoted as saying "'[t]he Department of Motor Vehicles is proud to be *working with Governor Cuomo* in a concerted effort to address the problems caused by the most dangerous drivers with a history of repeat alcohol- or drug-related driving offenses.'" Id. (emphasis added). These comments make clear that DMV bypassed the Legislature in addressing the issue of repeat DWI offenders.

It is axiomatic that an administrative agency cannot set social policy. Rather, it can only implement social policy enacted by the Legislature. See Serio, 100 N.Y.2d at 865 ("'[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives'") (quoting Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987)). In Boreali, the Court of Appeals held that:

> Here, we cannot say that the broad enabling statute in issue is itself an unconstitutional delegation of legislative authority. However, we do conclude that the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.

71 N.Y.2d at 9. More specifically:

> [T]he Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public. While the Legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body. In this instance, the Council usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests. In view of the political, social and economic, rather than technical, focus of the resulting regulatory scheme, we conclude that the Council's actions were ultra vires and that the order and judgment of the courts below, which declared the Council's regulations invalid, should be affirmed.

Id. at 6.

Boreali would appear to compel the conclusion that the new DMV regulations are illegal and ultra vires. While DMV undoubtedly has a certain amount of discretion to decide, on a case-by-case basis, whether a particular individual poses a unique and immediate threat to the motoring public and should be revoked for a longer-than-normal period of time, it is quite another thing for an administrative agency to declare, *with no legislative guidance*, that entire groups -- consisting of thousands of individuals -- can be generically characterized as

"persistently dangerous drivers" and punished far more severely than has ever been thought possible.

This is particularly true where, as here, (a) the groups in question have always existed, (b) the motorists in question had always been permitted to get their licenses back in a well-known time frame, and (c) there has been no legislative determination that a change in circumstances has taken place and/or that a change in policy was necessary (or even welcome). In this regard, the doctrine of legislative acquiescence provides that "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence." Engle v. Talarico, 33 N.Y.2d 237, 242 (1973).

Simply stated, the Legislature's failure to enact any new legislation addressing the issue of repeat DWI offenders is a tacit acknowledgment that the status quo should not be disturbed. While the executive branch of government may be frustrated by the Legislature's lack of action, taking matters into its own hands violates the separation of powers doctrine and is illegal and ultra vires. See also People v. Letterlough, 86 N.Y.2d 259, 269 (1995) ("While innovative ideas to address the serious problem of recidivist drunk driving are not to be discouraged, the courts must act within the limits of their authority and cannot overreach by using their probationary powers to accomplish what only the legislative branch can do"); id. ("Since . . . the creation of such a penalty out of whole cloth usurps the legislative prerogative, the condition, however well-intended, cannot be upheld").

Notably, the Appellate Division, First Department, recently struck down New York City's "large soda ban" based upon the separation of powers doctrine as delineated in Boreali. See New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene, ___ A.D.3d ___, 2013 WL 3880139 (1st Dep't 2013).

### § 55:27 The new regulations are being applied retroactively

One of the more disturbing aspects of the new DMV regulations is that DMV is applying them to offenses that were committed -- and to license revocations that had commenced -- prior to the date that the regulations were enacted. In this regard, it is axiomatic that "[t]he States are prohibited from enacting an *ex post facto* law." Garner v. Jones, 529 U.S. 244, 249 (2000). See also Peugh v. United States, 133 S.Ct. 2072, 2081 (2013). "One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." Garner, 529 U.S. at 249. See also Peugh, 133 S.Ct. at 2081.

In Garner, *supra*, the United States Supreme Court made clear that retroactive changes to the rules governing the parole of inmates can violate the *Ex Post Facto* Clause. 529 U.S. at 250. See also Peugh, 133 S.Ct. at 2085. Peugh, which was decided by the Supreme Court on June 10, 2013, held that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." 133 S.Ct. at 2078. In so holding, the Court reasoned as follows:

> A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation. . . .
>
> Our holding today is consistent with basic principles of fairness that animate the *Ex Post Facto* Clause. The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. * * *
>
> [T]he *Ex Post Facto* Clause does not merely protect reliance interests. It also reflects principles of "fundamental justice." * * *
>
> "[T]he *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." That is precisely what the amended Guidelines did here. Doing so created a "significant risk" of a higher sentence for Peugh, and offended "one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice."

Id. at 2084-85, 2088 (citations omitted).

Critically, the Peugh Court -- citing Garner -- stated that "our precedents make clear that the coverage of the *Ex Post Facto* Clause is not limited to legislative acts." Id. at 2085. Numerous federal Circuit Courts of Appeals have also made clear that administrative regulations are subject to the *Ex Post Facto* Clause where they have "the force and effect of law." See, e.g., Metheny v. Hammonds, 216 F.3d 1307, 1310 (11th Cir. 2000);

Shabazz v. Gabry, 123 F.3d 909, 915 n.12 (6th Cir. 1997); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir. 1995); Dehainaut v. Pena, 32 F.3d 1066, 1073 (7th Cir. 1994); Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 726 (9th Cir. 1993); U.S. ex rel. Forman v. McCall, 709 F.2d 852, 559 (3d Cir. 1983) ("We note at the outset that the fact that the guidelines are administrative regulations rather than statutes does not preclude their being 'laws' for ex post facto purposes, for it is a fundamental principle of administrative law that '[v]alidly promulgated regulations have the force and effect of law'") (citation omitted).

Regardless of whether the *Ex Post Facto* Clause technically applies to the new regulations, in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988), the Supreme Court held as follows:

> Retroactivity is not favored in the law. Thus, congressional enactments *and administrative rules* will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant*.

(Emphases added) (citations omitted).

In this regard, New York Courts -- including the Third Department -- have also recognized a presumption that new administrative regulations, like new laws, apply prospectively. See, e.g., Matter of Montgomerie v. Tax Appeals Tribunal, 291 A.D.2d 129, 132 (3d Dep't 2002); Matter of Rudin Mgmt. Co. v. Commissioner, Dep't of Consumer Affairs, 213 A.D.2d 185, 185 (1st Dep't 1995); Matter of Good Samaritan Hosp. v. Axelrod, 150 A.D.2d 775, 777 (2d Dep't 1989); Matter of Linsley v. Gallman, 38 A.D.2d 367, 369 (3d Dep't 1972), aff'd on opinion below, 33 N.Y.2d 863 (1973).

Retroactively changing the rules applicable to the length of a driver's license revocation after a person has pled guilty to a VTL § 1192 offense (and/or after the person has applied for relicensure) is analogous to retroactively changing the rules applicable to how long the person will remain in prison for the offense. In both situations the person has a legitimate -- indeed Constitutional -- expectation at the time of

sentencing/application that the rules then in effect will not change after the fact. Faith in our legal system would literally evaporate if sentences can validly be changed, long after a plea bargain is entered, at the whim of an administrative agency. Notably, the Peugh Court repeatedly made clear that one of the principal interests that the *Ex Post Facto* Clause was designed to serve is "fundamental justice."

In People v. Luther, ___ Misc. 3d ___, ___ N.Y.S.2d ___, 2013 WL 3467329, *6 (East Rochester Just. Ct. 2013), the Court held that:

> The fundamental concept of the prohibition of ex post fact laws is putting a defendant on notice that certain conduct may lead to specified violations and consequences. In this case, at the time of the violation and the plea, the defendant was not on notice that a third violation of V & T § 1192(3) would or could lead to a suspension of driving privileges for two (2) years [sic five (5) years] beyond the mandatory six (6) month revocation. While DWI was illegal before and after the regulatory change, the punishment/consequences as to driving privileges were [more than] quadrupled. While this may or may not constitute an ex post facto law, it certainly violates basic[] principals of justice.
>
> The defendant's motion to vacate the plea of guilty is granted. The matter is restored to the trial calendar on all pending charges.

(Citations omitted).

### § 55:28 Although DMV can theoretically deviate from the new regulations in "unusual, extenuating and compelling circumstances," in reality this standard cannot be met

15 NYCRR § 136.5(d) provides that:

> While it is the Commissioner's *general policy* to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the *general policy*, as set forth above, in the exercise of discretionary authority granted

> under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded.

(Emphases added). See also 15 NYCRR § 132.3.

According to 15 NYCRR § 136.5(d), the new DMV regulations are merely a "general policy" that DMV is free to deviate from in its discretion upon a showing of "unusual, extenuating and compelling circumstances." It is the authors' understanding, however, that the DMV employees at the Driver Improvement Bureau who review "compelling circumstances" claims are instructed to never grant them. As such, the employees who review such claims in reality have no discretion whatsoever. They simply deny them all.

In this regard, it appears that DMV's so-called "general policy" is not a general policy at all. Rather, it is a hard-and-fast rule that (a) has no exceptions, and (b) has the force and effect of law. Notably, the DMV regulations do not define what would constitute "unusual, extenuating and compelling circumstances"; nor are there any guidelines to assist a DMV employee in rendering such a determination. Accordingly, even if it is theoretically possible to meet this standard, there is no policy in effect to ensure that similarly situated individuals are treated similarly. Thus, even if "compelling circumstances" claims are actually judged on their merits (which they aren't), the claims are reviewed in an arbitrary and capricious manner.

### § 55:29 IID rules now apply to youthful offenders

Prior to November 1, 2013, the requirement that certain DWI offenders install ignition interlock devices ("IIDs") in their vehicles only applied where the defendant was "convicted." As such, the rules did not apply to youthful offender adjudications (as such adjudications are not "convictions"). See CPL § 720.10.

Effective November 1, 2013, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) provide that the IID requirements of VTL § 1198 now apply to anyone "convicted of, *or adjudicated a youthful offender for*, a violation of [VTL § 1192(2), (2-a) or (3)]." (Emphasis added).

### § 55:30 Duration of IID requirement

Prior to November 1, 2013, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) provided that the duration of a mandatory IID requirement was "during the term of such probation or conditional

discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than six months."

This language led to considerable confusion in that many people who thought that they had received a 6-month IID requirement -- and many Judges who thought that they had imposed a 6-month IID requirement -- were confronted with a situation in which the installer would not remove the IID without a Court order on the ground that the sentence was for *a minimum of* 6 months as opposed to for *precisely* 6 months. In addition, defendants who installed the IID prior to sentencing were not given credit for "time served."

As a result, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) were amended, effective November 1, 2013, to provide that the duration of a mandatory IID requirement is as follows:

> [D]uring the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an [IID] for at least [6] months, unless the court ordered such person to install and maintain an [IID] for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an [IID] was installed in advance of sentencing.

## § 55:31 "Good cause" for not installing IID defined

An issue had arisen as to how to handle situations in which the defendant failed to install an IID due to the fact that the defendant did not own -- and claimed that he or she would not operate -- a motor vehicle during the duration of the IID requirement. In this regard, effective November 1, 2013, VTL § 1198(4)(a) defines "good cause" for not installing an IID as follows:

> Good cause may include a finding that the person is not the owner of a motor vehicle if such person asserts under oath that such person is not the owner of any motor vehicle and that he or she will not operate any motor vehicle during the period of interlock restriction except as may be otherwise

> authorized pursuant to law. "Owner" shall have the same meaning as provided in [VTL § 128].

## § 55:32 Violating VTL § 1192 while on a conditional license is now AUO 1st

In People v. Rivera, 16 N.Y.3d 654, 655-56, 926 N.Y.S.2d 16, 17 (2011), the Court of Appeals held that "a driver whose license has been revoked, but who has received a conditional license and failed to comply with its conditions, may be prosecuted only for the traffic infraction of driving for a use not authorized by his license, not for the crime of driving while his license is revoked." In other words, since a person who possesses a valid conditional license is not committing AUO, committing DWI while on a conditional license is not AUO 1st.

Effective November 1, 2013, Rivera was legislatively overruled. In this regard, newly enacted VTL § 511(3)(a)(iv) provides that a person commits the felony of AUO 1st when the person "operates a motor vehicle upon a public highway while holding a conditional license issued pursuant to [VTL § 1196(7)(a)] while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)]."

CHAPTER 13

# AGGRAVATED UNLICENSED OPERATION OF A MOTOR VEHICLE (AUO)

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## § 13:1 In general

One of the most common crimes in New York is Aggravated Unlicensed Operation of a Motor Vehicle (a.k.a. AUO). AUO comes in 3 degrees: AUO 3rd (a misdemeanor), see VTL § 511(1); AUO 2nd (a more serious misdemeanor), see VTL § 511(2); and AUO 1st (a class E felony). See VTL § 511(3). Unlicensed Operation, a traffic infraction, see VTL § 509(1), is a lesser included offense of AUO. See § 13:10, *infra*. DWI-related AUO is an aggravating factor that raises the felony class level of various vehicular crimes. See, e.g., PL § 120.04(2); PL § 120.04-a(2); PL § 125.13(2); PL § 125.14(2).

This chapter addresses a variety of common issues that arise in connection with AUO charges.

## § 13:2 AUO 3rd -- Generally

The lowest level of AUO is AUO 3rd. In this regard, VTL § 511(1)(a) provides as follows:

> 1. Aggravated unlicensed operation of a motor vehicle in the third degree.
>
> (a) A person is guilty of the offense of [AUO 3rd] when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of obtaining a license to operate such motor vehicle issued by the commissioner is suspended, revoked or otherwise withdrawn by the commissioner.

AUO 3rd is an unclassified misdemeanor. VTL § 511(1)(b).

## § 13:3 Proof that defendant "knew or had reason to know" license was suspended or revoked is essential element of AUO

"[A]ggravated unlicensed operation has a mens rea element. To be convicted, a defendant must know or have reason to know that his driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor Vehicles." People v. Pacer, 6 N.Y.3d 504, 508, 814 N.Y.S.2d 575, 576-77 (2006). See also VTL § 511(1)(a).

In People v. Crandall, 199 A.D.2d 867, ___, 606 N.Y.S.2d 357, 359 (3d Dep't 1993), the Appellate Division, Third Department, held that:

> The record indicates that the prosecution sustained its burden of proving beyond a reasonable doubt that defendant operated a motor vehicle while knowing or having reason to know that his license was revoked in violation of [VTL] § 511(3)(a). The Chief Clerk of the Schenectady City Court testified that defendant had signed an acknowledgment of the order of suspension or revocation. Defendant identified his signature on the order and testified that he believed that a stay on his prior conviction permitted him to

> drive. However, the order of stay provided that "jail along with any fine imposed, [should] be stayed pending the termination of the appeal taken." This evidence permitted a fact-finder to conclude beyond a reasonable doubt that defendant knew that his license was revoked.

## § 13:4 Applicability of Crawford v. Washington to AUO cases

Prior to the United States Supreme Court's landmark Confrontation Clause decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), the defendant's knowledge of the fact that his or her driver's license was suspended or revoked was often proven at trial, pursuant to VTL § 214, by the introduction into evidence of:

> [A] document titled "Affidavit of Regularity/Proof of Mailing" from a Department of Motor Vehicles official, purporting to explain the Department's ordinary mailing procedures for revocation notices. The affidavit contained a statement, on the official's "information and belief," that the ordinary procedures described in the affidavit had been followed in defendant's case.

People v. Pacer, 6 N.Y.3d 504, 509, 814 N.Y.S.2d 575, 577 (2006). See also People v. Darrisaw, 66 A.D.3d 1427, 886 N.Y.S.2d 315 (4th Dep't 2009); People v. Wolters, 41 A.D.3d 518, 838 N.Y.S.2d 117 (2d Dep't 2007); People v. Capellan, 6 Misc. 3d 809, ___, 791 N.Y.S.2d 315, 316 (N.Y. City Crim. Ct. 2004).

In this regard, VTL § 214 affidavits were allowed to substitute for the live testimony of a DMV employee. However, in Pacer, *supra*, the Court of Appeals held that this procedure violates Crawford. See Pacer, 6 N.Y.3d at 507, 814 N.Y.S.2d at 576.

In People v. Abelo, 79 A.D.3d 668, ___, 914 N.Y.S.2d 54, 56 (1st Dep't 2010), the People attempted to satisfy Pacer by calling a DMV employee as a witness. However, the employee who was called was not employed by DMV at the time of the suspensions in question, nor was she familiar with the DMV procedures in effect at the time. Under these circumstances, the Appellate Division, First Department, held that:

> [T]he only basis for admitting the required notice of suspension was the testimony of a witness who was not qualified to testify

> concerning procedures in use at the time that the notice was sent. Admitting such evidence contravenes the rationale of People v. Pacer, *supra*. A witness who on cross-examination denies knowing what procedures were used at the time of mailing does not satisfy the obligation to produce a witness who can be adequately cross-examined concerning notice to defendant. In essence, the notice of suspension was admitted without foundation, and under the facts of this case its admission constituted reversible error.

Id. at ___, 914 N.Y.S.2d at 56 (citation omitted). Cf. People v. Morales, 273 A.D.2d 102, ___, 709 N.Y.S.2d 544, 545 (1st Dep't 2000) ("The court properly exercised its discretion in permitting expert testimony as to records and procedures of the Department of Motor Vehicles, since this subject was beyond the knowledge of the average juror and the testimony did not usurp the functions of the jury").

In People v. Rayford, 80 A.D.3d 780, ___, 916 N.Y.S.2d 603, 605 (2d Dep't 2011), the Appellate Division, First Department, stated that "[t]he defendant correctly contends that the admission of a certain document as proof that a 'Notice of Suspension' of his driver's license had been mailed to him constituted testimonial hearsay and, thus, violated his right of confrontation."

In People v. Baker, 14 Misc. 3d 23, ___, 829 N.Y.S.2d 806, 807 (App. Term, 9th & 10th Jud. Dist. 2006), the Appellate Term found that, irrespective of Pacer, the purported "Affidavit of Regularity/Proof of Mailing" was undated and was not notarized. As such, the document was "not an affidavit despite its title." Id. at ___, 829 N.Y.S.2d at 807.

In People v. Brown, 31 Misc. 3d 794, ___, 919 N.Y.S.2d 324, 326 (Rochester City Ct. 2011), the Court found that DMV's Mailing Record for Notice of Suspension or Revocation form, which is a substitute for a VTL § 214 Affidavit of Regularity/Proof of Mailing, was an "attempt by the Department of Motor Vehicles to skirt the holding in People v. Pacer." (Citation omitted). As such, the Court dismissed the simplified traffic information charging the defendant with AUO 2nd on the ground that there was no valid allegation that the defendant "knew or had reason to know" that his driver's license was suspended. See generally People v. Parson, 143 Misc. 2d 592, 541 N.Y.S.2d 321 (Rochester City Ct. 1989).

By contrast, a properly certified copy of the defendant's DMV driving abstract apparently can be admitted into evidence without violating Crawford. See, e.g., People v. Smith, 118

A.D.3d 920, ___, 988 N.Y.S.2d 233, 235 (2d Dep't 2014); People v. Stewart, 68 A.D.3d 1438, ___, 892 N.Y.S.2d 570, 573 (3d Dep't 2009); People v. Carney, 41 A.D.3d 1239, ___, 838 N.Y.S.2d 316, 317 (4th Dep't 2007). See generally People v. Wray, 183 Misc. 2d 444, 704 N.Y.S.2d 787 (Kings Co. Sup. Ct. 2000) (DMV documents admissible under business records exception to hearsay rule); People v. Michaels, 174 Misc. 2d 982, 667 N.Y.S.2d 646 (N.Y. City Crim. Ct. 1997) (properly authenticated DMV abstract is admissible). Cf. People v. Maldonado, 42 Misc. 3d 81, ___, 981 N.Y.S.2d 241, 245 (App. Term, 2d, 11th & 13th Jud. Dist. 2013) (two counts of AUO 2nd and one count of AUO 3rd dismissed where DCJS printout purportedly supporting charges was not properly certified/authenticated); People v. Watson, 167 Misc. 2d 441, 634 N.Y.S.2d 634 (N.Y. City Crim. Ct. 1995) (AUO 2nd charge dismissed at trial on ground that defendant's DMV driving abstract was not properly certified/authenticated). Critically, however, although a DMV driving abstract can demonstrate whether a person's driver's license was suspended or revoked on a particular date, it is unclear whether a DMV driving abstract, standing alone, can prove beyond a reasonable doubt that the person "knew or had reason to know" of such suspension/revocation.

In People v. Jarocha, 66 A.D.3d 1384, ___, 885 N.Y.S.2d 803, 803 (4th Dep't 2009), the Appellate Division, Fourth Department, found that "the People presented the order of suspension and revocation with defendant's signature and thus established that defendant knew or had reason to know that his license had been revoked."

In People v. Maldonado, 44 A.D.3d 793, ___, 843 N.Y.S.2d 415, 416-17 (2d Dep't 2007), Appellate Division, Second Department, held that:

> The Supreme Court properly found, based upon a preponderance of the evidence, that the defendant violated a condition of his probation by knowingly operating a motor vehicle with a suspended license. Contrary to the defendant's contention, the admission of a certified copy of his New York State Department of Motor Vehicles driver abstract (hereinafter the DMV abstract) did not implicate the Confrontation Clause under the Sixth Amendment of the United States Constitution, because a probation revocation hearing is not a criminal prosecution. In addition, the DMV abstract was properly admitted under the business records exception to the hearsay rule.

(Citations omitted).

## § 13:5 Effect of failure to notify DMV of address change

VTL § 505(5) provides that:

> 5. Change of address. It shall be the duty of every licensee to notify the commissioner in writing of any change of residence of such licensee within [10] days after such change occurs and to make a notation of such change of residence on such license in the place provided by the commissioner.

In People v. Kirksey, 186 Misc. 2d 514, 718 N.Y.S.2d 583 (Ithaca City Ct. 2000), the defendant -- who was charged with AUO 3rd -- (a) failed to notify DMV of his change of address from New York City to Ithaca, (b) apparently did not receive a suspension notice that DMV mailed to his former address, and (c) claimed that since he never received the suspension notice he did not "know or have reason to know" that his license was suspended. The Court held that the defendant was estopped from claiming improper service of the suspension notice due to his failure to comply with VTL § 505(5). See generally People v. Suarez, 167 Misc. 2d 189, ___, 638 N.Y.S.2d 1020, 1022 (Valley Stream Just. Ct. 1996) (same rule applied to claim that supporting deposition was improperly served).

## § 13:6 Incriminating admission regarding knowledge of license suspension/revocation must be included in People's CPL § 710.30 notice

In People v. Calise, 167 Misc. 2d 277, 639 N.Y.S.2d 671 (N.Y. City Crim. Ct. 1996), no CPL § 710.30 notice was given. However, the accusatory instrument provided, in pertinent part:

> Deponent is further informed by informant that informant's basis for believing that the defendant knew or had reason to know that his/her license was suspended or revoked is as follows: The defendant was unable to produce a valid license. The defendant stated, in sum and substance, that he/she did not have a driver's license. The defendant stated, in sum and substance that he/she knew his/her driver's license was suspended or revoked.

Id. at ___, 639 N.Y.S.2d at 672.

The Court rejected the People's claim that the contents of the accusatory instrument gave the defendant actual notice of the People's intent to use the statements at trial despite the lack

of CPL § 710.30 notice. In so holding, the Court noted that "[t]he clear language of the statute imposes on the People the obligation not only to inform the defendant of the statements but also of their intent to use them at trial." Id. at ___, 639 N.Y.S.2d at 672.

In People v. Boyles, 210 A.D.2d 732, 621 N.Y.S.2d 118 (3d Dep't 1994), a DWI/AUO 1st case, the defendant was served with two CPL § 710.30 notices: the first at the time of his arrest; the second following his indictment and arraignment in County Court. The second CPL § 710.30 notice omitted a significant statement that was contained in the first. On appeal, the Appellate Division, Third Department, held as follows:

> Because we are remitting this case for a new trial, we also address defendant's contention that County Court erred when it admitted into evidence his statement that he was coming from Shoprite and was on his way to Fallsburg because he was not given proper notice pursuant to CPL 710.30. That statement is significant because the officers apparently knew that Shoprite closed some two hours earlier. The People served two CPL 710.30 notices on defendant; one personally at the time he was arrested and brought before the Monticello Justice Court and a second within 15 days of the arraignment in County Court. Only the earlier notice contained defendant's statement that he was coming from Shoprite. . . . Because the CPL 710.30 notice served at that arraignment in County Court failed to apprise defendant of the People's intention to use his statement that he was coming from Shoprite against him at the trial in that court, that statement should have been suppressed. Defendant was entitled to rely upon the contents of the subsequent CPL 710.30 notice to determine whether to move for suppression of any evidence specified therein before trial in County Court.

Id. at ___, 621 N.Y.S.2d at 120.

### § 13:7 License suspension/revocation does not automatically terminate

Defendants charged with AUO often claim that they thought that their license suspension/revocation had automatically terminated at the conclusion of the minimum suspension/revocation period. However, VTL § 503(2)(j) makes clear that a driver's

license suspension does not terminate until a suspension termination fee is paid; and VTL §§ 510(5), 510(6), 1193(2)(c)(1) and VTL § 1194(2)(d)(1) make clear that an application for relicensure is required after a period of license revocation.

Accordingly, it is no defense to an AUO charge that the defendant thought that the suspension/revocation of his or her driver's license automatically terminated at the expiration of the minimum suspension/revocation period. See, e.g., People v. Demperio, 86 N.Y.2d 549, 552, 634 N.Y.S.2d 672, 673 (1995) (per curiam) (VTL § 1193(2)(c) provides a defendant with "reason to know that upon revocation of his license, a new license application [is] required"); People v. Campbell, 36 A.D.3d 1016, ___, 827 N.Y.S.2d 768, 768-69 (3d Dep't 2007) ("[VTL] § 511(3) and [VTL] § 503(2)(j), when read together, 'put defendant on notice that the [AUO] statute encompasses a suspension that continued in effect based upon a failure to pay the termination of suspension fee'") (citation omitted); People v. Cleveland, 238 A.D.2d 897, ___, 660 N.Y.S.2d 771, 772 (4th Dep't 1997) (same); People v. Fisher, 165 Misc. 2d 650, 630 N.Y.S.2d 188 (Nassau Co. Dist. Ct. 1995) (same); People v. Bell, 163 Misc. 2d 432, ___, 620 N.Y.S.2d 923, 926 (Clarkstown Just. Ct. 1994). Cf. People v. Root, 267 A.D.2d 1103, 701 N.Y.S.2d 227 (4th Dep't 1999) (under former rule, a license suspension did automatically terminate by operation of law at the conclusion of the suspension period).

## § 13:8 Reading a DMV driving abstract

An essential skill for handling VTL cases is the ability to read and interpret a DMV driving abstract. To assist in this regard, DMV created a mock driving abstract along with an explanation of the symbols and words used therein. A copy of this document is set forth as Appendix 10.

## § 13:9 Admissibility of passenger's driving record to attempt to prove that passenger -- rather than defendant -- operated vehicle

In People v. Reichel, 110 A.D.3d 1356, 975 N.Y.S.2d 470 (3d Dep't 2013), the defendant was convicted of Manslaughter 2nd as a result of a motor vehicle accident. The primary issue in the case was whether the operator of the vehicle at the time of the accident was the defendant or rather the victim (who was the defendant's pregnant girlfriend). In this regard, the Appellate Division, Third Department, held, *inter alia*, that:

> Supreme Court [did not abuse] its discretion in refusing to allow defendant to introduce evidence of the victim's prior traffic infractions and accidents, which, defendant contends, would have provided the jury with

> an alternative explanation for the accident, to wit, that it was the victim, not defendant, who was driving the Mitsubishi at the time of the accident. The flaw in defendant's argument on this point is that the victim's allegedly poor driving history simply is not probative of whether she was a passenger in or the driver of the Mitsubishi on the night in question, no more so than defendant's driving history -- which included two prior convictions for [DWI] and [6] prior convictions for [AUO] -- would be probative of whether he was a passenger in or the operator of the vehicle.

Id. at ___, 975 N.Y.S.2d at 475 (citations omitted).

### § 13:10 Unlicensed operation is a lesser included offense of AUO

"Defendants who drive without a license but who neither know nor have reason to know that their driving privileges have been terminated commit a violation ([VTL] § 509[1])." People v. Pacer, 6 N.Y.3d 504, 508, 814 N.Y.S.2d 575, 577 (2006). A trial court's failure to charge unlicensed operation, in violation of VTL § 509(1), as a lesser included offense of AUO where there is a reasonable view of the evidence which would support such a finding constitutes reversible error. Id. at 513, 814 N.Y.S.2d at 580. See also People v. Gribben, 164 A.D.2d 944, 560 N.Y.S.2d 52 (2d Dep't 1990). See generally People v. Wolters, 41 A.D.3d 518, ___, 838 N.Y.S.2d 117, 117-18 (2d Dep't 2007) ("We note that if the Supreme Court, upon retrial, submits to the jury the lesser-included offense of unlawfully operating or driving a motor vehicle on a public highway, that count must be submitted in the alternative (see CPL 300.40[3][b], 300.50)"). Cf. People v. Kulk, 103 A.D.3d 1038, ___, 962 N.Y.S.2d 408, 411 (3d Dep't 2013) (under circumstances of case, failure to charge AUO 2nd as lesser included offense of AUO 1st was not reversible error); People v. Taylor, 246 A.D.2d 610, ___, 667 N.Y.S.2d 299, 299-300 (2d Dep't 1998) ("On the facts of this case, no reasonable view of the evidence would have permitted the jury to conclude that the defendant committed the lesser offense but did not commit the greater"); People v. Peters, 188 A.D.2d 1037, 592 N.Y.S.2d 1004 (4th Dep't 1992) (same).

In People v. Osborne, 60 A.D.3d 1310, ___, 875 N.Y.S.2d 396, 397 (4th Dep't 2009), the Appellate Division, Fourth Department, held that:

> The People correctly concede that . . . count 11, charging defendant with unlicensed

> operation of a motor vehicle, is a lesser inclusory concurrent count of count 6, charging defendant with [AUO]. Thus, [count 11] must be dismissed as a matter of law.

In People v. Alshoaibi, 273 A.D.2d 871, ___, 711 N.Y.S.2d 646, 648 (4th Dep't 2000):

> Defendant contend[ed] that the court erred in refusing to charge unlicensed operation of a motor vehicle ([VTL] § 509[1]) as a lesser included offense of [AUO 1st] ([VTL] § 511[3][a]). That contention is foreclosed by the jury's verdict finding him guilty of [AUO 1st] and the jury's implicit rejection of the charged lesser-included offenses of [AUO] in the [2nd] and [3rd] degrees.

## § 13:11 Roadways upon which AUO statute applies

VTL § 1100(a) provides that "[t]he provisions of [VTL Title VII] apply upon public highways, private roads open to public motor vehicle traffic and any other parking lot, except where a different place is specifically referred to in a given section." VTL § 511 is part of Title V -- *not* Title VII -- of the VTL. In addition, VTL § 511 by its express terms only applies to operation "upon a public highway." As such, a person caught driving in a parking lot with a suspended or revoked driver's license cannot validly be charged with AUO. See People v. Stewart, 92 A.D.3d 1146, ___, 940 N.Y.S.2d 178, 180 (3d Dep't 2012); People v. Mills, 45 A.D.3d 1348, ___, 845 N.Y.S.2d 597, 598 (4th Dep't 2007). See also VTL § 512 (driving with suspended or revoked registration).

In People v. Hopper, 165 Misc. 2d 694, ___, 629 N.Y.S.2d 943, 945 (Dewitt Just. Ct. 1995), the Court concluded that:

> [T]he New York State Legislature, amended Section 1192 of the [VTL] by adding . . . Subdivision (7).
>
> In the above section of the [VTL] the Legislature directly addressed the situation concerning driving while intoxicated in a parking lot.
>
> Conversely, the New York State Legislature, in its infinite wisdom, and for good or for ill, has not chosen to amend the statutes concerning Suspended Registration and [AUO].

> It is the decision of this Court that the motion to dismiss the charges against the Defendant consisting of violations of Sections 512 Suspended registration; 511(1)(a) [AUO 3rd]; 511(2)(a)(i) [AUO 2nd] is hereby granted and those charges are dismissed.

(Citation omitted). See generally People v. Thew, 44 N.Y.2d 681, 405 N.Y.S.2d 433 (1978); People v. Kenyon, 85 A.D.2d 916, 446 N.Y.S.2d 783 (4th Dep't 1981); People v. Conzo, 100 Misc. 2d 143, 418 N.Y.S.2d 750 (Suffolk Co. Sup. Ct. 1979); People v. Robillard, 2002 WL 377027 (Cayuga Co. Ct. 2002).

### § 13:12 AUO is a "continuing crime"

"A continuing crime is one 'that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time.'" People v. Shack, 86 N.Y.2d 529, 540, 634 N.Y.S.2d 660, 667 (1995) (citation omitted). AUO is a continuing crime. People v. Miller, 163 A.D.2d 627, ___, 558 N.Y.S.2d 269, 270 (3d Dep't 1990). As such, a defendant may only be prosecuted once for a single incident of AUO -- even if, in so doing, he or she operated the vehicle in more than one jurisdiction. See, e.g., Matter of Johnson v. Morgenthau, 69 N.Y.2d 148, 512 N.Y.S.2d 797 (1987).

### § 13:13 *Attempted* AUO is not a legally cognizable offense

Penal Law § 110.00 provides that "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." In terms of punishment, an attempt to commit a crime is generally punished one level lower than the crime itself. See PL § 110.05.

In People v. Prescott, 263 A.D.2d 254, 704 N.Y.S.2d 410 (4th Dep't 2000), the Appellate Division, Fourth Department, *temporarily* created the crime of attempted AUO. On appeal, however, the Court of Appeals reversed, holding that attempted AUO is *not* a legally cognizable offense. People v. Prescott, 95 N.Y.2d 655, 722 N.Y.S.2d 778 (2001).

Interestingly, however, although attempted AUO is not an appropriate *charge*, it can be a valid *plea bargain*. See People v. Foster, 19 N.Y.2d 150, 278 N.Y.S.2d 603 (1967) (plea of guilty to nonexistent crime not invalid where defendant sought, and freely and knowingly accepted, such plea as part of a plea bargain struck for his benefit). See also People v. Johnson, 23 N.Y.3d 973, ___ N.Y.S.2d ___, 2014 WL 2515688, *1 (2014) ("Where

a defendant enters a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required. Indeed, under such circumstances defendants can even plead guilty to crimes that do not exist") (citations omitted); People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) ("a plea may be to a hypothetical crime"); People v. Keizer, 100 N.Y.2d 114, 118 n.2, 760 N.Y.S.2d 720, 723 n.2 (2003) (same); People v. Clairborne, 29 N.Y.2d 950, 951, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 110.00 ("Although there may not be a separately prosecutable crime of attempt to commit a particular substantive crime, a bargained-for guilt plea to such an attempt, as a lesser crime than the one charged in the accusatory instrument, which is struck for the benefit of the defendant, may bind the defendant").

**§ 13:14 AUO 3rd -- Sentence**

When a person is convicted of AUO 3rd, the sentence of the Court must be:

1. A fine of between $200 and $500, up to 30 days in jail, or both. VTL § 511(1)(b);

2. Effective July 1, 2008, a mandatory surcharge of $55. VTL § 1809(1)(c);

3. Effective August 1, 2008, an additional surcharge of $20 (effective July 26, 2013, this amount is $28). VTL § 1809-e(1)(a);

4. A crime victim assistance fee of $5. VTL § 1809(1)(c); and

5. If the case is in either a Town or Village Court, an additional $5 surcharge. VTL § 1809(9).

In other words, if the case is in a Town or Village Court, the mandatory surcharge for most VTL offenses is $93; otherwise, the mandatory surcharge for most VTL offenses is $88.

In People v. Edenholm, 9 A.D.3d 892, ___, 779 N.Y.S.2d 688, 689 (4th Dep't 2004), the Appellate Division, Fourth Department, held that a 90-day jail sentence for AUO 3rd was illegal. See also People v. Laurino, 205 A.D.2d 556, 613 N.Y.S.2d 206 (2d Dep't 1994).

* * * * * * * * * *

When a person is convicted of committing AUO 3rd in a vehicle with a GVWR of more than 18,000 pounds, the sentence of the Court must be:

1. A fine of between $500 and $1,500, up to 30 days in jail, or both. VTL § 511(1)(c);

2. Effective July 1, 2008, a mandatory surcharge of $55. VTL § 1809(1)(c);

3. Effective August 1, 2008, an additional surcharge of $20 (effective July 26, 2013, this amount is $28). VTL § 1809-e(1)(a);

4. A crime victim assistance fee of $5. VTL § 1809(1)(c); and

5. If the case is in either a Town or Village Court, an additional $5 surcharge. VTL § 1809(9).

In other words, if the case is in a Town or Village Court, the mandatory surcharge is $93; otherwise, the mandatory surcharge is $88.

### § 13:15 Sentence for AUO 3rd not required to include fine

A sentence for AUO 3rd is not required to include a fine. See, e.g., VTL § 511(1)(b); People v. Kropp, 49 A.D.3d 1339, 854 N.Y.S.2d 273 (4th Dep't 2008). Where the sentencing Court misapprehends the law and refers to the fine as mandatory (in a case where the defendant is also sentenced to jail), the sentence will be vacated and the case remanded for re-sentencing. See Kropp, 49 A.D.3d at ___, 854 N.Y.S.2d at 273-74.

### § 13:16 Sentence for AUO can be more lenient where license suspension was for support arrears or overdue taxes

VTL § 511(7) provides an exception to the mandatory sentencing provisions of VTL §§ 511(1)(b) and 511(2)(b) in cases where the defendant's driver's license was suspended due to support arrears or past-due tax liabilities and the defendant has adequately addressed the issue. In this regard, VTL § 511(7) provides as follows:

> Exceptions. When a person is convicted of a violation of [VTL § 511(1) or (2)], and the suspension was issued pursuant to (a) [VTL § 510(4-e)] due to a support arrears, or (b) [VTL § 510(4-f)] due to past-due tax liabilities, the mandatory penalties set forth in [VTL § 511(1) or (2)] shall not be

> applicable if, on or before the return date or subsequent adjourned date, such person presents proof that such support arrears or past-due tax liabilities have been satisfied as shown by certified check, notice issued by the court ordering the suspension, or notice from a support collection unit or department of taxation and finance as applicable. The sentencing court shall take the satisfaction of arrears or the payment of the past-due tax liabilities into account when imposing a sentence for any such conviction. For licenses suspended for non-payment of past-due tax liabilities, the court shall also take into consideration proof, in the form of a notice from the department of taxation and finance, that such person has made payment arrangements that are satisfactory to the commissioner of taxation and finance.

## § 13:17 Successful DDP completion does not terminate sentence for AUO

VTL § 1196(4) provides, in pertinent part, that:

> Notwithstanding any contrary provisions of this chapter, satisfactory participation in and completion of [the Drinking Driver Program] shall result in the termination of any sentence of imprisonment that may have been imposed by reason of a conviction [of, or youthful offender adjudication for, alcohol or drug-related traffic offenses]; provided, however, that nothing contained in this section shall delay the commencement of such sentence.

In People ex rel. Paganini v. Jablonsky, 79 N.Y.2d 586, 584 N.Y.S.2d 415 (1992), the defendant was convicted of DWI and AUO 2nd arising out of the same incident. The defendant was sentenced to a year in jail for the DWI charge and 180 days in jail for the AUO charge. While his appeal was pending, however:

> Paganini enrolled in and completed a [VTL] § 1196 certified alcohol rehabilitation program. He subsequently petitioned Supreme Court, Nassau County, for a writ of habeas corpus alleging that, pursuant to [VTL] § 1196(4), both of his jail sentences should terminate upon completion of the program. That court sustained the writ and directed

> petitioner's immediate release from custody. The Appellate Division reversed and dismissed the habeas corpus proceeding, concluding that the sentence termination provisions in [VTL] § 1196(4), as interpreted and implemented by the regulations of the Commissioner of Motor Vehicles, were not applicable to his sentence for [AUO 2nd]. That sentence is the only matter before us inasmuch as Paganini's sentence for his [DWI] conviction was properly terminated under [VTL] § 1196(4) upon his successful completion of the rehabilitation program.

Id. at 589, 584 N.Y.S.2d at 415-16 (citation omitted).

The defendant argued that AUO 2nd, in violation of VTL § 511(2)(a)(ii), is an "alcohol or drug-related traffic offense" within the meaning of VTL § 1196(4). The Court of Appeals disagreed. In so holding, the Court reasoned that:

> The goal of [VTL] § 1196 rehabilitation programs is to induce drivers with alcohol or drug problems to obtain professional help, thus reducing threats to the public safety from persons who disregard the dangers of driving with diminished capacities due to intoxication and impairment. The statute and the implementing regulation, by targeting and limiting eligibility to participate in the programs, foster that goal. They reflect a rational policy choice not to extend the termination-of-sentence incentive to [VTL] offenders who knowingly drive without a license -- the core element of the [VTL] § 511(2) offense at issue in this case -- because that would not directly foster the particular goals of [VTL] § 1196 rehabilitation and education programs. That Paganini's unlicensed driving conviction may be traced back to a suspension, which was based on his prior refusal to take a chemical test and a prior [DWAI] conviction, therefore does not qualify him for the termination-of-sentence remedy.

Id. at 590, 584 N.Y.S.2d at 416 (citation omitted).

## § 13:18 Court can consider pending AUO charge in sentencing defendant for DWI

In People v. Rawleigh, 89 A.D.3d 1483, ___, 932 N.Y.S.2d 660, 662-63 (4th Dep't 2011), the Appellate Division, Fourth Department, held that "County Court did not err in considering defendant's arrests for [AUO] in sentencing him despite the fact that those charges were still pending. The court suspended defendant's license during the pendency of the trial, and defendant did not deny that he drove without a license in contravention of the court's order." (Citations omitted).

## § 13:19 Attorney suspended from practice of law for 6 months for AUO 3rd conviction

In Matter of Semel-DeFeo, 78 A.D.3d 82, 906 N.Y.S.2d 914 (2d Dep't 2010) (per curiam), an attorney was suspended from the practice of law for 6 months for an AUO 3rd conviction. Notably, although this was the attorney's only criminal conviction:

> [T]he record evinces the respondent's pattern of contempt and disregard for the Traffic Violations Division of the Department of Motor Vehicles by virtue of his numerous license suspensions for failing to answer summonses and pay fines. Despite his misdemeanor conviction, the respondent continued to drive with a suspended license. While the respondent's underlying actions do not directly impact on his practice of law, the repetitive nature of such conduct reflects an overall disrespect for the law.

Id. at ___, 906 N.Y.S.2d at 915. Cf. Matter of DelCol, 23 A.D.3d 7, 802 N.Y.S.2d 188 (2d Dep't 2005) (per curiam) (attorney censured for DWI and AUO convictions, as well as for failure to report same); Matter of Plante, 7 A.D.3d 98, 776 N.Y.S.2d 817 (2d Dep't 2004) (per curiam) (attorney censured for DWI and AUO convictions); Matter of Goldstein, 285 A.D.2d 187, 728 N.Y.S.2d 758 (2d Dep't 2001) (per curiam) (attorney censured for DWI, AUO and Reckless Driving convictions).

## § 13:20 AUO 2nd -- Generally

The middle level of AUO is AUO 2nd. In this regard, VTL § 511(2)(a) provides as follows:

> 2. Aggravated unlicensed operation of a motor vehicle in the second degree. (a) A person is guilty of the offense of [AUO 2nd] when such person commits the offense of [AUO 3rd]; and

> (i) has previously been convicted of an offense that consists of or includes the elements comprising the offense committed within the immediately preceding [18] months; or
>
> (ii) the suspension or revocation is based upon a refusal to submit to a chemical test pursuant to [VTL § 1194], a finding of driving after having consumed alcohol in violation of [VTL § 1192-a] or upon a conviction for a violation of any of the provisions of [VTL § 1192]; or
>
> (iii) the suspension was a mandatory suspension pending prosecution of a charge of a violation of [VTL § 1192] ordered pursuant to [VTL § 1193(2)(e)] or other similar statute; or
>
> (iv) such person has in effect [3] or more suspensions, imposed on at least [3] separate dates, for failure to answer, appear or pay a fine, pursuant to [VTL § 226(3) or VTL § 510(4-a)].

AUO 2nd is an unclassified misdemeanor. VTL § 511(2)(b).

### § 13:21 Proof that defendant "knew or had reason to know" license was suspended on 3 or more separate dates not required in connection with VTL § 511(2)(a)(iv) charge

AUO 2nd, in violation of VTL § 511(2)(a)(iv), requires that the defendant have in effect 3 or more suspensions imposed on at least 3 separate dates. In People v. Abelo, 79 A.D.3d 668, 914 N.Y.S.2d 54 (1st Dep't 2010), the defendant contended that, in connection with a VTL § 511(2)(a)(iv) charge, the People are required to prove that he "knew or had reason to know" that he was driving with 3 outstanding suspensions. The Appellate Division, First Department, summarily rejected the claim, holding that "the statute only requires knowledge or reason to know of [1] such suspension, not of [3] suspensions." Id. at ___, 914 N.Y.S.2d at 56. See also People v. Pabon, 167 Misc. 2d 214, 640 N.Y.S.2d 421 (N.Y. City Crim. Ct. 1995) (same).

### § 13:22 AUO 2nd -- Sentence

When a person is convicted of AUO 2nd pursuant to VTL § 511(2)(a)(i) (*i.e.*, the AUO is enhanced because the person has a prior AUO conviction within the past 18 months), the sentence of the Court must be:

1. A fine of not less than $500, *and* either (a) up to 180 days in jail, (b) where appropriate, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation. VTL § 511(2)(b);

2. Effective July 1, 2008, a mandatory surcharge of $55. VTL § 1809(1)(c);

3. Effective August 1, 2008, an additional surcharge of $20 (effective July 26, 2013, this amount is $28). VTL § 1809-e(1)(a);

4. A crime victim assistance fee of $5. VTL § 1809(1)(c); and

5. If the case is in either a Town or Village Court, an additional $5 surcharge. VTL § 1809(9).

In other words, if the case is in a Town or Village Court, the mandatory surcharge is $93; otherwise, the mandatory surcharge is $88.

The AUO 2nd statute does not provide for a maximum fine. However, in People v. Jimerson, 13 A.D.3d 1140, ___, 788 N.Y.S.2d 526, 527 (4th Dep't 2004), the Appellate Division, Fourth Department, stated that the maximum fine for AUO 2nd is $1,000. See generally PL § 80.05(1) (the maximum fine for most class A misdemeanors is $1,000).

In People v. Borush, 39 A.D.3d 890, ___, 834 N.Y.S.2d 340, 341 (3d Dep't 2007), the Appellate Division, Third Department, held that an 8-month jail sentence for AUO 2nd was illegal. See also People v. Greene, 195 A.D.2d 1079, 602 N.Y.S.2d 581 (4th Dep't 1993) (360-day jail sentence for AUO 2nd was illegal). See generally People v. Head, 145 Misc. 2d 984, 554 N.Y.S.2d 751 (App. Term, 9th & 10th Jud. Dist. 1990).

* * * * * * * * * *

When a person is convicted of AUO 2nd pursuant to VTL § 511(2)(a)(ii), (iii) or (iv) (*i.e.*, the AUO is enhanced because the underlying suspension/revocation is DWI-related or the person has in effect 3 or more suspensions imposed on at least 3 separate dates), the sentence of the Court must be:

1. A fine of between $500 and $1,000, *and* either (a) between 7 and 180 days in jail, (b) where appropriate, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation. VTL § 511(2)(b);

2. Effective July 1, 2008, a mandatory surcharge of $55. VTL § 1809(1)(c);

3. Effective August 1, 2008, an additional surcharge of $20 (effective July 26, 2013, this amount is $28). VTL § 1809-e(1)(a);

4. A crime victim assistance fee of $5. VTL § 1809(1)(c); and

5. If the case is in either a Town or Village Court, an additional $5 surcharge. VTL § 1809(9).

In other words, if the case is in a Town or Village Court, the mandatory surcharge is $93; otherwise, the mandatory surcharge is $88.

### § 13:23 Sentence for AUO 2nd must include fine and either jail or probation

A sentence for AUO 2nd must include a fine and either jail or probation. See, e.g., VTL § 511(2)(b); People v. Jimerson, 13 A.D.3d 1140, ___, 788 N.Y.S.2d 526, 527 (4th Dep't 2004).

### § 13:24 AUO 1st -- Generally

The highest level of AUO is AUO 1st. In this regard, VTL § 511(3)(a) provides as follows:

> 3. Aggravated unlicensed operation of a motor vehicle in the first degree. (a) A person is guilty of the offense of [AUO 1st] when such person:
>
> (i) commits the offense of [AUO 2nd] as provided in [VTL § 511(2)(a)(ii), (iii) or (iv)] and is operating a motor vehicle while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)]; or
>
> (ii) commits the offense of [AUO 3rd] as defined in [VTL § 511(1)]; and is operating a motor vehicle while such person has in effect [10] or more suspensions, imposed on at least [10] separate dates for failure to answer, appear or pay a fine, pursuant to [VTL § 226(3) or VTL § 510(4-a)]; or
>
> (iii) commits the offense of [AUO 3rd] as defined in [VTL § 511(1)]; and is operating a

> motor vehicle while under permanent revocation as set forth in [VTL § 1193(2)(b)(12)]; or
>
> (iv) operates a motor vehicle upon a public highway while holding a conditional license issued pursuant to [VTL § 1196(7)(a)] while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)].

AUO 1st is a class E felony. VTL § 511(3)(b).

### § 13:25 CPL § 200.60 applies to felony AUO

An element of AUO is that the defendant "knew or had reason to know" that his or her driving privileges were suspended or revoked. See VTL § 511(1)(a). In the felony AUO (*i.e.*, AUO 1st) context, the suspension/revocation often resulted from a DWI-related conviction and/or chemical test refusal revocation. In such a situation, the DWI-related suspension/revocation (a) raises the grade of the offense from a misdemeanor to a felony, and (b) is an element of the charge.

As a result, the People and the Court must utilize the procedure set forth in CPL § 200.60. See People v. Cooper, 78 N.Y.2d 476, 478, 577 N.Y.S.2d 202, 203 (1991) ("When a defendant's prior conviction raises the grade of an offense, and thus becomes an element of the higher grade offense, the Criminal Procedure Law -- reflecting a concern for potential prejudice and unfairness to the defendant in putting earlier convictions before the jury -- specifies a procedure for alleging and proving the prior convictions (CPL 200.60)"). This statute provides, in pertinent part, that:

> A previous conviction that "raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter" may not be referred to in the indictment (CPL 200.60[1]). Instead, it must be charged by special information filed at the same time as the indictment (CPL 200.60[2]). An arraignment must be held on the special information outside the jury's presence. If a defendant admits a previous conviction, "that element of the offense * * * is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of

> the offense." (CPL 200.60[3][a]). If, however, the defendant denies the previous conviction or remains silent, the People may prove that element before the jury as part of their case (CPL 200.60[3][b]).

Id. at 481-82, 577 N.Y.S.2d at 205.

Construed literally, CPL § 200.60 only applies to a defendant's previous *convictions*, *not* to "conviction-related facts" -- such as a prior DWI-related license revocation -- that necessarily reveal the prior DWI conviction to the jury. Faced with this situation in Cooper, the Court of Appeals held that the spirit and purpose of CPL § 200.60 requires that the statute be applied not only to previous convictions, but also to relevant "conviction-related facts":

> In a situation such as the one before us -- where pleading and proving knowledge of a prior conviction necessarily reveals the conviction -- the protection afforded by CPL 200.60 can be effectuated only by reading the statute to require resort to the special information procedure for all of the conviction-related facts that constitute the enhancing element.
>
> Proper application of CPL 200.60 required that defendant be given an opportunity to admit -- outside the jury's presence -- the element that raised his crime in grade. That opportunity could have been afforded by a special information charging him with the prior conviction, the revocation of his license, and knowledge of the conviction and revocation. If defendant chose to admit those facts, no mention of them was necessary before the jury. If defendant denied all or any of those facts, the People could have proceeded with their proof, as the statute provides.

Id. at 482-83, 577 N.Y.S.2d at 205.

Although Cooper involved a charge of Vehicular Manslaughter, its rationale also applies to felony AUO. See, e.g., People v. Burgess, 89 A.D.3d 1100, 933 N.Y.S.2d 715 (2d Dep't 2011); People v. Anderson, 89 A.D.3d 1161, 932 N.Y.S.2d 561 (3d Dep't 2011); People v. Flanagan, 247 A.D.2d 899, 668 N.Y.S.2d 528 (4th Dep't 1998); People v. Boyles, 210 A.D.2d 732, 621 N.Y.S.2d 118 (3d Dep't 1994); People v. Brockway, 202 A.D.2d 1015, 609 N.Y.S.2d 481 (4th Dep't 1994); People v. Williams, 197 A.D.2d 721, 602

N.Y.S.2d 912 (2d Dep't 1993); People v. Sawyer, 188 A.D.2d 939, 592 N.Y.S.2d 92 (3d Dep't 1992). See generally People v. Cleophus, 81 A.D.3d 844, 916 N.Y.S.2d 624 (2d Dep't 2011) (defense counsel's mishandling of CPL § 200.60 issue constituted ineffective assistance of counsel); People v. Miller, 142 A.D.2d 760, 530 N.Y.S.2d 866 (3d Dep't 1988).

When the Cooper/CPL § 200.60 procedure is utilized in an AUO 1st case, if the defendant concedes the predicate DWI-related suspension/revocation, then a conviction of either DWI or DWAI would also result in a conviction of AUO 1st. In this regard, the People and the defense can enter into a stipulation whereby the jury would "automatically" find the defendant guilty of AUO 1st if it finds the defendant guilty of either DWI or DWAI. See, e.g., People v. Swan, 277 A.D.2d 1033, 716 N.Y.S.2d 194 (4th Dep't 2000); People v. Donhauser, 255 A.D.2d 933, 683 N.Y.S.2d 357 (4th Dep't 1998); People v. Tatro, 245 A.D.2d 1040, 667 N.Y.S.2d 560 (4th Dep't 1997); People v. Nedoroscik, 178 A.D.2d 684, 577 N.Y.S.2d 157 (3d Dep't 1991).

A chemical test refusal revocation is also a "conviction-related fact" for purposes of Cooper and CPL § 200.60. See, e.g., People v. Alshoaibi, 273 A.D.2d 871, 711 N.Y.S.2d 646 (4th Dep't 2000); People v. Orlen, 170 Misc. 2d 737, 651 N.Y.S.2d 860 (Nassau Co. Ct. 1996).

In People v. Mason, 248 A.D.2d 751, ___, 669 N.Y.S.2d 712, 714 (3d Dep't 1998), the Appellate Division, Third Department, reversed the defendant's DWI and AUO 1st convictions where:

> Revelation of the conviction-related fact of defendant's previous license revocation rendered the special information and arraignment procedure of CPL 200.60 "an empty gesture." The court's limiting instruction was insufficient to eliminate the likelihood of prejudice to defendant. Therefore, a new trial is necessary.

(Citations omitted).

**§ 13:26 CPL § 400.40 does not apply to felony AUO**

In People v. Worley, 43 A.D.3d 571, ___, 840 N.Y.S.2d 489, 490 (3d Dep't 2007), the Appellate Division, Third Department, held that:

> [D]efendant contends, with regard to his conviction for [AUO], that the People were required to file proof of the previous suspension of his driving privileges pursuant

> to CPL 400.40. We disagree. That statutory provision prescribes the procedure for determining prior convictions for the enhancement of sentence where a defendant has been convicted of an unclassified misdemeanor or a traffic violation. Inasmuch as defendant here was convicted of a class E felony, the cited statutory provision is inapplicable.

(Citation omitted).

**§ 13:27 AUO 2nd is a lesser included offense of AUO 1st**

In People v. Sikorski, 280 A.D.2d 414, ___, 721 N.Y.S.2d 48, 49 (1st Dep't 2001), the Appellate Division, First Department, reduced defendant's conviction of AUO 1st to AUO 2nd where:

> [T]he People failed to establish that defendant committed the crime of [AUO 1st], which requires proof that defendant operated a vehicle with 10 or more license suspensions in effect ([VTL] § 511[3][a][ii]). In this regard, the abstract of defendant's driving record that was introduced into evidence by the People was not properly certified as required by CPLR 4540(b).
>
> The evidence was, however, sufficient to sustain a conviction for the lesser included offense of [AUO 2nd], which requires proof that defendant had [3] or more suspensions in effect (see, [VTL] § 511[2][a][iv]). We note that this charge was supported by the admission of [8] notices of suspension and defendant has not challenged the admissibility of this evidence on appeal.

(Citation omitted).

In People v. Whipple, 276 A.D.2d 827, 714 N.Y.S.2d 374 (3d Dep't 2000), the Appellate Division, Third Department, reduced defendant's conviction of AUO 1st to AUO 2nd where the jury convicted the defendant of AUO 1st but was deadlocked on the associated DWI and DWAI charges.

### § 13:28 *Conviction* of VTL § 1192 is not an element of AUO 1st

While a *violation* of VTL § 1192 is an essential element of an AUO 1st charge (pursuant to VTL § 511(3)(a)(i)), a *conviction* of VTL § 1192 is not. People v. Keller, 252 A.D.2d 817, ___, 675 N.Y.S.2d 441, 442 (3d Dep't 1998). In Keller:

> [D]efendant was convicted by a jury of [AUO 1st], [DWAI], failure to keep right and unlicensed operation of a motor vehicle, all as a result of his operation of a motor vehicle on January 1, 1994. The convictions were appealed and were upheld by this court, with the exception of the conviction for [DWAI] which was reversed due to an inordinate delay in sentencing.

Id. at ___, 675 N.Y.S.2d at 442.

On appeal, the defendant claimed that the reversal of the DWAI conviction required the reduction of his AUO 1st conviction to AUO 2nd -- as a violation of VTL § 1192 is an element of the AUO 1st charge. Rejecting the argument, the Appellate Division, Third Department, held that:

> To find defendant guilty of the crime of [AUO 1st], the jury was required, as pertinent to this appeal, to find that defendant was operating a motor vehicle while under the influence of alcohol in violation of [VTL] § 1192(1), (2), (3), (4) or (5). There is no question that the jury found defendant guilty of, *inter alia*, the infraction of [DWAI] in violation of [VTL] § 1192(1) since this was their verdict on count one of the indictment. The mere fact that, due to an apparent oversight, sentencing for the conviction of [DWAI] was not imposed does not negate the jury's finding that on the day in question defendant was operating a motor vehicle while his ability was impaired due to the consumption of alcohol. Since a conviction under [VTL] § 1192 is not an element of [AUO 1st] and all of the elements necessary to convict defendant of this charge were presented to the jury, we find that their verdict should not be disturbed.

Id. at ___, 675 N.Y.S.2d at 442 (citation omitted). Cf. People v. Miner, 261 A.D.2d 420, 689 N.Y.S.2d 233 (2d Dep't 1999) (jury's verdict convicting defendant of AUO 1st but acquitting

him of DWI and DWAI was repugnant, since essential element of AUO 1st is that defendant was driving in violation of VTL § 1192(1), (2), (3), (4) or (5)).

### § 13:29 AUO 1st cannot serve as underlying felony for Assault 1st charge

In People v. Belizaire, 234 A.D.2d 467, ___, 651 N.Y.S.2d 574, 574-75 (2d Dep't 1996), the Appellate Division, Second Department, held that "[AUO 1st] may not serve as the underlying felony for [Assault 1st]. . . . The interpretation of the Penal Law advocated by the People would lead to an unjust and unreasonable result."

### § 13:30 VTL § 511(3) is not unconstitutionally vague

VTL § 511(3), the AUO 1st statute, has been challenged as being unconstitutionally vague. Such challenges have been unsuccessful. See People v. Campbell, 36 A.D.3d 1016, 827 N.Y.S.2d 768 (3d Dep't 2007); People v. Cleveland, 238 A.D.2d 897, 660 N.Y.S.2d 771 (4th Dep't 1997).

### § 13:31 VTL § 511(3) is not an *ex post facto* law

In People v. Guszack, 237 A.D.2d 715, 654 N.Y.S.2d 845 (3d Dep't 1997), the Appellate Division, Third Department, rejected the defendant's claim that VTL § 511(3)(a) constitutes an *ex post facto* law. In so holding, the Court reasoned that:

> Because the enactment of [VTL] § 511(3)(a) provided defendant with fair warning that, upon his commission of an alcohol-related vehicular offense, he would be subjected to enhanced criminal liability as the result of the continued revocation of his driver's license, the statutory scheme suffers no constitutional infirmity.

Id. at ___, 654 N.Y.S.2d at 845-46. See also People v. Cintron, 163 Misc. 2d 881, ___, 622 N.Y.S.2d 662, 663 (Kings Co. Sup. Ct. 1995) ("the punishment to be imposed herein would not be punishment for earlier license suspensions but only a stiffened penalty for the present crime because it is a repetitive one. Moreover, defendant was given fair warning by the amendment to section 511 of the [VTL] that his continued operation of a motor vehicle while his license suspensions were in effect would be regarded as felonious conduct") (citations omitted).

## § 13:32 Conviction of both DWAI and AUO 1st does not violate Double Jeopardy

In People v. Khan, 291 A.D.2d 898, ___, 737 N.Y.S.2d 738, 739 (4th Dep't 2002), the Appellate Division, Fourth Department, held that:

> We reject the contention of defendant that his conviction of both DWAI and AUO in the first degree violates the constitutional prohibition against double jeopardy. Although in this case commission of DWAI is an element of AUO in the first degree and therefore does not "require[] proof of an additional fact which [AUO in the first degree] does not," here both charges are contained within a single indictment and were disposed of by a single plea, and Penal Law § 70.25(2) requires that the sentences upon conviction of both counts be concurrent. Double jeopardy therefore is not implicated.

(Citations omitted).

## § 13:33 AUO 1st -- Sentence

When a person is convicted of AUO 1st, the sentence of the Court must be:

1. A fine of between $500 and $5,000, *and* either (a) up to 4 years in state prison, (b) where appropriate and a term of imprisonment is not required by the Penal Law, a sentence of probation as provided in VTL § 511(6), or (c) a "split sentence" of jail and probation. VTL § 511(3)(b);

2. Effective July 1, 2008, a mandatory surcharge of $55. VTL § 1809(1)(c);

3. Effective August 1, 2008, an additional surcharge of $20 (effective July 26, 2013, this amount is $28). VTL § 1809-e(1)(a); and

4. A crime victim assistance fee of $5. VTL § 1809(1)(c).

In other words, the mandatory surcharge is $88.

## § 13:34 Sentence for AUO 1st must include fine and either jail or probation

A sentence for AUO 1st must include a fine and either jail or probation. See, e.g., VTL § 511(3)(b); People v. Duquette, 100 A.D.3d 1105, ___ n.2, 952 N.Y.S.2d 909, 910 n.2 (3d Dep't 2012); People v. Rodriguez, 164 Misc. 2d 974, 627 N.Y.S.2d 254 (Kings Co. Sup. Ct. 1995).

In People v. Faulcon, 109 A.D.3d 1021, ___, 971 N.Y.S.2d 356, 357 (3d Dep't 2013):

> County Court promised defendant that his sentence would not include a fine, but such sentence would have been illegal. The legal sentence that County Court imposed [which included a fine] was inconsistent with that promise. Although defendant failed to preserve this issue by moving to withdraw the plea or vacate the judgment of conviction, the sentence must nevertheless "be vacated, and the matter remitted . . . to afford . . . defendant the opportunity to accept the sentence that was actually imposed, or permit him to withdraw his plea of guilty."

(Citations omitted). See also People v. Ryan, 83 A.D.3d 1128, ___, 920 N.Y.S.2d 806, 809 (3d Dep't 2011); People v. Eron, 79 A.D.3d 1774, ___, 914 N.Y.S.2d 849, 851 (4th Dep't 2010); People v. Barber, 31 A.D.3d 1145, ___, 818 N.Y.S.2d 391, 391-92 (4th Dep't 2006).

In People v. Jenkins, 94 A.D.3d 1474, 942 N.Y.S.2d 397 (4th Dep't 2012), the defendant pled guilty to felony DWI and AUO 1st. The sentencing court "advised defendant that it could sentence him to a term of incarceration of up to [4] years or to probation, but it did not indicate to defendant that it was required to impose either a fine, or a term of incarceration, or both." Id. at ___, 942 N.Y.S.2d at 397. The Appellate Division, Fourth Department, held that "inasmuch as the court failed to advise defendant that he must either be fined, or incarcerated or both, we conclude that the plea was not knowingly, voluntarily and intelligently entered. We therefore reverse the judgment and vacate the plea, and we remit the matter to County Court for further proceedings on the superior court information." Id. at ___, 942 N.Y.S.2d at 397-98.

## § 13:35 Consecutive sentences in AUO cases

Penal Law § 70.25(2) provides that:

> When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently.

In People v. Goldstein, 12 N.Y.3d 295, 300, 879 N.Y.S.2d 814, 817 (2009), the Court of Appeals held that "the conduct underlying the count alleging [AUO] was distinct from that involved in the ensuing reckless endangerment offenses and thus permitted a consecutive sentence." See also People v. Goddeau, 43 A.D.3d 491, 840 N.Y.S.2d 244 (3d Dep't 2007).

In People v. Clemens, 177 A.D.2d 1053, ___, 578 N.Y.S.2d 296, 296 (4th Dep't 1991), the Appellate Division, Fourth Department, held that "[t]he trial court erred in ordering that the sentence imposed on defendant's conviction for [DWI] be served consecutively to the sentence of [AUO 1st]," (citation omitted), and modified defendant's sentences to run concurrently. See also People v. Milo, 235 A.D.2d 552, 654 N.Y.S.2d 146 (2d Dep't 1997) (same); People v. Magistro, 156 A.D.2d 1029, 550 N.Y.S.2d 875 (4th Dep't 1989) (same); People v. Khan, 291 A.D.2d 898, 737 N.Y.S.2d 738 (4th Dep't 2002) (PL § 70.25(2) requires concurrent sentences where defendant convicted of AUO 1st and DWAI).

In People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, 258 (3d Dep't 2001), the Appellate Division, Third Department, stated that sentences imposed for felony DWI and AUO 1st could run consecutively without running afoul of PL § 70.25(2). Critically, however, in People v. DeMaio, 304 A.D.2d 988, ___, 760 N.Y.S.2d 558, 559 (3d Dep't 2003), the Court clarified its position in Richburg:

> Although there are numerous factual circumstances that can comprise both the crimes of [AUO 1st] (see [VTL] § 511[3][a][i], [ii]) and felony [DWI] (see [VTL] § 1193[1][c][i], [ii]), it is apparent that [DWI] can constitute a material element of [AUO 1st]. It was thus incumbent upon the People to show either that defendant's felony [DWI] was not, in fact, a material element of his [AUO 1st] (see e.g. [VTL] § 511[3][a][ii] [authorizing such charge based upon nonalcohol-related elements]) or that the two offenses were based upon separate and distinct acts. Here, the indictment alleges defendant's driving while under the influence as an element of the charge of [AUO 1st].

> Both the offenses to which defendant eventually pleaded guilty are alleged in the indictment to have occurred on the same date, place and time. The plea allocution confirms such facts and, indeed, further reveals that the same prior offenses provided the basis for both the previous revocation of defendant's license and the elevation of the [DWI] to felony status. It is thus clear that defendant's felony [DWI] charge was a material element of his [AUO 1st] and the People failed to show that the two offenses arose from separate and distinct acts.
>
> The People's reliance upon People v. Richburg, with no concomitant case-specific factual analysis, is misplaced. *Richburg should not be construed as holding that felony [DWI] and [AUO 1st] cannot fall within the parameters of Penal Law § 70.25(2). To the contrary, since felony [DWI] can constitute a material element of [AUO 1st], the People bear the burden when advocating consecutive sentences of showing identifiable separate acts sustaining such sentences.* The People failed to make such a showing in this case and, therefore, the sentences must be modified to run concurrently.

(Emphasis added) (citation and footnote omitted).

Shortly after DeMaio was decided, the Third Department upheld consecutive sentences in a felony DWAI Drugs/AUO 1st case where the defendant's only challenge to such sentence was that it was harsh and excessive. See People v. Clark, 309 A.D.2d 1076, 766 N.Y.S.2d 710 (3d Dep't 2003). Thus, it is critical that defense counsel in a felony DWI/AUO 1st case expressly object to consecutive sentences on the specific ground that such sentences violate PL § 70.25(2).

In People v. Borush, 39 A.D.3d 890, 834 N.Y.S.2d 340 (3d Dep't 2007), the Third Department, citing DeMaio, invalidated consecutive sentences for a VOP involving charges of *misdemeanor* DWI and AUO 2nd. In so holding, the Court stated that "[b]ecause the act of driving a motor vehicle while intoxicated and while suspended was a single act, concurrent sentences should have been imposed." Id. at ___, 834 N.Y.S.2d 341. Notably, however, the DeMaio Court had noted that "[t]he common element of merely operating a motor vehicle is not a *material* element" in combined DWI/AUO cases. 304 A.D.2d at ___ n.1, 760 N.Y.S.2d at 559 n.1. Thus, consecutive sentences *are* permissible where the defendant is convicted of misdemeanor DWI and misdemeanor AUO arising out

of the same act. See People v. Skarczewski, 287 N.Y. 826 (1942). It should be noted, however, that the combined sentences cannot exceed 1 year. See PL § 70.25(3) ("Where consecutive definite sentences of imprisonment are not prohibited by [PL § 70.25(2)] and are imposed on a person for offenses which were committed as parts of a single incident or transaction, the aggregate of the terms of such sentences shall not exceed one year"). See also People v. Furber, 169 A.D.2d 841, ___, 565 N.Y.S.2d 210, 211 (2d Dep't 1991) (same).

### § 13:36 AUO convictions and "second felony offender" sentencing

Sentencing as a "second felony offender" is governed by PL § 70.06. This section provides, in pertinent part, that "[a] second felony offender is a person . . . who stands convicted of a felony defined in this chapter, . . . after having previously been subjected to one or more predicate felony convictions." PL § 70.06(1)(a).

The express language of PL § 70.06, as well as the case law interpreting it, make clear that a defendant is not eligible for second felony offender status unless the present felony conviction is for a PL offense. Thus, a defendant presently convicted of a felony under the VTL (such as AUO 1st) cannot be sentenced as a second felony offender. See, e.g., People v. Cammarata, 216 A.D.2d 965, ___, 629 N.Y.S.2d 716, 716 (4th Dep't 1995) ("The People concede . . . that defendant was illegally sentenced as a second felony offender on his conviction of [AUO 1st] ([VTL] § 511[3][a]) and felony [DWI] ([VTL] § 1192[3]; § 1193[1][c]) because sentencing as a second felony offender applies only to Penal Law violations").

### § 13:37 Violation of conditional license as AUO

When a person's driver's license is suspended or revoked in connection with a VTL § 1192 violation, the person may be eligible for a conditional driver's license. Where such license is granted by DMV, although the person's license status is technically "suspended" or "revoked," he or she will nonetheless possess a license that is valid for certain purposes. See VTL § 1196(7)(a). This raises the question: What is the appropriate charge where a person operates a motor vehicle in violation of a conditional license?

Prior to the enactment of VTL § 1196(7)(f), an issue existed as to whether a person driving outside of the parameters of a conditional license committed AUO, a misdemeanor, or rather merely committed the traffic infraction of driving in violation of a licensing restriction, in violation of VTL § 509(3). In People v. Tousley, 86 Misc. 2d 1059, 383 N.Y.S.2d 996 (Yates Co. Ct. 1976), the Court held that the appropriate charge under the

circumstances is the traffic infraction. In so holding, the Court commented that if the Legislature "intended that these specially considered drivers should be guilty of a misdemeanor for driving other than to and from work, school or class, at work or during the specific 3 hours on the weekend, . . . then the legislature should have said so." Id. at ___, 383 N.Y.S.2d at 998. It never did. Thus, pursuant to the doctrine of legislative acquiescence, which provides that "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence," Engle v. Talarico, 33 N.Y.2d 237, 242, 351 N.Y.S.2d 677, 680-81 (1973), this issue should have been put to rest.

However, 12 years later, in People v. Sabin, 139 Misc. 2d 641, 528 N.Y.S.2d 288 (Westchester Co. Ct. 1988), the Court expressly disagreed with Tousley, and held that the defendant could validly be charged with AUO. This time, the Legislature did not acquiesce. Rather, in 1989, subsequent to Sabin, the Legislature enacted VTL § 1196(7)(f), which expressly provides, in pertinent part:

> It shall be a traffic infraction for the holder of a conditional license or privilege to operate a motor vehicle upon a public highway for any use other than those authorized pursuant to [VTL § 1196(7)(a)].

VTL § 1196(7)(f) clearly legislatively overrules Sabin. In addition, published decisions decided subsequent to the enactment of VTL § 1196(7)(f) have consistently agreed with Tousley (and either disagreed with or distinguished Sabin). See, e.g., People v. Buckley, 13 Misc. 3d 910, 821 N.Y.S.2d 859 (Sullivan Co. Ct. 2006) (AUO 1st charge dismissed where defendant possessed valid pre-conviction conditional license at time of new DWI charge); People v. Greco, 151 Misc. 2d 859, ___, 583 N.Y.S.2d 714, 715 (App. Term, 9th & 10th Jud. Dist. 1992) ("It is the opinion of this Court that a person holding a restricted use license, has a license and may not be charged as if he is operating the motor vehicle with a revoked or suspended license").

In People v. Rivera, 16 N.Y.3d 654, 655-56, 926 N.Y.S.2d 16, 17 (2011), the Court of Appeals (temporarily) resolved this issue, holding as follows: "a driver whose license has been revoked, but who has received a conditional license and failed to comply with its conditions, may be prosecuted only for the traffic infraction of driving for a use not authorized by his license, not for the crime of driving while his license is revoked."

Effective November 1, 2013, however, Rivera was partially legislatively overruled. In this regard, newly enacted VTL §

511(3)(a)(iv) provides that a person commits the felony of AUO 1st when the person "operates a motor vehicle upon a public highway while holding a conditional license issued pursuant to [VTL § 1196(7)(a)] while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)]." The title of this new offense (*i.e.*, AUO 1st) is a misnomer -- as a person who commits this offense is not unlicensed (and is thus not committing AUO). Perhaps this offense should be a new category of Aggravated DWI (akin to Leandra's Law) or a new category of felony DWI.

Regardless, Rivera still applies to cases that fall below the level of AUO 1st. In other words, a person who drives in violation of the conditions of a valid conditional license -- but not in a manner constituting AUO 1st -- "may be prosecuted only for the traffic infraction of driving for a use not authorized by his license." Rivera, 16 N.Y.3d at 655-56, 926 N.Y.S.2d at 17.

**§ 13:38 Can a person commit AUO on a lawn tractor?**

In People v. Canute, 8 A.D.3d 1125, ___, 778 N.Y.S.2d 247, 248-49 (4th Dep't 2004), the Appellate Division, Fourth Department, held both:

(a) that a lawn tractor is a "motor vehicle" within the "broad definition" of VTL § 125; and

(b) "that [VTL] § 511(3)(a), when read in conjunction with sections 125 and 509(1), placed defendant on notice that the statute prohibiting [AUO] encompasses the operation of a lawn tractor on a public highway."

It is the authors' opinion that the dissent in Canute makes more sense (particularly in light of the Court of Appeals' subsequent decision in People v. Rivera, 16 N.Y.3d 654, 926 N.Y.S.2d 16 (2011)):

> Even assuming, arguendo, that a lawn tractor constitutes a motor vehicle within the meaning of [VTL] § 125, we conclude that defendant cannot be convicted of [AUO 1st] pursuant to [VTL] § 511(3)(a) because a license is not required to operate a lawn tractor in this State. In order to establish that defendant committed the crime of [AUO 1st], the People must prove, inter alia, that he was operating a motor vehicle "while knowing or having reason to know that [his] license or privilege of operating such motor vehicle . . . [has been] suspended, revoked or otherwise withdrawn" (§ 511[1][a]). As

> County Court properly noted, the crime at issue requires both operation of a motor vehicle and knowledge, or reason to know, that the license to operate "such motor vehicle" has been suspended or revoked. Because no license is required to operate the vehicle at issue, defendant cannot have committed the crime of [AUO 1st].

8 A.D.3d at ___, 778 N.Y.S.2d at 249.

**§ 13:39 Can the police stop a car for suspicion of AUO?**

In People v. Pate, 52 A.D.3d 1118, ___, 860 N.Y.S.2d 318, 318-19 (3d Dep't 2008):

> In November 2005, a police officer encountered defendant in the course of a domestic disturbance call. After concluding that the situation was under control and checking to make sure that defendant did not have any outstanding warrants, the officer advised defendant to leave the premises. Defendant drove away. The officer then ran a check of defendant's license and determined that it was suspended. As a result, the officer filed an information alleging [AUO 3rd], leading to an arrest warrant being issued for defendant.
>
> About six weeks later, the same officer recognized that a radio transmission concerned the vehicle which defendant had previously been driving. The officer responded to the area, pulled the vehicle over, requested defendant's identification and arrested him. During a search of defendant incident to the arrest, the officer discovered crack cocaine.

The Appellate Division, Third Department, held that "[t]he arresting officer knew that, six weeks prior to the stop at issue, defendant had driven the same vehicle while his driver's license was suspended. This knowledge gave the officer reasonable cause to stop the vehicle." Id. at ___, 860 N.Y.S.2d at 31.

Similarly, in People v. Haynes, 35 A.D.3d 1212, ___, 825 N.Y.S.2d 627, 628 (4th Dep't 2006), the Appellate Division, Fourth Department, held that:

> The police officer who stopped the vehicle was aware that defendant had recently been ticketed for unlicensed operation of a motor vehicle, and that knowledge gave the officer the requisite level of suspicion to justify the stop of defendant's vehicle. While a computer check would have confirmed the status of defendant's license, we cannot conclude under the circumstances of this case that a computer check was necessary inasmuch as the ticket for unlicensed operation of a motor vehicle was issued close in time to the stop of defendant's vehicle.

(Citations omitted). See generally People v. Reed, 45 A.D.3d 1333, 844 N.Y.S.2d 809 (4th Dep't 2007); People v. Eason, 283 A.D.2d 655, ___, 725 N.Y.S.2d 84, 84 (2d Dep't 2001) ("The stop was validly based on the police officer's concededly correct knowledge that the registration for the vehicle had been suspended"); People v. Clark, 227 A.D.2d 983, ___, 643 N.Y.S.2d 836, 836 (4th Dep't 1996) ("The officer knew defendant and knew that his driver's license had been revoked. Furthermore, before stopping defendant's vehicle, the officer confirmed by a computer check that defendant's driver's license had been revoked. Therefore, the officer had reasonable suspicion that defendant was committing [AUO]"); People v. Riggio, 202 A.D.2d 609, ___, 609 N.Y.S.2d 257, 258 (2d Dep't 1994) ("the police officer testified that several days earlier he had run a check on the defendant's license after seeing the defendant behind the wheel of a parked car. In this manner, the police officer learned that the defendant, who the officer had arrested for [DWI] on a prior occasion, did not have a valid license. Therefore, at the time he stopped the defendant, the police officer had a reasonable suspicion that the defendant was operating his vehicle without a valid license"); People v. Beckwith, 163 A.D.2d 863, 558 N.Y.S.2d 394 (4th Dep't 1990).

### § 13:40 Suppressibility of DMV records as "fruit of the poisonous tree"

For many years, the lower Courts had reached differing conclusions with regard to the issue of whether a person's DMV records are suppressible under the "fruit of the poisonous tree" doctrine. In People v. Tolentino, 14 N.Y.3d 382, 900 N.Y.S.2d 708 (2010), the Court of Appeals held that they are not. Specifically, the Court held that "a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name." Id. at 388, 900 N.Y.S.2d at 712. In so holding, the Court reasoned that:

> In INS v. Lopez-Mendoza, the Supreme Court held that the "'body' or identity of a defendant . . . in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." A contrary holding would "permit[] a defendant to hide who he is [and] would undermine the administration of the criminal justice system." Accordingly, defendant does not argue that his name or identity would be subject to suppression as a fruit of the allegedly unlawful stop. Rather, he claims that the preexisting DMV records are subject to suppression because without the alleged illegality, the police would not have learned his name and would not have been able to access these records.
>
> Federal circuit courts addressing this issue in the context of those suspected of illegally residing in the country have held that, when the police stop or seize a defendant, learn his or her name, and use that name to check preexisting government immigration files, the records are not subject to suppression. * * *
>
> The facts here are analogous. The officers learned defendant's identity when they stopped his car; that knowledge permitted the police to run a computer check that led to the retrieval of defendant's DMV records. Under the rationale of Lopez-Mendoza and the above federal circuit court decisions, defendant's DMV records were therefore not suppressible as the fruit of the purportedly illegal stop. In short, "there is no sanction . . . when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence."
>
> While not forming an independent basis for this outcome, the result is further supported by the nature of the records at issue, which were public records already in the possession of authorities.

Id. at 384-85, 385-86, 900 N.Y.S.2d at 710, 710-11 (citations omitted).

## § 13:41 AUO -- Defense

VTL § 511(4) provides that:

> In any prosecution under [VTL § 511] or [VTL § 511-a], it is a defense that the person operating the motor vehicle has at the time of the offense a license issued by a foreign country, state, territory or federal district, which license is valid for operation in this state in accordance with the provisions of [VTL § 250].

## § 13:42 AUO -- *Not* a defense

Where a person's New York driving privileges are suspended or revoked, it is no defense to an AUO charge that the person possesses a valid out-of-state or out-of-country driver's license. In this regard, VTL § 250(2) provides, in pertinent part, that:

> The exemption granted in this subdivision shall not apply to persons whose privilege of operating a motor vehicle in this state, or whose former license to drive in this state, has been suspended or revoked, until such suspension or revocation has been terminated or privilege of operating a motor vehicle restored.

## § 13:43 AUO -- Plea bargain limitations

Similar to VTL § 1192(10), which contains various plea bargaining limitations in DWI cases, VTL § 511(5) places a plea bargaining limitation on AUO charges. Specifically, VTL § 511(5) provides:

> 5. Limitation on pleas. Where an accusatory instrument charges a violation of [VTL § 511], any plea of guilty entered in satisfaction of such charge must include at least a plea of guilty of one of the offenses defined by this section and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, that if the district attorney upon reviewing the available evidence determines that the charge of a violation of this section is not warranted, he may set forth upon the record the basis for such determination and consent

> to a disposition by plea of guilty to another charge in satisfaction of such charge, and the court may accept such plea.

In the authors' experience, in stark contrast with the plea bargaining limitations in VTL § 1192(10), the plea bargaining limitation in VTL § 511(5) is largely ignored. In this regard, AUO charges are commonly plea bargained to the traffic infractions of Unlicensed Operation, in violation of VTL § 509(1), or Facilitating Aggravated Unlicensed Operation in the 3rd Degree, in violation of VTL § 511-a(1). The likely reason why is that, unlike VTL § 1192(10)(a)(i) -- which generally allows a DWI charge to be plea bargained to the traffic infraction of DWAI -- VTL § 511(5) generally prohibits an AUO charge from being reduced to a non-criminal offense. Many people consider this to be a legislative oversight, as AUO 3rd was originally classified as a traffic infraction. Thus, when VTL § 511(5) was enacted it was similar to VTL § 1192(10)(a)(i).

### § 13:44 AUO -- Sentence of probation

VTL § 511(6) provides an alternative to incarceration as a penalty for AUO. In this regard, VTL § 511(6) provides:

> 6. Sentence of probation. In any case where a sentence of probation is authorized by [VTL § 511], the court may in its discretion impose such sentence, provided however, if the court is of the opinion that a program of alcohol or drug treatment may be effective in assisting in prevention of future offenses of a similar nature upon imposing such sentence, the court shall require as a condition of the sentence that the defendant participate in such a program.

### § 13:45 AUO -- Accusatory instrument sufficient

In People v. Maldonado, 42 Misc. 3d 81, ___, 981 N.Y.S.2d 241, 244 (App. Term, 2d, 11th & 13th Jud. Dist. 2013), the Appellate Term held that an accusatory instrument charging the defendant with AUO 2nd and AUO 3rd was facially sufficient where:

> The deponent police officer alleged in the accusatory instrument that, upon his search of the official, computerized records of the DMV, he had discovered that the records indicate that defendant's driving privilege had been suspended/revoked on July 19, 2008 as a result of defendant's failure to answer or appear in response to a traffic summons;

> that all such summonses contain the warning that "if you don't answer this ticket by mail within 15 days your license will be suspended"; and that the "Department of Motor Vehicles mails a notice of suspension to any such person at their last known address."

In People v. Sanago, 2012 WL 1886662, *1 (App. Term, 11th & 13th Jud. Dist. 2012), the Appellate Term held that an accusatory instrument charging the defendant with AUO 2nd was facially sufficient where:

> In his supporting deposition, the arresting officer alleged that he believed that defendant had reason to know that his license had been suspended based upon the officer's search of the official, computerized records of the Department of Motor Vehicles, which indicated that defendant's license had been suspended at the time of the instant offense on December 27, 2009 as a result of defendant's failure to answer a summons, and that all such summonses feature a warning that "if you do not answer this ticket by mail within fifteen (15) days, your license will be suspended. The suspension occurs automatically (by computer) within four (4) weeks of the defendant's failure to answer." The arresting officer further alleged that, during the traffic stop, defendant was unable to produce a valid driver's license. Also supporting an inference that defendant was aware of the suspension of his license was a certified copy of defendant's driving abstract, which was attached to the supporting deposition and listed a 2008 suspension of defendant's license.

In People v. Michtavy, 2011 WL 3370571, *1 (App. Term, 2d, 11th & 13th Jud. Dist. 2011):

> The sole issue raised on appeal is whether the information set forth sufficient factual allegations of the alleged offense [of AUO 3rd]. Contrary to defendant's contention, the information did not need to establish that defendant knew how the Department of Motor Vehicles would effectuate the suspension of his license by computer, only that defendant "knew or had reason to know" that his license was suspended at the time of the incident. The supporting deposition

> stated that defendant was aware that he had received a prior traffic summons, that he knew that he had failed to answer that traffic summons, and that all such summonses have printed on them that "if you do not answer this ticket by mail within fifteen (15) days, your *license will be suspended*" (emphasis added). Since defendant knew that he did not answer the earlier traffic summons, he "had reason to know" that his license was suspended at the time of the incident involved herein.

(Citations omitted).

In People v. Crawley, 2011 WL 2749634, *1 (App. Term, 1st Jud. Dist. 2011) (per curiam), the Appellate Term held that an accusatory instrument charging the defendant with AUO 3rd was facially sufficient where:

> The underlying misdemeanor complaint alleged that, at a specified time and location, defendant was operating a motor vehicle; that a computer check of records of the Department of Motor Vehicles revealed that her license had been suspended for failure to pay assessments for prior traffic violations; that [6] points were charged against her driving record during a period of 18 months; and that a notice was sent to defendant's last known address directing her to pay the minimum assessment amount. These factual allegations were sufficient, for pleading purposes, to establish reasonable cause to believe that defendant was driving "while knowing or having reason to know" that her license was suspended.

See also People v. Mayes, 19 Misc. 3d 48, 858 N.Y.S.2d 856 (App. Term, 9th & 10th Jud. Dist. 2008); People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (Rochester City Ct. 1996); People v. Rodriguez, 165 Misc. 2d 684, 630 N.Y.S.2d 205 (N.Y. City Crim. Ct. 1995); People v. Gabriel, 164 Misc. 2d 473, 625 N.Y.S.2d 433 (N.Y. City Crim. Ct. 1995); People v. Howell, 158 Misc. 2d 653, 601 N.Y.S.2d 778 (N.Y. City Crim. Ct. 1993).

### § 13:46 Facial sufficiency of simplified traffic information charging AUO in NYC

In People v. Fernandez, 20 N.Y.3d 44, 46, 956 N.Y.S.2d 443, 444 (2012), the Court of Appeals held that:

> [T]he accusatory instrument was a facially sufficient simplified traffic information, although it was titled "Complaint/Information," and contained factual information. For the reasons set forth below, we hold that the accusatory instrument was sufficient to serve as a simplified traffic information because it was substantially in the form prescribed by the Commissioner of Motor Vehicles.

See also id. at 50, 956 N.Y.S.2d at 447 (in the case of simplified traffic informations, the title of the accusatory instrument "cannot be dispositive when it is the legislature's intention that no single part of the form be dispositive. . . . [T]he Commissioner of Motor Vehicles does not require a simplified traffic information to have any title at all (see 15 NYCRR 122.2). It would be illogical, then, to find that the title of the form governs over its substance").

Notably, Fernandez may only apply to cases in New York City and other cities having a population of 1,000,000 or more. See id. at 51, 956 N.Y.S.2d at 447 ("Defendant also argues this is not a facially sufficient simplified traffic information since the form used in this case does not comply with 15 NYCRR part 91, promulgated pursuant to [VTL] § 207, which authorizes the Commissioner of Motor Vehicles to prescribe the form of a uniform summons and complaint in traffic violation cases. However, neither [VTL] § 207 nor 15 NYCRR part 91 apply to simplified traffic informations in New York City").

In addition, the Fernandez Court concluded with the following comment:

> Although we hold that according to the technical specifications of the regulations, [NYPD] Procedure No. 209-11 substantially complies with 15 NYCRR 122.2, and is therefore sufficient as a simplified traffic information, a new more carefully drawn form would better service the city and the public. The present form is confusing and hardly "simplified." It would seem clear that, at the very least, a simplified traffic information used in New York City should be titled "simplified traffic information" and should not include any space for factual allegations.

Id. at 53, 956 N.Y.S.2d at 449.

**§ 13:47 AUO -- Accusatory instrument insufficient**

In People v. Brown, 31 Misc. 3d 794, ___, 919 N.Y.S.2d 324, 326 (Rochester City Ct. 2011), the Court found that DMV's Mailing Record for Notice of Suspension or Revocation form, which is a substitute for a VTL § 214 Affidavit of Regularity/Proof of Mailing, was an "attempt by the Department of Motor Vehicles to skirt the holding in People v. Pacer." (Citation omitted). As such, the Court dismissed the simplified traffic information charging the defendant with AUO 2nd on the ground that there was no valid allegation that the defendant "knew or had reason to know" that his driver's license was suspended.

In People v. Acevedo, 27 Misc. 3d 889, ___, 897 N.Y.S.2d 899, 903 (N.Y. City Crim. Ct. 2010), the Court held that:

> Here, the Complaint specifically alleges that Defendant's license was suspended for failure to pay a driver's responsibility assessment, and that Defendant was instructed to pay the minimum amount in [30] days or less by a notice sent to his last known address or his license would be suspended by the DMV. Defendant's license was not suspended for failure to answer a traffic summons, but rather for his alleged failure to answer a notice sent by the DMV. Yet the People failed to provide a copy of this notice, or an affidavit from an employee of the DMV setting forth the DMV's procedure for issuing and mailing such notices. As with defendant Gonzalez in Brown, *supra*, the only allegation supporting the element that Defendant had knowledge of his license being suspended is Police Officer Checa's "belief" based upon a computer check of DMV records. Because this allegation is based on facts of which Officer Checa has no personal knowledge, we find that the count of [AUO] has been insufficiently alleged. Defendant's motion to dismiss this count is accordingly granted.

See also People v. J.T., 2006 WL 2727987 (N.Y. City Crim. Ct. 2006); People v. Pierre, 157 Misc. 2d 812, 599 N.Y.S.2d 412 (N.Y. City Crim. Ct. 1993).

In People v. Lesnak, 165 Misc. 2d 706, ___, 630 N.Y.S.2d 459, 461 (Suffolk Co. Dist. Ct. 1995), the Court held as follows:

> The court rules, then, that the deposition supporting a simplified traffic information,

> to the extent it is based on information and belief, must contain a statement of the source of that information and belief if it is to be sufficient on its face.
>
> In docket number 3346496, containing the [VTL] § 511(1)(a) charge, the complainant officer has not specified the source of his information that the license of defendant was suspended. Docket number 3405443 contains the [VTL] § 511(2)(a)(iv) charge, [AUO 2nd], based on more than [3] suspensions imposed on [3] different dates. The complainant officer does not provide the source of his knowledge about the suspensions. The court finds docket numbers 3346496 and 3405443, containing charges of the violation of [VTL] §§ 511(1)(a) and 511(2)(a)(iv) are insufficient for their failure to contain a statement of the source of the information and belief on which they are partially based. The motion to dismiss them is granted.

See also People v. Dumas, 42 Misc. 3d 265, ___, 974 N.Y.S.2d 921, 924 (Buffalo City Ct. 2013). See generally People v. Kouyate, 159 Misc. 2d 179, 603 N.Y.S.2d 374 (N.Y. City Crim. Ct. 1993).

**§ 13:48 AUO -- Evidence before Grand Jury insufficient**

In People v. Williams, 12 Misc. 3d 824, 819 N.Y.S.2d 423 (Kings Co. Sup. Ct. 2006), the defendant was indicted for, *inter alia*, AUO 1st, AUO 2nd and AUO 3rd. The allegation before the Grand Jury was that, on the date of his arrest, the defendant's driver's license was suspended pending prosecution for a violation of VTL § 1192. Apparently, however, although the defendant's driver's license was definitely suspended and/or revoked, it was *not* suspended pending prosecution for a violation of VTL § 1192. Accordingly, the Court dismissed the AUO 1st and AUO 2nd charges. Id. at ___, 819 N.Y.S.2d at 425.

In People v. Carlsons, 171 Misc. 2d 943, ___, 656 N.Y.S.2d 116, 118 (Nassau Co. Sup. Ct. 1997), the Court held that:

> This Court now holds based upon the language of Section 214 of the [VTL], that in order to establish a legally sufficient case of [AUO], the People must offer evidence that defendant was driving and also submit to the grand jury a certified copy of defendant's Abstract of Driving Record together with an affidavit from a responsible DMV employee based on the

> employee's personal knowledge, setting forth the procedure utilized for the issuance and mailing of the notice of suspension to the driver whose license was suspended.

Cf. People v. Keller, 214 A.D.2d 825, ___, 625 N.Y.S.2d 325, 326 (3d Dep't 1995) ("Inasmuch as defendant's guilt with respect to two of the crimes with which he had been charged -- felony DWI and [AUO] -- was predicated upon, among other things, his having been previously convicted of certain offenses, the certificate of conviction and Department of Motor Vehicles abstract, which constituted evidence of those prior convictions, were quite properly put before the Grand Jury") (citations omitted).

**§ 13:49 AUO -- Proof at trial insufficient**

In People v. Francis, 114 A.D.3d 699, ___, 979 N.Y.S.2d 687, 688-89 (2d Dep't 2014), the Appellate Division, Second Department, held that:

> Viewing the evidence in the light most favorable to the prosecution, the Supreme Court correctly determined that it was legally insufficient to establish the defendant's guilt of [AUO 3rd] pursuant to [VTL] § 511(1)(a). . . . In order to support a conviction of [AUO 3rd], the People must establish that the defendant knew or had reason to know that his or her driving privilege had been revoked, suspended, or otherwise withdrawn by the Commissioner of Motor Vehicles. Here, the evidence was legally insufficient to prove that the defendant knew or had reason to know that her license had been suspended.
>
> The testimony on behalf of the People, given by an employee from the Kings County office of the New York State Department of Motor Vehicles (hereinafter the DMV), revealed that the employee had no personal knowledge of the procedures utilized by the Albany DMV office, which handled the mailing of the notices of impending and actual suspension of the defendant's license. Consequently, the People failed to present sufficient proof regarding the standard practice and procedure of the Albany DMV office that were designed to ensure that the suspension orders were properly addressed and mailed, did not establish that the suspension orders were

> mailed to the defendant, and, thus, failed to prove that the defendant knew, or had reason to know, that her license had been suspended.

(Citation omitted). See also People v. Outram, 2009 WL 250358 (App. Term, 2d, 11th & 13th Jud. Dist. 2009).

### § 13:50 When is an AUO verdict repugnant?

In People v. Whipple, 276 A.D.2d 827, ___, 714 N.Y.S.2d 374, 376 (3d Dep't 2000), the Appellate Division, Third Department, held that the defendant's conviction of AUO 1st was repugnant "given the fact that the jury was deadlocked on the crimes of [DWI] and [DWAI]." In so holding, the Court reasoned that:

> [B]ecause the record reveals that the jury could not reach an agreement on [DWI] *or* [DWAI] and was therefore deadlocked on an essential element of [AUO 1st], the verdict on this count was repugnant. We thus modify the judgment by reducing defendant's conviction under count three to the lesser included offense of [AUO 2nd] (see generally, CPL 470.15[2][a]).

Id. at ___, 714 N.Y.S.2d at 376 (citation omitted). Cf. People v. Morgan, 219 A.D.2d 759, ___, 631 N.Y.S.2d 449, 450 (3d Dep't 1995) (similar verdict affirmed where "[t]he nature of the deadlock remained unexplored and the jury was discharged without objection").

In People v. Miner, 261 A.D.2d 420, 689 N.Y.S.2d 233 (2d Dep't 1999), the Appellate Division, Second Department, held that the jury's verdict convicting the defendant of AUO 1st but acquitting him of DWI and DWAI was repugnant, since an essential element of AUO 1st is that the defendant was driving in violation of VTL § 1192(1), (2), (3), (4) or (5). Accordingly, the Court reversed the defendant's conviction of AUO 1st, but affirmed his conviction of AUO 2nd. Cf. People v. Keller, 252 A.D.2d 817, 675 N.Y.S.2d 441 (3d Dep't 1998) (AUO 1st conviction survives reversal of DWAI conviction due to an inordinate delay in sentencing).

### § 13:51 Amendment of indictment during trial to change theory of prosecution of AUO 1st charge improper

In People v. Allen, 158 A.D.2d 932, ___, 551 N.Y.S.2d 96, 97 (4th Dep't 1990), the Appellate Division, Fourth Department, held that:

> The court erred in permitting the People to amend the second count of the indictment during trial. The amendment changed the theory of prosecution on the charge of [AUO 1st]. Accordingly, defendant's conviction on that count should be reversed and the count dismissed.

(Citations omitted). Cf. People v. Crandall, 199 A.D.2d 867, ___, 606 N.Y.S.2d 357, 358 (3d Dep't 1993) ("we hold that the amendment did not change the theory of the prosecution's case nor did it otherwise tend to prejudice defendant on the merits").

**§ 13:52 AUO plea vacated where plea allocution deficient**

In People v. Ham, 265 A.D.2d 674, ___, 697 N.Y.S.2d 359, 360 (3d Dep't 1999):

> A review of the plea allocution reveals that defendant responded to County Court's inquiry as to whether he had a valid driver's license by replying that he had a Pennsylvania license and that at the time of this incident he thought, based upon the paperwork he received, that his driving privileges in New York had been reinstated. Defendant also stated that he did not learn otherwise until later.

(Footnote omitted). The Appellate Division, Third Department, held that:

> Although defendant did not move to withdraw his plea or make a postallocution motion, the People concede that this issue falls within the narrow exception to the preservation requirement. Our review of the record confirms defendant's contention that the plea allocution was deficient with respect to this count in that defendant's statement negated that -- at the time of this offense -- he knew or had reason to know that his license in this State was suspended or revoked. Accordingly, defendant's plea to this count must be vacated and the matter remitted to County Court.

Id. at ___, 697 N.Y.S.2d at 360 (citations omitted).

In People v. Reed, 1 Misc. 3d 44, ___, 768 N.Y.S.2d 541, 542 (App. Term, 2d & 11th Jud. Dist. 2003), the Appellate Term vacated a guilty plea where:

> The plea and sentencing transcript reveals that defense counsel informed the court below that some of defendant's driver's license suspensions "were in his brother's name", after which the court made no further inquiry. Considering the fact that defendant was charged with [AUO] based on said suspensions, we find that counsel's incongruous statement clearly required further inquiry by the court inasmuch as it casts a significant doubt upon defendant's guilt or otherwise calls into question the voluntariness of the plea. Moreover, the transcript reveals that defendant only said two words, "No" and "Yes", during his entire plea. Although the court was not required to make a factual inquiry, the record must demonstrate that defendant's plea was made knowingly and voluntarily, and the transcript herein fails to indicate the foregoing or that he intentionally relinquished or abandoned any right or privilege, and a waiver cannot be presumed from a silent record.

(Citations omitted).

**§ 13:53 AUO and Sandoval**

In People v. Black, 77 A.D.3d 966, ___, 911 N.Y.S.2d 78, 79 (2d Dep't 2010), the Appellate Division, Second Department, held that:

> The County Court properly ruled that the People could question the defendant on cross-examination, if he were to testify at trial, concerning his prior convictions for operating a motor vehicle while under the influence of alcohol and [AUO], by allowing the People to solely inquire if the defendant had ever been convicted of a felony or a misdemeanor.

See also § 13:25, *supra*.

In a case not involving driving, the Appellate Division, Third Department, held that:

> Defendant also claims that County Court abused its discretion by permitting the

> People to cross-examine her -- had she chosen to testify -- concerning the circumstances that led to her being previously convicted of [DWI] and [AUO 3rd]. These convictions, as well as the underlying acts, are indicative of defendant's willingness to place her individual interest ahead of that of society and were relevant on the issue of her credibility as a witness.

People v. Stevens, 65 A.D.3d 759, ___, 884 N.Y.S.2d 283, 287 (3d Dep't 2009). See also People v. Pomales, 49 A.D.3d 962, 853 N.Y.S.2d 407 (3d Dep't 2008).

### § 13:54 Where person arrested for AUO, police can impound vehicle and conduct inventory search

Where a person is arrested for AUO, the police can impound the person's vehicle and conduct an inventory search thereof (at least where there is no licensed driver immediately available). See, e.g., People v. Washington, 50 A.D.3d 1539, ___, 856 N.Y.S.2d 783, 785 (4th Dep't 2008); People v. Cochran, 22 A.D.3d 677, 804 N.Y.S.2d 346 (2d Dep't 2005); People v. Figueroa, 6 A.D.3d 720, 776 N.Y.S.2d 574 (2d Dep't 2004); People v. Rhodes, 206 A.D.2d 710, 614 N.Y.S.2d 641 (3d Dep't 1994).

However, the inventory search must be properly conducted/proven or any evidence obtained pursuant thereto will be suppressed. See, e.g., People v. Johnson, 1 N.Y.3d 252, 771 N.Y.S.2d 64 (2003); People v. Leonard, 119 A.D.3d 1237, ___ N.Y.S.2d ___, 2014 WL 3630546 (3d Dep't 2014); People v. Wright, 285 A.D.2d 984, 730 N.Y.S.2d 388 (4th Dep't 2001); People v. Lloyd, 167 A.D.2d 856, 562 N.Y.S.2d 257 (4th Dep't 1990).

### § 13:55 Seizure and redemption of unlawfully operated vehicles

VTL § 511-b sets forth a very specific set of procedures for the seizure and redemption of unlawfully operated vehicles. In this regard, VTL § 511-b(1) provides that:

> Upon making an arrest or upon issuing a summons or an appearance ticket for the crime of [AUO 1st or AUO 2nd] committed in his presence, an officer shall remove or arrange for the removal of the vehicle to a garage, automobile pound, or other place of safety where it shall remain impounded, subject to the provisions of this section if: (a) the operator is the registered owner of the vehicle or the vehicle is not properly registered; or (b) proof of financial

> security is not produced; or (c) where a person other than the operator is the registered owner and, such person or another properly licensed and authorized to possess and operate the vehicle is not present. The vehicle shall be entered into the New York statewide police information network as an impounded vehicle and the impounding police department shall promptly notify the owner and the local authority that the vehicle has been impounded.

The remaining subdivisions of VTL § 511-b set forth the procedures for obtaining the release of vehicles seized pursuant to VTL § 511-b(1). Notably, VTL § 511-b only applies if, *inter alia*:

(a) The defendant is arrested/ticketed for AUO 1st or AUO 2nd (*i.e.*, the statute does not apply to AUO 3rd). See VTL § 511-b(1); People v. Miles, 3 Misc. 3d 566, ___ n.1, 774 N.Y.S.2d 647, 650 n.1 (Rochester City Ct. 2003); and

(b) The offense was committed in the officer's presence. See VTL § 511-b(1).

## § 13:56 Forfeiture of vehicles used in the commission of AUO 1st

VTL § 511-c sets forth a very intricate and complicated set of procedures for the forfeiture of vehicles used in the commission of felony AUO. Notably, the decision to seek forfeiture under VTL § 511-c is discretionary -- not mandatory. See VTL § 511-c(2).

CHAPTER 41

# TEST REFUSALS

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## § 41:1 In general

A motorist suspected of violating VTL § 1192 will generally be requested to submit to three separate and distinct types of tests -- (1) field sobriety tests, such as the Horizontal Gaze Nystagmus test, the Walk-and-Turn test and the One-Leg Stand test, (2) a breath screening test, such as the Alco-Sensor test, and (3) a chemical test, such as the Breathalyzer, DataMaster, Intoxilyzer, Alcotest, etc., and/or a blood or urine test. This chapter deals with the consequences of refusing to submit to such testing, with the primary focus being on the consequences of a refusal to submit to a chemical test.

## § 41:2 Refusal to communicate with police -- Generally

As a general rule, the People cannot use a defendant's refusal to communicate with the police as part of their direct case, and/or to impeach the defendant's testimony at trial, regardless of whether such conduct takes place pre-arrest, post-arrest, or at the time of arrest. See, e.g., People v. Basora, 75 N.Y.2d 992, 993, 557 N.Y.S.2d 263, 264 (1990); People v. DeGeorge, 73 N.Y.2d 614, 618-20, 543 N.Y.S.2d 11, 12-14 (1989); People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981), and 49 N.Y.2d 174, 424 N.Y.S.2d 402 (1980). See also Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1624 n.37 (1966).

Nonetheless, in People v. Johnson, 253 A.D.2d 702, ___, 679 N.Y.S.2d 361, 362 (1st Dep't 1998), the Court held that "defendant's refusal to give his name or other pedigree information to the police was properly admitted as evidence of his consciousness of guilt."

## § 41:3 Refusal to submit to field sobriety tests

There is no requirement, statutory or otherwise, that a DWI suspect submit to field sobriety tests. See Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond"). However, although a DWI suspect has the right to refuse to perform field sobriety tests, the police are not required to inform the suspect of such right, as "[t]here is no statutory or other requirement for the establishment of rules regulating field sobriety tests." People v. Sheridan, 192 A.D.2d 1057, ___, 596 N.Y.S.2d 245, 245-46 (4th Dep't 1993).

In addition, the refusal to perform field sobriety tests is admissible against the defendant at trial. See People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("evidence of defendant's refusal to submit to certain field sobriety tests

[is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause"). The Berg Court noted, however, that "the inference of intoxication arising from failure to complete the tests successfully 'is far stronger than that arising from a refusal to take the test.'" Id. at 706, 685 N.Y.S.2d at 909 (citation omitted).

Similarly, in People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983), the Court held that:

> It is true that the admission into evidence of defendant's refusal to submit to the sobriety test here cannot be deemed a violation of his Federal or State privilege against self-incrimination on the basis that it was coerced. . . . There is no constitutional violation in so using defendant's refusal even if defendant was not specifically warned that it could be used against him at trial. . . .
>
> [However,] though *admissible*, the defendant's refusal to submit to co-ordination tests in this case on the ground that they would be painful because of his war wounds was nevertheless of *limited probative value* in proving circumstantially that defendant would have failed the tests.

Notably, the Powell Court made clear that "[a]s the Court of Appeals has stated in respect to another example of assertive conduct, '[t]his court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged' (People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626, 196 N.E.2d 263)." Id. at ___, 463 N.Y.S.2d at 476.

## § 41:4 Refusal to submit to breath screening test

VTL § 1194(1)(b) provides that:

> (b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of [the VTL] shall, at the request of a police officer, submit to a *breath test* to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit

> to a chemical test in the manner set forth in [VTL § 1194(2)].

(Emphasis added).

The phrase "breath test" in VTL § 1194(1)(b) refers to a preliminary test of a DWI suspect's breath for the presence of alcohol using a preliminary breath screening device such as an Alco-Sensor (commonly referred to as a "PBT"). The refusal to submit to a breath screening test in violation of VTL § 1194(1)(b) is a traffic infraction. See VTL § 1800(a); People v. Leontiev, 38 Misc. 3d 716, ___, 956 N.Y.S.2d 832, 837-38 (Nassau Co. Dist. Ct. 2012); People v. Pecora, 123 Misc. 2d 259, ___, 473 N.Y.S.2d 320, 323 (Wappinger Just. Ct. 1984); People v. Steves, 117 Misc. 2d 841, ___, 459 N.Y.S.2d 402, 403 (Webster Just. Ct. 1983); People v. Hamza, 109 Misc. 2d 1055, ___, 441 N.Y.S.2d 579, 581 (Gates Just. Ct. 1981); People v. Graser, 90 Misc. 2d 219, ___, 393 N.Y.S.2d 1009, 1014 (Amherst Just. Ct. 1977). See generally People v. Cunningham, 95 N.Y.2d 909, 910, 717 N.Y.S.2d 68, 68 (2000).

VTL § 1194(1)(b) makes clear that a motorist is under no obligation to submit to a breath screening test unless he or she has either (a) been involved in an accident, or (b) committed a VTL violation. In addition, since obtaining a breath sample from a motorist for alcohol analysis constitutes a "search" within the meaning of the 4th Amendment, see Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966), submission to such a search cannot lawfully be required in the absence of probable cause. See People v. Brockum, 88 A.D.2d 697, ___, 451 N.Y.S.2d 326, 327 (3d Dep't 1982); Pecora, 123 Misc. 2d at ___, 473 N.Y.S.2d at 322. See generally People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1976). As such, absent a proper factual predicate for a police officer to request that a motorist submit to a breath screening test, a refusal to submit thereto does not violate VTL § 1194(1)(b). See also Chapter 7, *supra*.

Although the results of an Alco-Sensor test are inadmissible at trial, see People v. Thomas, 121 A.D.2d 73, ___, 509 N.Y.S.2d 668, 671 (4th Dep't 1986), aff'd, 70 N.Y.2d 823, 523 N.Y.S.2d 437 (1987), in People v. MacDonald, 89 N.Y.2d 908, 910, 653 N.Y.S.2d 267, 268 (1996), the Court of Appeals held that "testimony regarding defendant's attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt, particularly in light of the trial court's limiting instructions to the jury on this point."

In perhaps the only published case dealing directly with the issue of the admissibility of an Alco-Sensor test refusal at trial, the Court held that an Alco-Sensor test refusal, like an

Alco-Sensor test result, is inadmissible. People v. Ottino, 178 Misc. 2d 416, 679 N.Y.S.2d 271 (Sullivan Co. Ct. 1998). In so holding, the Court reasoned that "to allow the jury to hear the evidence of an alco-sensor test refusal would in effect make admissible that evidence which is clearly inadmissible." Id. at ___, 679 N.Y.S.2d at 273. Although MacDonald, *supra*, appears at first glance to hold otherwise, MacDonald is distinguishable from Ottino in that the evidence that was permitted in MacDonald was not evidence of defendant's refusal to submit to an Alco-Sensor test, but rather "testimony regarding defendant's [conduct in] attempt[ing] to avoid giving an adequate breath sample for alco-sensor testing." 89 N.Y.2d at 910, 653 N.Y.S.2d at 268.

### § 41:5 Refusal to submit to chemical test

The remainder of this chapter deals with the consequences of, and procedures applicable to, a DWI suspect's refusal to submit to a chemical test. In New York, there are two separate and very distinct consequences of refusing to submit to a chemical test. First, the refusal generally can be used against the defendant in a VTL § 1192 prosecution as "consciousness of guilt" evidence. Second, the refusal is a civil violation -- wholly independent of the VTL § 1192 charge in criminal Court -- which results in proceedings before a DMV Administrative Law Judge ("ALJ"), and generally results in both a significant driver's license revocation and a civil penalty (*i.e.*, fine).

### § 41:6 DMV refusal sanctions civil, not criminal, in nature

A DMV refusal hearing is "civil" or "administrative" in nature, as are the consequences resulting therefrom. See, e.g., Matter of Barnes v. Tofany, 27 N.Y.2d 74, 77, 313 N.Y.S.2d 690, 693 (1970) ("We hold that the 'double punishment' feature of our Vehicle and Traffic statute -- one criminal and the other administrative -- is lawful"); Matter of Brennan v. Kmiotek, 233 A.D.2d 870, ___, 649 N.Y.S.2d 611, 612 (4th Dep't 1996); Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, ___, 459 N.Y.S.2d 494, 496-97 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983).

### § 41:7 Civil sanctions for chemical test refusal -- First offense

A chemical test refusal is considered to be a "first offense" if, within the past 5 years, the person has neither (a) had his or her driving privileges revoked for refusing to submit to a chemical test, nor (b) been convicted of violating any subdivision of VTL § 1192, or been found to have violated VTL § 1192-a, *not arising out of the same incident*. See VTL § 1194(2)(d). The civil sanctions for refusing to submit to a chemical test as a first offense are:

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 1 year. VTL § 1194(2)(d)(1)(a);

2. A civil penalty in the amount of $500. VTL § 1194(2)(d)(2); and

3. A driver responsibility assessment of $250 a year for 3 years. VTL § 1199. See also § 46:47, *infra*.

The driver responsibility assessment is also imposed for a conviction of a violation of any subdivision of VTL § 1192. VTL § 1199(1). However, if a person is both convicted of a violation of VTL § 1192 *and* found to have refused a chemical test in accordance with VTL § 1194 in connection with the same incident, only one driver responsibility assessment will be imposed. Id.

## § 41:8 Civil sanctions for chemical test refusal -- Repeat offenders

A chemical test refusal is considered to be a "repeat offense" if, within the past 5 years, the person has either (a) had his or her driving privileges revoked for refusing to submit to a chemical test, or (b) been convicted of violating any subdivision of VTL § 1192, or been found to have violated VTL § 1192-a, *not arising out of the same incident*. See VTL § 1194(2)(d). In addition, a prior "Zero Tolerance" chemical test refusal, in violation VTL § 1194-a(3), has the same effect as a prior refusal pursuant to VTL § 1194(2)(c) "solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of [VTL Article 31], provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in [VTL § 201(1)(k)]." VTL § 1194(2)(d)(1)(a).

The civil sanctions for refusing to submit to a chemical test as a repeat offender are:

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 18 months. VTL § 1194(2)(d)(1)(a);

2. A civil penalty in the amount of $750 (unless the predicate was a violation of VTL § 1192-a or VTL § 1194-a(3), in which case the civil penalty is $500). VTL § 1194(2)(d)(2); and

3. A driver responsibility assessment of $250 a year for 3 years. VTL § 1199. See also § 46:47, *infra*.

The driver responsibility assessment is also imposed for a conviction of a violation of any subdivision of VTL § 1192. VTL § 1199(1). However, if a person is both convicted of a violation of VTL § 1192 *and* found to have refused a chemical test in accordance with VTL § 1194 in connection with the same incident, only one driver responsibility assessment will be imposed. Id.

In addition, DMV will require evidence of alcohol evaluation and/or rehabilitation before it will relicense the person. See § 50:15 and Appendix 53, *infra*.

### § 41:9 Civil sanctions for chemical test refusal -- Commercial drivers

Effective November 1, 2006, the holder of a commercial driver's license who refuses to submit to a chemical test as a first offense is subject to the following civil sanctions:

1. Mandatory revocation of the person's commercial driver's license for at least 18 months -- *even if the person was operating a personal, non-commercial motor vehicle* (at least 3 years if the person was operating a commercial motor vehicle transporting hazardous materials). VTL § 1194(2)(d)(1)(c); and

2. A civil penalty in the amount of $500 ($550 if the person was operating a commercial motor vehicle). VTL § 1194(2)(d)(2).

A chemical test refusal by the holder of a commercial driver's license is considered to be a "repeat offense" if the person has *ever* either (a) had a prior finding that he or she refused to submit to a chemical test, or (b) had a prior conviction of any of the following offenses:

1. Any violation of VTL § 1192;

2. Any violation of VTL § 600(1) or (2); or

3. Any felony involving the use of a motor vehicle pursuant to VTL § 510-a(1)(a).

See VTL § 1194(2)(d)(1)(c).

The holder of a commercial driver's license who is found to have refused to submit to a chemical test as a repeat offender is subject to the following civil sanctions:

1. Permanent disqualification from operating a commercial motor vehicle. VTL § 1194(2)(d)(1)(c); and

2. A civil penalty in the amount of $750. VTL § 1194(2)(d)(2).

The DMV Commissioner has the authority to waive such "permanent revocation" from operating a commercial motor vehicle where at least 10 years have elapsed from the commencement of the revocation period, provided:

> (i) that during such [10] year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] and has not been convicted of any one of the following offenses: any violation of [VTL § 1192]; refusal to submit to a chemical test pursuant to [VTL § 1194]; any violation of [VTL § 600(1) or(2)]; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to [VTL § 510-a(1)(a)];
>
> (ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment; and
>
> (iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities as provided for in [Correction Law § 701] by the court in which such person was last penalized.

VTL § 1194(2)(d)(1)(c)(i)-(iii).

However, "[u]pon a third finding of refusal and/or conviction of any of the offenses which require a permanent commercial driver's license revocation, such permanent revocation may not be waived by the commissioner under any circumstances." VTL § 1194(2)(d)(1)(d).

### § 41:10 Chemical test refusal revocation -- Underage offenders

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year. VTL § 1194(2)(d)(1)(b).

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), and who "has a prior finding,

conviction or youthful offender adjudication resulting from a violation of [VTL § 1192] or [VTL § 1192-a], *not arising from the same incident*," will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year or until the person reaches the age of 21, *whichever is longer*. VTL § 1194(2)(d)(1)(b) (emphasis added).

For further treatment of chemical test refusals by underage offenders, see Chapter 15, *supra*.

### § 41:11 Chemical test refusal revocation runs separate and apart from VTL § 1192 suspension/revocation

The license revocation which results from a chemical test refusal is a "civil" or "administrative" penalty separate and distinct from the license suspension/revocation which results from a VTL § 1192 conviction in criminal Court. See § 41:6, *supra*. As such, the suspension/revocation periods run separate and apart from each other to the extent that they do not overlap.

In other words, to the extent that a VTL § 1192 suspension/revocation and a chemical test refusal revocation overlap, DMV runs the suspension/revocation periods *concurrently*; but to the extent that the suspension/revocation periods do *not* overlap, DMV runs the periods *consecutively*. The following example will illustrate this situation:

> A woman over the age of 21 with a New York State driver's license is (a) charged with 1st offense DWI, and (b) accused of refusing to submit to a chemical test arising out of the same incident
>
> If the woman pleads guilty to DWAI at arraignment, the 90-day license suspension arising from such conviction will start immediately, and the suspension period will not be credited toward any revocation period imposed by DMV for the chemical test refusal
>
> If the woman pleads guilty to DWI at arraignment, the 6-month license revocation arising from such conviction will start immediately, and the revocation period will not be credited toward any revocation period imposed by DMV for the chemical test refusal
>
> If the woman pleads not guilty at arraignment, the arraigning Judge will suspend her driver's license and provide her with a form entitled "Notice of Temporary Suspension and Notice of Hearing" on one side, and "Waiver of Hearing" on the other side

This suspension, which lasts the shorter of 15 days or until the DMV refusal hearing, will *not* be credited toward either (a) any revocation period imposed for the chemical test refusal, and/or (b) any suspension/ revocation period imposed for a VTL § 1192 conviction

If the woman loses her refusal hearing while the criminal case is still pending, her driver's license will be revoked for at least 1 year commencing at the conclusion of the hearing, and the revocation period will not be credited toward any suspension/revocation period imposed for a VTL § 1192 conviction

If the woman waives her right to a refusal hearing, DMV will commence the 1-year refusal revocation as of the date it receives the "Waiver of Hearing" form

Thus, if the woman in the example is not interested in contesting either the DWI charge or the alleged chemical test refusal, her defense counsel should attempt to minimize the amount of time that her driver's license will be suspended/ revoked. In this regard, the best course of action is to negotiate a plea bargain (hopefully to DWAI) which will be entered at the time of arraignment, and to execute the "Waiver of Hearing" form provided by the Court and mail it to DMV immediately.

### § 41:12 DMV refusal sanctions do not apply if chemical test result is obtained

Under the circumstances set forth in VTL § 1194(3), a DWI suspect can be subjected to a compulsory (*i.e.*, forcible) Court-Ordered chemical test despite his or her refusal to consent to such test. If a compulsory chemical test is administered to a DWI suspect, his or her refusal to voluntarily submit to the test is admissible in Court as consciousness of guilt evidence. See People v. Demetsenare, 243 A.D.2d 777, ___, 663 N.Y.S.2d 299, 302 (3d Dep't 1997). See also VTL § 1194(2)(f).

By contrast, where a compulsory chemical test is administered, a DWI suspect's refusal to voluntarily submit to the test is *not* a refusal for DMV purposes. In this regard, VTL § 1194(2)(b)(1) provides, in pertinent part:

> (b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . and having thereafter been requested to submit to such chemical test and having been informed that the person's

> license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked . . . for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested . . ., refuses to submit to such chemical test or any portion thereof, *unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made*.

(Emphasis added).

Similarly, VTL § 1194(2)(b)(2) provides that the officer's Report of Refusal must satisfy all of the following requirements:

> The report of the police officer shall set forth reasonable grounds to believe [1] such arrested person . . . had been driving in violation of any subdivision of [VTL § 1192] . . ., [2] that said person had refused to submit to such chemical test, and [3] *that no chemical test was administered pursuant to the requirements of [VTL § 1194(3)]*.

(Emphasis added). See also 15 NYCRR § 139.2(a) ("No report [of refusal] shall be made if there was a compulsory test administered pursuant to [VTL § 1194(3)]").

The rationale is that the civil sanctions for a refusal are designed to penalize those who frustrate prosecution under VTL § 1192 by refusing to submit to a chemical test; since prosecution is not frustrated where a compulsory chemical test is obtained pursuant to VTL § 1194(3), DMV refusal sanctions are unnecessary, "and no departmental chemical test refusal hearing should be held in any such case." See Appendix 39.

Although both VTL § 1194 and the regulations promulgated thereunder provide that no Report of Refusal should be made where there is a chemical test refusal combined with a compulsory chemical test, no provision is made in either the statute or the regulations for the situation where a DWI suspect refuses a chemical test but is thereafter persuaded by the police to change his or her mind and submit to a test. This is presumably due to the fact that the statute contemplates that once a DWI suspect refuses a chemical test, "unless a court order has been granted pursuant to [VTL § 1194(3)], *the test shall not be given* and a written report of such refusal shall be immediately made by the

police officer before whom such refusal was made." VTL § 1194(2)(b)(1) (emphasis added).

In practice, however, the police often persuade a DWI suspect who has refused to submit to a chemical test to change his or her mind and submit to a test. See, e.g., People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 75 (3d Dep't 1983). Under such circumstances (*i.e.*, where a chemical test is administered and a test result obtained despite an initial refusal), can the person also be subjected to DMV refusal sanctions? The answer is no.

In this regard, DMV's position is that the rationale applicable to compulsory chemical tests is equally applicable in this situation. That is, the civil sanctions of refusal are designed to penalize those who frustrate prosecution under VTL § 1192 by refusing to submit to a chemical test; since prosecution is not frustrated where a chemical test is obtained, DMV refusal sanctions are unnecessary and no departmental chemical test refusal hearing should be held in any such case. See Appendix 60.

### § 41:13 VTL § 1194 preempts field of chemical testing

In People v. Moselle, 57 N.Y.2d 97, 109, 454 N.Y.S.2d 292, 297 (1982), the Court of Appeals made clear that VTL § "1194 has pre-empted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." See also People v. Prescott, 95 N.Y.2d 655, 659 & n.3, 722 N.Y.S.2d 778, 780 & n.3 (2001); People v. Ameigh, 95 A.D.2d 367, ___, 467 N.Y.S.2d 718, 718 (3d Dep't 1983). See generally People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012) ("The standards governing the administration of chemical tests to ascertain BAC in this circumstance are set forth in Vehicle and Traffic Law § 1194").

### § 41:14 What is a "chemical test"?

In the field of New York DWI law, the phrase "breath test" refers to a preliminary test of a DWI suspect's breath for the presence of alcohol using a preliminary breath screening device such as an Alco-Sensor (commonly referred to as a "PBT"). See § 41:4, *supra*. By contrast, the phrase "chemical test" is the term used to describe a test of the alcoholic and/or drug content of a DWI suspect's blood using an instrument other than a PBT.

In other words, BAC tests conducted utilizing breath testing instruments such as the Breathalyzer, DataMaster, Intoxilyzer, Alcotest, etc. are referred to as "chemical tests," *not* "breath tests." Similarly, the phrase "refusal to submit to a chemical

test" refers to a DWI suspect's refusal to submit to such a test -- *not* to the mere refusal to submit to a breath screening test in violation of VTL § 1194(1)(b).

A chemical test is usually performed both (a) at a police station, and (b) *after* the suspect has been placed under arrest for DWI. By contrast, a breath test is usually performed both (a) at the scene of a traffic stop, and (b) *before* the suspect has been placed under arrest for DWI.

### § 41:15 Who can lawfully be requested to submit to a chemical test?

For individuals 21 years of age or older, VTL § 1194(2)(a) provides, in pertinent part:

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
> > (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation; or . . .
> >
> > (2) within two hours after a breath [screening] test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member. . . .

For individuals under the age of 21, see Chapter 15, *supra*.

As VTL § 1194(2)(a) makes clear, either a lawful VTL § 1192 arrest, or a positive result from a lawfully requested breath screening test, is a prerequisite to a valid request that a DWI

suspect submit to a chemical test. See, e.g., People v. Moselle, 57 N.Y.2d 97, 107, 454 N.Y.S.2d 292, 296 (1982); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988) ("In order for the testing strictures of Vehicle and Traffic Law § 1194 to come into play, there must have been a lawful arrest for driving while intoxicated"); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74 (3d Dep't 1983); Matter of June v. Tofany, 34 A.D.2d 732, ___, 311 N.Y.S.2d 782, 783 (4th Dep't 1970); Matter of Burns v. Hults, 20 A.D.2d 752, ___, 247 N.Y.S.2d 311, 312 (4th Dep't 1964); Matter of Leonard v. Melton, 58 A.D.2d 669, ___, 395 N.Y.S.2d 526, 527 (3d Dep't 1977) (proof that DWI suspect operated vehicle is necessary prerequisite to valid request to submit to chemical test pursuant to VTL § 1194). See also Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984) ("It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test").

### § 41:16 Who can lawfully request that a DWI suspect submit to a chemical test?

VTL § 1194(2)(a) provides, among other things, that a chemical test must be "administered by or at the direction of a police officer." This requirement "does not preclude the police officer who determines that testing is warranted from administering the test as well. . . . [C]orroboration of the results is not required." People v. Evers, 68 N.Y.2d 658, 659, 505 N.Y.S.2d 68, 69 (1986).

In Matter of Murray v. Tofany, 33 A.D.2d 1080, ___, 307 N.Y.S.2d 776, 779 (3d Dep't 1970), the Appellate Division, Third Department, held that a "special policeman" duly appointed by the Mayor of Lake George was a "police officer" authorized to request a chemical test of a DWI suspect. See also Matter of Giacone v. Jackson, 267 A.D.2d 673, ___, 699 N.Y.S.2d 587, 588 (3d Dep't 1999) (fact that State Trooper's "Certificate of Appointment and Acceptance" was not properly filed with Secretary of State does not invalidate his arrests). See generally Matter of Metzgar v. Tofany, 78 Misc. 2d 1002, 359 N.Y.S.2d 160 (Nassau Co. Sup. Ct. 1974).

### § 41:17 Should a DWI suspect refuse to submit to a chemical test?

There is no simple answer (or even necessarily a correct answer) to the question of whether a DWI suspect should submit to a chemical test in a given situation -- a question which usually

arises in the middle of the night! The answer depends upon many factors, such as whether there has been an accident involving serious physical injury or death, whether the DWI charge is a felony, whether the person is a repeat/multiple offender, whether the person needs to drive to earn a living, whether the test result is likely to be above the legal limit, whether there is a plea bargaining policy in the county with regard to test refusals and/or BAC limits (e.g., no reduction to DWAI if the defendant's BAC is above .15), etc.

The following *general* rules represent the author's current opinions on this issue:

If there has been an accident involving serious physical injury or death -- *refuse* the test

In such a situation, the civil consequences of a refusal are comparatively insignificant; and, in any event, the compulsory chemical test that the police will obtain voids the refusal for DMV purposes. See § 41:12, *supra*

If the DWI charge is a felony -- *refuse* the test

In such a situation:

(a) The civil consequences of a refusal are comparatively insignificant; and, in any event, the defendant will generally receive a sentence from the Court that will cause his or her driving privileges to be revoked for at least as long as from the refusal

(b) Most defendants in this situation accept a negotiated plea bargain prior to being indicted; thus, the DMV refusal hearing is defense counsel's best opportunity to obtain information that would justify a plea bargain outside of a standard, policy-driven offer

(c) If the case is litigated, a DWAI verdict is more likely where there is a refusal than where there is a chemical test result of .08 or more

If the DWI charge is a misdemeanor and the person needs to drive to earn a living -- take the test

In such a situation, a refusal (i) will mandate that the person obtain a VTL § 1192 conviction (in order to obtain a conditional license), and (ii) the person will have to remain on the conditional license longer than if he or she had taken the test. See § 41:71, *infra*

If there is a plea bargaining policy in the county with regard to test refusals and/or BAC limits -- take the action that will reduce the likelihood of an unfavorable plea bargain (e.g., some prosecutors tend to offer a better deal where the defendant refuses -- others tend to punish the defendant for the refusal)

If the person *credibly* claims to have only consumed enough alcohol to produce a chemical test result of less than .08 (such a conversation should not be had in a manner likely to be overheard by the police) -- take the test

> The police almost always charge VTL § 1192 suspects who refuse the chemical test with common law DWI, in violation of VTL § 1192(3), and *not* with DWAI; thus, where the person consumed alcohol, but only enough to produce a chemical test result of less than .08, the chemical test result may lead to a DWAI charge (or even to no VTL § 1192 charge at all)

In most other situations -- *refuse* the test

> In light of New York's current DWI laws (e.g., a person who refuses the test cannot be charged with Aggravated DWI (unless there is a child under 16 years of age in the vehicle); everyone convicted of DWI now faces the ignition interlock device requirement; a person whose BAC is .08% or more faces the indefinite suspension of his or her driver's license pending prosecution (with no credit for "time served" upon conviction); etc.), it is increasingly likely that the consequences of taking the test outweigh those of refusing (unless the defendant is sure to pass it)

The authors' previous position was as follows:

If the person is a 1st offender -- take the test

> In such a situation:
>
> (a) If the person needs to drive, a refusal (i) will mandate that he or she obtain a VTL § 1192 conviction (in order to obtain a conditional license), (ii) the person will have to remain on the conditional license longer than if he or she had taken the test, see § 41:71, *supra*, and (iii) the refusal adds a $500 civil penalty
>
> (b) If the person does not need to drive, obtains a VTL § 1192 plea, and takes the DDP (but does not obtain a conditional license), a refusal increases the loss of license from approximately 2 months (*i.e.*, the length

of the DDP) to at least 1 year, and adds a $500 civil penalty

(c) If the person does not need to drive, obtains a DWAI plea, and does not take the DDP, a refusal increases the loss of license from 90 days to at least 1 year, and adds a $500 civil penalty

(d) If the person does not need to drive, obtains a DWI plea, and does not take the DDP, a refusal adds a $500 civil penalty

If the person is a 2nd offender within 5 years, and the DWI charge is a misdemeanor -- take the test

In such a situation, most prosecutors require a plea to the DWI charge, and the person is not eligible for either the DDP or a conditional license; a refusal increases the loss of license from at least 6 months to at least 18 months, and adds a $750 civil penalty

If the person is a 3rd offender within 10 years, and the DWI charge is a misdemeanor -- take the test

In such a situation, the person may be eligible for the DDP (but will *not* be eligible for a conditional license); if DDP eligible, a refusal increases the minimum loss of license from the length of the DDP to at least 18 months, see Chapter 50 and Appendix 53, *infra*, and adds a civil penalty of either $500 or $750

If the person is under the age of 21 -- the same rules apply as for a person who is 21 years of age or older.

## § 41:18 There is no Constitutional right to refuse to submit to a chemical test

It is well settled that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." South Dakota v. Neville, 459 U.S. 553, 560 n.10, 103 S.Ct. 916, 921 n.10 (1983). See also id. at 565, 103 S.Ct. at 923 ("Respondent's right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the . . . legislature"); People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012); People v. Thomas, 46 N.Y.2d 100, 106, 412 N.Y.S.2d 845, 848 (1978) ("inasmuch as a defendant can constitutionally be compelled to take such a test, he has no constitutional right not to take one"); People v. Shaw, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 930 (1988); People v. Mosher, 93 Misc. 2d 179, ___, 402 N.Y.S.2d 735, 736 (Webster Just. Ct. 1978). There are, however, three exceptions to this general rule:

> Taking a driver's blood for alcohol analysis does not . . . involve an unreasonable search under the Fourth Amendment *when there is [1] probable cause, [2] exigent circumstances and [3] a reasonable examination procedure*. So long as these requirements are met . . . the test may be performed absent defendant's consent and indeed over his objection without violating his Fourth Amendment rights.

People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1981) (emphasis added) (citation omitted). See also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); Missouri v. McNeely, 133 S.Ct. 1552 (2013).

### § 41:19 There is a *statutory* right to refuse to submit to a chemical test

Although there is no *Constitutional* right to refuse to submit to a chemical test, see § 41:18, *supra*, VTL § 1194(2)(b)(1) grants a DWI suspect a qualified "statutory right to refuse the test." People v. Shaw, 72 N.Y.2d 1032, 1034, 534 N.Y.S.2d 929, 930 (1988). See also People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012); People v. Daniel, 84 A.D.2d 916, ___, 446 N.Y.S.2d 658, 659 (4th Dep't 1981) ("The 1953 statute conferred upon the motorist certain rights, the most important of which was the right to refuse to take the test. That statutory right is in excess of the motorist's constitutional rights"), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Wolter, 83 A.D.2d 187, ___, 444 N.Y.S.2d 331, 333 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978) ("The defendant's right of refusal . . . is a qualified statutory right designed to avoid the unpleasantness connected with administering a chemical test on an unwilling subject"); People v. Porter, 46 A.D.2d 307, ___, 362 N.Y.S.2d 249, 254 (3d Dep't 1974); People v. Smith, 79 Misc. 2d 172, ___, 359 N.Y.S.2d 446, 448 (Broome Co. Ct. 1974).

The right of refusal is "qualified" in two ways. First, VTL § 1194(2) penalizes the exercise of the right with a civil penalty, "license revocation and disclosure of [the] refusal in a prosecution for operating a vehicle while under the influence of alcohol or drugs." People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978). See also People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012). Second, under the circumstances set forth in VTL § 1194(3), a DWI suspect can be subjected to a compulsory (*i.e.*, forcible) Court-Ordered chemical test despite his or her refusal to consent to such test.

In addition, there is no requirement that the defendant be advised of his or her right to refuse, "and the absence of such an advisement does not negate consent otherwise freely given." People v. Marietta, 61 A.D.3d 997, ___, 879 N.Y.S.2d 476, 477 (2d Dep't 2009).

### § 41:20 Legislative policy for creating statutory right of refusal

The Legislative policy behind the creation of the statutory right of refusal was set forth by the Court of Appeals in People v. Kates, 53 N.Y.2d 591, 596, 444 N.Y.S.2d 446, 448 (1981):

> "The only reason the opportunity to revoke is given is to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test" (Report of Joint Legislative Committee on Motor Vehicle Problems, McKinney's 1953 Session Laws of N.Y., pp. 1912-1928). * * *
>
> It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse.

See also People v. Paddock, 29 N.Y.2d 504, 506, 323 N.Y.S.2d 976, 977 (1971) (Jasen, J., concurring); People v. Ameigh, 95 A.D.2d 367, ___, 467 N.Y.S.2d 718, 719 (3d Dep't 1983); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978); People v. Smith, 79 Misc. 2d 172, ___, 359 N.Y.S.2d 446, 448 (Broome Co. Ct. 1974).

### § 41:21 Refusal to submit to a chemical test is not an appropriate criminal charge

The Court of Appeals has made clear that "the Legislature in the enactment of section 1194 of the Vehicle and Traffic Law [embodied] two penalties or adverse consequences of refusal [to submit to a chemical test] -- license revocation and disclosure of [the] refusal in a prosecution for operating a vehicle while under the influence of alcohol or drugs." People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 849-50 (1978). See also VTL § 1194(2); People v. Leontiev, 38 Misc. 3d 716, ___, 956 N.Y.S.2d 832, 837 (Nassau Co. Dist. Ct. 2012). See generally People v. Ashley, 15 Misc. 3d 80, ___, 836 N.Y.S.2d 758, 761 (App. Term, 9th & 10th Jud. Dist. 2007) ("defendant was also convicted of

'refusal to submit to a breath test.' Though the accusatory instrument refers to Vehicle and Traffic Law § 1194(3), that statute neither compels a person who is arrested for driving while intoxicated to submit to a 'breath test,' nor deems the failure to do so to be a criminal offense. Therefore, the judgment convicting defendant of refusal to take a breath test must be reversed").

Nonetheless, in People v. Burdick, 266 A.D.2d 711, ___, 699 N.Y.S.2d 173, 175 (3d Dep't 1999), the Appellate Division, Third Department, appears to affirm defendant's conviction in Delaware County Court of, among other things, "refusal to submit to a chemical test (Vehicle and Traffic Law § 1194[2])." In this regard, Delaware County District Attorney Richard D. Northrup, Jr. confirms that this reference in Burdick is a typographical error -- the defendant was in actuality charged with, and convicted of, refusal to submit to a *breath test* (*i.e.*, Alco-Sensor test), in violation of VTL § 1194(1)(b), which *is* a traffic infraction. See VTL § 1800(a); People v. Pecora, 123 Misc. 2d 259, ___, 473 N.Y.S.2d 320, 323 (Wappinger Just. Ct. 1984); People v. Hamza, 109 Misc. 2d 1055, ___, 441 N.Y.S.2d 579, 581 (Gates Just. Ct. 1981).

### § 41:22 Refusal warnings -- Generally

Various subdivisions of VTL § 1194(2) mandate that a DWI suspect be given adequate "refusal warnings" before an alleged chemical test refusal can be used against him or her at trial and/or at a DMV refusal hearing. See VTL § 1194(2)(b)(1); VTL § 1194(2)(c); VTL § 1194(2)(f). To satisfy this requirement, most law enforcement agencies have adopted standardized, boilerplate refusal warnings which track the statutory language of VTL § 1194(2).

In this regard, most police officers carry wallet-size cards which contain Miranda warnings on one side, and so-called "DWI warnings" on the other. Model refusal warnings promulgated by DMV read as follows:

> 1. You are under arrest for driving while intoxicated.
>
> 2. A refusal to submit to a chemical test, or any portion thereof, will result in the immediate suspension and subsequent revocation of your license or operating privilege, whether or not you are convicted of the charge for which you were arrested.
>
> 3. If you refuse to submit to a chemical test, or any portion thereof, your refusal

> can be introduced into evidence against you at any trial, proceeding, or hearing resulting from this arrest.
>
> 4. Will you submit to a chemical test of your (breath/blood/urine) for alcohol? or (will you submit to a chemical analysis of your blood/urine for drugs)?

People v. Robles, 180 Misc. 2d 512, ___ n.1, 691 N.Y.S.2d 697, 698-99 n.1 (N.Y. City Crim. Ct. 1999). See also People v. Smith, 18 N.Y.3d 544, 546-47, 942 N.Y.S.2d 426, 427 (2012); People v. Lynch, 195 Misc. 2d 814, ___, 762 N.Y.S.2d 474, 477 (N.Y. City Crim. Ct. 2003).

The statutory refusal warnings, although arguably coercive in nature, do not constitute *impermissible* coercion. See People v. Dillin, 150 Misc. 2d 311, ___-___, 567 N.Y.S.2d 991, 993-95 (N.Y. City Crim. Ct. 1991). See also People v. Hochheimer, 119 Misc. 2d 344, ___, 463 N.Y.S.2d 704, 710 (Monroe Co. Sup. Ct. 1983).

### § 41:23 Refusal warnings need not precede request to submit to chemical test

Most police officers, prosecutors, Courts and even defense attorneys are under the incorrect impression that VTL § 1194(2) requires that refusal warnings be read to a DWI suspect before he or she can lawfully be requested to submit to a chemical test. See, e.g., People v. Whelan, 165 A.D.2d 313, ___ n.1, 567 N.Y.S.2d 817, 819 n.1 (2d Dep't 1991) ("Vehicle and Traffic Law § 1194(2)(b) mandates that prior to requesting an arrested defendant to consent to a chemical test, he must be advised that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test whether or not he is found guilty of the charge for which he is arrested").

However, "[o]nly if the driver declines the initial offer to submit to a chemical test, [the driver] having consented to a chemical test by virtue of the operation of a vehicle within the State, VTL § 1194(2)(a), need he or she be informed of the effect of that refusal." People v. Rosado, 158 Misc. 2d 50, ___ n.1, 600 N.Y.S.2d 624, 625 n.1 (N.Y. City Crim. Ct. 1993). In other words, it is only once a DWI suspect initially refuses to submit to a properly requested chemical test that refusal warnings must be read to him or her in "clear and unequivocal" language, thereby giving the suspect the choice of whether to "persist" in the refusal. See also People v. Smith, 18 N.Y.3d 544, 549, 942 N.Y.S.2d 426, 429 (2012) ("To implement the statute, law enforcement authorities have developed a standardized verbal

warning of the consequences of refusal to take the test that is given to a motorist suspected of driving under the influence . . . . The duty to give the warning is triggered if the motorist is asked to take a chemical test and declines to do so. If, after being advised of the effect of such a refusal, the motorist nonetheless withholds consent, the motorist may be subjected to the statutory consequences").

As the Court of Appeals explained in People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978), "[u]nder the procedure prescribed by section 1194 of the Vehicle and Traffic Law *a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal* the test is not to be given (§ 1194, subd. 2); the choice is the driver's." (Emphasis added). See also Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, ___, 459 N.Y.S.2d 494, 497 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983). See generally South Dakota v. Neville, 459 U.S. 553, 565 n.16, 103 S. Ct. 916, 923 n.16 (1983) ("Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test").

In this regard, the Rosado Court stated:

> Although the drivers in both Thomas and Geary were given warnings twice, the statute contains no requirement that warnings precede the initial request to submit to the test. As all drivers consent to submit to the test, VTL § 1194(2)(a), no warnings need precede the first request. It is my belief, having viewed numerous videotaped "refusals," that the practice of reading a legalistic set of warnings to an allegedly intoxicated driver, before the driver is first requested to submit to the test, results in many more refusals to submit than would occur if the driver were first just simply asked. It is my further belief that many police officers mistakenly assume that the refusal warnings are analogous to Miranda warnings and must be fully delivered before a chemical test may be administered; I have viewed a number of videotapes in which the officer continued to read the warnings even though the driver agreed to submit to the test.

158 Misc. 2d at ___ n.3, 600 N.Y.S.2d at 626 n.3. See also People v. Coludro, 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y. City

Crim. Ct. 1995). Cf. People v. Pagan, 165 Misc. 2d 255, ___, 629 N.Y.S.2d 656, 659-60 (N.Y. City Crim. Ct. 1995) (disapproving of procedure set forth in Thomas and approved in Rosado).

Thus, where a police officer reads the refusal warnings to a DWI suspect prior to requesting that the suspect submit to a chemical test (and the suspect initially refuses), the officer has created a situation in which he or she may be required to read the warnings a second time (in order to allow the suspect to "persist" in the refusal). See, e.g., Rosado, *supra*.

### § 41:24 Refusal warnings must be given in "clear and unequivocal" language

VTL § 1194(2)(f) mandates that refusal warnings be administered to a DWI suspect in "clear and unequivocal" language. See also VTL § 1194(2)(b)(1); VTL § 1194(2)(c); People v. Smith, 18 N.Y.3d 544, 549, 550, 942 N.Y.S.2d 426, 429, 430 (2012). In this regard, "[t]he determination of the standard for clear and unequivocal language is viewed in the eyes of the person who is being told the warnings, not the person administering them. . . . Therefore, the question of whether the warnings were clear and unequivocal [is] decided on the defendant's understanding them, not on the objective standard of whether the police officer read the warnings verbatim from the statute." People v. Lynch, 195 Misc. 2d 814, ___, 762 N.Y.S.2d 474, 477-78 (N.Y. City Crim. Ct. 2003).

People v. Smith, 18 N.Y.3d 544, 942 N.Y.S.2d 426 (2012), is the seminal case on this issue. In Smith, the police read the standardized chemical test refusal warnings to the defendant three times. The defendant's response to the first set of warnings was "that he understood the warnings but wanted to speak to his lawyer before deciding whether to take a chemical test." Id. at 547, 942 N.Y.S.2d at 427. The defendant's response to the second set of warnings was that he wanted to call his lawyer (which he attempted to do but was unsuccessful). Id. at 547, 942 N.Y.S.2d at 428. The defendant's response to the third set of warnings was "that he was waiting for his attorney to call him back." Id. at 547, 942 N.Y.S.2d at 428. "At this juncture, the troopers interpreted defendant's response as a refusal to submit to the test." Id. at 547, 942 N.Y.S.2d at 428.

The Court of Appeals held that there was no refusal, as (a) the defendant never actually refused to submit to a chemical test, and (b) the police never advised him that his third statement (*i.e.*, that he was waiting for his attorney to call him back) would be construed as a refusal. Critically, the Court found that even though the refusal warnings had been read from the standardized warning card three separate times, "[s]ince a reasonable motorist in defendant's position would not have

understood that, unlike the prior encounters, the further request to speak to an attorney would be interpreted by the troopers as a binding refusal to submit to a chemical test, defendant was not adequately warned that his conduct would constitute a refusal. The evidence of that refusal therefore was received in error at trial." Id. at 551, 942 N.Y.S.2d at 431.

In this regard, the Smith Court noted that:

> All that is required for a refusal to be admissible at trial is a record basis to show that, through words or actions, defendant declined to take a chemical test despite having been clearly warned of the consequences of refusal. In this case, such evidence would have been present if, during the third request, troopers had merely alerted defendant that his time for deliberation had expired and if he did not consent to the chemical test at that juncture his response would be deemed a refusal.

Id. at 551-52, 942 N.Y.S.2d at 431.

An issue can (and often does) arise where an individual who is read the refusal warnings does not understand what is meant by the term "chemical test" -- especially if the individual has already submitted to one or more breath screening tests. In People v. Cousar, 226 A.D.2d 740, ___, 641 N.Y.S.2d 695, 695 (2d Dep't 1996), the Appellate Division, Second Department, found that the refusal warnings given to the defendant were sufficiently clear and unequivocal where, when the defendant stated that he did not understand the warning as recited from the police officer's DWI warning card, "the arresting officer explained the warnings to him 'in layman's terms.'" See also Matter of Cruikshank v. Melton, 82 A.D.2d 932, 440 N.Y.S.2d 759 (3d Dep't 1981); Matter of Jason v. Melton, 60 A.D.2d 707, 400 N.Y.S.2d 878 (3d Dep't 1977); Matter of Warren v. Melton, 59 A.D.2d 963, 399 N.Y.S.2d 295 (3d Dep't 1977); Kowanes v. State Dep't of Motor Vehicles, 54 A.D.2d 611, 387 N.Y.S.2d 331 (4th Dep't 1976).

On the other hand, where an officer who attempts to explain the refusal warnings in layman's terms does so incorrectly, such warnings do not satisfy the "clear and unequivocal" language requirement. See Matter of Gargano v. New York State Dep't of Motor Vehicles, 118 A.D.2d 859, 500 N.Y.S.2d 346 (2d Dep't 1986). See generally People v. Morris, 8 Misc. 3d 360, 793 N.Y.S.2d 754 (N.Y. City Crim. Ct. 2005); Matter of Pucino v. Tofany, 60 Misc. 2d 778, 304 N.Y.S.2d 81 (Dutchess Co. Sup. Ct. 1969).

Various Courts have found that refusal warnings administered

to non-English speaking defendants did not satisfy the "clear and unequivocal" language requirement. See, e.g., People v. Garcia-Cepero, 22 Misc. 3d 490, ___, 874 N.Y.S.2d 689, 692-94 (Bronx Co. Sup. Ct. 2008); People v. Robles, 180 Misc. 2d 512, 691 N.Y.S.2d 697 (N.Y. City Crim. Ct. 1999); People v. Camagos, 160 Misc. 2d 880, 611 N.Y.S.2d 426 (N.Y. City Crim. Ct. 1993); People v. Niedzwiecki, 127 Misc. 2d 919, 487 N.Y.S.2d 694 (N.Y. City Crim. Ct. 1985). But see People v. Burnet, 24 Misc. 3d 292, ___, 882 N.Y.S.2d 835, 841-42 (Bronx Co. Sup. Ct. 2009); People v. An, 193 Misc. 2d 301, 748 N.Y.S.2d 854 (N.Y. City Crim. Ct. 2002).

Refusal warnings read from an outdated warning card (which had not been amended to reflect changes in the law) do not satisfy the "clear and unequivocal" language requirement. People v. Philbert, 110 Misc. 2d 1042, 443 N.Y.S.2d 354 (N.Y. City Crim. Ct. 1981).

## § 41:25 Incomplete refusal warnings invalidates chemical test refusal

VTL § 1194(2)(f) provides that:

> (f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [VTL § 1192] *but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal* and that the person persisted in the refusal.

(Emphasis added).

Where a person has been lawfully arrested for a suspected violation of VTL § 1192, VTL § 1194(2)(b)(1) provides, in pertinent part:

> (b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . *and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the*

> *charge for which such person is arrested* . . ., refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

(Emphasis added).

In the context of a DMV refusal hearing, VTL § 1194(2)(c) provides that:

> The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of [VTL § 1192]; (2) did the police officer make a lawful arrest of such person; (3) *was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made*; and (4) did such person refuse to submit to such chemical test or any portion thereof.

(Emphasis added).

Where the police administer incomplete refusal warnings to a DWI suspect, his or her subsequent refusal to submit to a chemical test is both inadmissible at trial, and invalid for DMV purposes. See, e.g., People v. Boone, 71 A.D.2d 859, ___, 419 N.Y.S.2d 187, 188 (2d Dep't 1979); Matter of Harrington v. Tofany, 59 Misc. 2d 197, ___, 298 N.Y.S.2d 283, 285-86 (Washington Co. Sup. Ct. 1969).

### § 41:26 Informing defendant that chemical test refusal will result in incarceration pending arraignment, whereas submission to test will result in release on appearance ticket, does not constitute impermissible coercion

Many police departments have a policy pursuant to which, in addition to advising the defendant of the statutory refusal warnings, the defendant is also informed that refusal to submit to a chemical test will result in either (a) incarceration

pending arraignment, and/or (b) immediate arraignment at which bail will be set, whereas submission to the test will result in his or her immediate release on an appearance ticket (such as a UTT or DAT). Although such a policy is clearly "coercive" in nature, it apparently does not constitute *impermissible* coercion.

In this regard, in People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988), "[d]efendant contend[ed] that the police violated Vehicle and Traffic Law § 1194(2) by administering a breathalyzer test despite defendant's initial refusal to submit to the test, and by informing him of certain consequences -- not specifically prescribed by the statute -- of such refusal." In rejecting defendant's claims, the Court of Appeals held:

> Contrary to defendant's assertion, the statute is not violated by an arresting officer informing a person as to the consequences of his choice to take or not take a breathalyzer test. Thus, it cannot be said, in the circumstances of this case, that by informing defendant that his refusal to submit to the test would result in his arraignment before a Magistrate and the posting of bail, the officer violated the provisions of the Vehicle and Traffic Law.

71 N.Y.2d at 927, 528 N.Y.S.2d at 807-08.

Similarly, in People v. Bracken, 129 Misc. 2d 1048, ___, 494 N.Y.S.2d 1021, 1023 (N.Y. City Crim. Ct. 1985), the Court held that:

> "A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." The issuance of a DAT is such an incentive. * * *
>
> When the police informed the defendant of the consequences of his failure to submit to a breathalyzer test they were simply providing him a factual recitation of what would happen. . . .
>
> The VTL requires that persons who refuse the test have their licenses "immediately" suspended and sets forth a magistrate as one of those persons who have the right to effectuate the suspension[.] VTL § 1194(2). The policy to withhold the issuance of the DAT and bring "refusers" to the magistrate is

> reasonable and not shown to be part of any systemic plan or desire to coerce persons arrested to take the breathalyzer test.
>
> In fact, it would have been unreasonable and unfair not to tell the defendant of the policy to be followed upon his refusal to take the test. Giving the defendant knowledge of his choices concerning his liberty undoubtedly put pressure upon him to take the test. This was not a pressure, however, which rose to the level of impermissible coercion by any constitutional standard.

(Citation omitted). See also People v. Harrington, 111 Misc. 2d 648, 444 N.Y.S.2d 848 (Monroe Co. Ct. 1981) (same). Cf. People v. Stone, 128 Misc. 2d 1009, ___-___, 491 N.Y.S.2d 921, 923-25 (N.Y. City Crim. Ct. 1985) (reaching opposite conclusion).

**§ 41:27 What constitutes a chemical test refusal?**

"A refusal to submit [to a chemical test] may be evidenced by words or conduct." People v. Massong, 105 A.D.2d 1154, ___, 482 N.Y.S.2d 601, 602 (4th Dep't 1984). See also People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012) ("whether a defendant refused in a particular situation may be difficult to ascertain in cases where the accused did not communicate that intent in so many words. To be sure, a defendant need not expressly decline a police officer's request in order to effectuate a refusal that is admissible at trial. A defendant can signal an unwillingness to cooperate that is tantamount to a refusal in any number of ways, including through conduct. For example, where a motorist fails to follow the directions of a police officer prior to or during the test, thereby interfering with the timing of the procedure or its efficacy, this can constitute a constructive refusal"); People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, ___ (3d Dep't 2001); Matter of Stegman v. Jackson, 233 A.D.2d 597, ___, 649 N.Y.S.2d 529, 530 (3d Dep't 1996); Matter of McGuirk v. Fisher, 55 A.D.2d 706, ___, 389 N.Y.S.2d 47, 48 (3d Dep't 1976).

"[A] defendant's mere silence cannot be deemed a refusal if the defendant was not *told* any refusal would be introduced into evidence against him." People v. Niedzwiecki, 127 Misc. 2d 919, ___, 487 N.Y.S.2d 694, 696 (N.Y. City Crim. Ct. 1985). See also People v. Pagan, 165 Misc. 2d 255, ___, 629 N.Y.S.2d 656, 659 (N.Y. City Crim. Ct. 1995) (no refusal where defendant not read full set of refusal warnings until *after* arresting officer deemed her to have refused).

In Matter of Sullivan v. Melton, 71 A.D.2d 797, 419 N.Y.S.2d 343 (4th Dep't 1979), petitioner consented to a chemical test, but placed chewing gum in his mouth at a time and in a manner that the arresting officer took to be a refusal (in light of the requirement in 10 NYCRR § 59.5 that nothing be placed in a DWI suspect's mouth for at least 15 minutes prior to the collection of a breath sample). In reversing the finding of a refusal, the Appellate Division, Fourth Department, found:

> Petitioner consented to submit to the test and was not advised that placing gum in his mouth would constitute a refusal. . . . No evidence supports a finding that the test here could not have been given pursuant to this regulation, or that petitioner knowingly thwarted the test. . . . No prejudice resulted from petitioner's placing gum in his mouth. This is not the case where an initial consent to submit to the test is vitiated by conduct evidencing a refusal or where the test failed for reasons attributable to petitioner. . . . His actions under the circumstances were not the equivalent of a refusal.

Id. at ___, 419 N.Y.S.2d at 344-45 (citations omitted).

By contrast, in Matter of White v. Melton, 60 A.D.2d 1000, ___, 401 N.Y.S.2d 664, 665 (4th Dep't 1978), the same Court upheld a refusal where:

> [T]he officer warned the petitioner not once but twice of the consequences of refusal and his directive to petitioner that he should not place anything in his mouth was prompted by a rule on a direction sheet from the State Breathalyzer Operator which provides that nothing should be placed in the mouth for twenty minutes prior to taking a test. On the basis of the facts in this record, the referee was justified in finding that petitioner expressed no willingness to take the test and his conduct was the equivalent of a refusal.

See also Matter of Dykeman v. Foschio, 90 A.D.2d 892, ___, 456 N.Y.S.2d 514, 515 (3d Dep't 1982) (refusal upheld where petitioner failed to stop smoking even after being warned that such conduct would be treated as a refusal).

Similarly, in Matter of Brueck v. Melton, 58 A.D.2d 1000, ___, 397 N.Y.S.2d 271, 272 (4th Dep't 1977), the Court upheld a

refusal where:

> At the administrative hearing the arresting officer testified that although petitioner initially consented to take a breathalyzer test, she failed to blow any air into the machine as instructed to and only drooled. When advised to sit down and rest before attempting the test again, petitioner responded, "Leave me alone, I'm not going to take any test." Furthermore, petitioner never indicated to the administrator of the test that she was unable to complete it or that there was any physical reason preventing her from blowing air into the breathalyzer device.

A DWI suspect's refusal/failure to provide an adequate breath (or urine) sample for chemical testing can constitute a refusal. See, e.g., Matter of Craig v. Swarts, 68 A.D.3d 1407, ___ 891 N.Y.S.2d 204, 205 (3d Dep't 2009) ("Although petitioner verbally consented to taking the chemical test, numerous attempts on two separate machines failed to yield a testable sample and petitioner was deemed to have refused the test by his conduct"); Matter of Johnson v. Adduci, 198 A.D.2d 352, ___, 603 N.Y.S.2d 332, 333 (2d Dep't 1993) (refusal upheld where "petitioner refused to blow into the tube of [a properly functioning] testing machine, thereby preventing his breath from being tested"); People v. Bratcher, 165 A.D.2d 906, ___, 560 N.Y.S.2d 516, 517 (3d Dep't 1990) ("Defendant's refusal to breathe into the Intoxilyzer after being advised that his first attempt was inadequate to show a reading, together with proof that the machine was in good working order, was sufficient to constitute a refusal"); Matter of Beaver v. Appeals Bd. of Admin. Adjudication Bureau, 117 A.D.2d 956, ___, 499 N.Y.S.2d 248, 251 (3d Dep't) (dissenting opinion), rev'd for the reasons stated in the dissenting opinion below, 68 N.Y.2d 935, 510 N.Y.S.2d 79 (1986); People v. Adler, 145 A.D.2d 943, ___, 536 N.Y.S.2d 315, 316 (4th Dep't 1988) ("On three separate occasions in the conduct of the test, defendant ostensibly blew into the instrument used to record his blood alcohol content but, in the opinion of the administering officer, did so in such way that the instrument failed to record that a sample was received"); Matter of Van Sickle v. Melton, 64 A.D.2d 846, ___, 407 N.Y.S.2d 334, 335 (4th Dep't 1978) (petitioner "blew into the mouthpiece of the [properly functioning] apparatus on five occasions without activating the machine"); Matter of Kennedy v. Melton, 62 A.D.2d 1152, 404 N.Y.S.2d 174 (4th Dep't 1978); Matter of DiGirolamo v. Melton, 60 A.D.2d 960, ___, 401 N.Y.S.2d 893, 894 (3d Dep't 1978) ("The consent by the petitioner may be regarded as no consent at all if, as it appears from this record, the test failed for reasons attributable to him"); People v. Kearney, 196 Misc. 2d

335, ___ n.2, 764 N.Y.S.2d 542, 543 n.2 (Sullivan Co. Ct. 2003).

In this regard, "[t]o establish a refusal, the People must show that the failure to register a sample is the result of defendant's action and not of the machine's inability to register the sample." People v. Adler, 145 A.D.2d 943, ___, 536 N.Y.S.2d 315, 316 (4th Dep't 1988). See also People v. Bratcher, 165 A.D.2d 906, ___, 560 N.Y.S.2d 516, 517 (3d Dep't 1990); Matter of Van Sickle v. Melton, 64 A.D.2d 846, 407 N.Y.S.2d 334 (4th Dep't 1978). See generally Matter of Cushman v. Tofany, 36 A.D.2d 1000, ___, 321 N.Y.S.2d 831, 833 (3d Dep't 1971).

> By its terms VTL § 1194(2)(f) applies to a persistent "*refusal*" to take the breathalyzer test; it does not apply to a mere "failure" to take or complete the test. The distinction is important. By using the term "refusal" the Legislature made it plain that the statute is directed only at an intentional or willful refusal to take the breathalyzer test. The statute is *not* directed at a mere unintentional failure by the defendant to comply with the requirements of the breathalyzer test.
>
> The requirement that defendant's refusal be intentional grows out of the evidentiary theory underlying the statute. Evidence of a refusal is admissible on the theory that it evinces a defendant's consciousness of guilt. Obviously, an unintentional failure to complete the test does not evidence consciousness of guilt. * * *
>
> The crucial consideration in this regard is whether defendant's conduct was deliberate. Where a defendant does not consciously intend to evade the breathalyzer test, his mere failure to take or complete the test cannot properly be regarded either as a true "refusal" within the meaning of § 1194(2)(f) or as evidence of consciousness of guilt.

People v. Davis, 8 Misc. 3d 158, ___, ___, 797 N.Y.S.2d 258, 262-63, 263-64 (Bronx Co. Sup. Ct. 2005) (citations omitted).

Where a DWI suspect persistently refuses to submit to a properly requested chemical test, but subsequently changes his or her mind and consents to the test, the subsequent consent does *not* void the prior refusal. See, e.g., Matter of Viger v. Passidomo, 65 N.Y.2d 705, 707, 492 N.Y.S.2d 2, 3 (1985) ("Petitioner's willingness to undergo the chemical test to

determine the alcohol content of his blood approximately 1 hour and 40 minutes after his arrest does not preclude a determination that he had refused to take such test within the meaning of Vehicle and Traffic Law § 1194(3)(a)"); Matter of Nicol v. Grant, 117 A.D.2d 940, ___, 499 N.Y.S.2d 247, 248 (3d Dep't 1986); Matter of O'Brien v. Melton, 61 A.D.2d 1091, 403 N.Y.S.2d 353 (3d Dep't 1978); Matter of Reed v. New York State Dep't of Motor Vehicles, 59 A.D.2d 974, 399 N.Y.S.2d 332 (3d Dep't 1977); Matter of O'Dea v. Tofany, 41 A.D.2d 888, 342 N.Y.S.2d 679 (4th Dep't 1973). See generally Matter of Wilkinson v. Adduci, 176 A.D.2d 1233, ___, 576 N.Y.S.2d 728, 729 (4th Dep't 1991). In People v. Ferrara, 158 Misc. 2d 671, ___, 602 N.Y.S.2d 86, 89 (N.Y. City Crim. Ct. 1993), the Court stated:

> The defendant's subsequent willingness to have a blood test performed does not affect the admissibility of the defendant's prior refusal. The fact that the test could have been performed when the defendant agreed does not undermine the admissibility of the refusal. The defendant's later recantation of an earlier refusal doesn't "suffice to undo that refusal." * * *
>
> Thus, the defendant's initial refusal, after having been clearly and unequivocally advised as to the consequences of that refusal, stands as evidence of a consciousness of guilt despite a subsequent change of mind. The defendant may, if he or she chooses, explain to the trier of fact his reasons for refusing to take the test when offered and may, of course, testify to his later willingness to take the blood test in order to soften or obviate the impact of the evidence of the refusal. Plainly, this testimony might convince the trier of fact not to infer a consciousness of guilt from the defendant's refusal to take the test. However, these same facts do not render evidence of the refusal inadmissible at trial.

(Citations omitted).

Where a DWI suspect persistently refuses to submit to a properly requested chemical test, but subsequently changes his or her mind and consents, the police can refuse to administer the test to the suspect. See People v. Adler, 145 A.D.2d 943, ___, 536 N.Y.S.2d 315, 316 (4th Dep't 1988); Matter of Nicol v. Grant, 117 A.D.2d 940, 499 N.Y.S.2d 247 (3d Dep't 1986); Matter of White v. Fisher, 49 A.D.2d 450, 375 N.Y.S.2d 663 (3d Dep't 1975).

An attempt by a DWI suspect to select the type of chemical test to be administered (e.g., "I consent to a chemical test of my blood, but not of my breath"), to select the location of the test (e.g., "I consent to a test at the hospital, but not at the police station"), to select the person who will draw the blood (e.g., "I consent to a blood test, but only if the blood is drawn by *my* doctor"), and/or to otherwise place conditions on his or her consent to submit to a chemical test, generally constitutes a refusal. See, e.g., People v. Williams, 68 A.D.3d 414, ___, 891 N.Y.S.2d 17, 18 (1st Dep't 2009); Matter of Ehman v. Passidomo, 118 A.D.2d 707, ___, 500 N.Y.S.2d 44, 45 (2d Dep't 1986) ("Vehicle and Traffic Law § 1194 authorizes the police officer to decide the type of test to be administered; it does not provide an option to the petitioner"); Matter of Gilman v. Passidomo, 109 A.D.2d 1082, 487 N.Y.S.2d 186 (4th Dep't 1985) (same); People v. Aia, 105 A.D.2d 592, ___, 482 N.Y.S.2d 56, 57 (3d Dep't 1984) ("The choice of test was the officer's, not defendant's, and there is no showing that the officer was in any way unreasonable in his choice of which test to use"); Matter of Litts v. Melton, 57 A.D.2d 1027, 395 N.Y.S.2d 264 (3d Dep't 1977); Matter of Cushman v. Tofany, 36 A.D.2d 1000, ___, 321 N.Y.S.2d 831, 833 (3d Dep't 1971); Matter of Shields v. Hults, 26 A.D.2d 971, 274 N.Y.S.2d 760 (3d Dep't 1966); Matter of Breslin v. Hults, 20 A.D.2d 790, 248 N.Y.S.2d 70 (2d Dep't 1964). See generally Matter of Martin v. Tofany, 46 A.D.2d 967, ___, 362 N.Y.S.2d 57, 58 (3d Dep't 1974) (Petitioner's "explanation that he believed a blood test was required by law, and not chemical test by use of a breathalyzer, as requested by the trooper, lacks merit"); Matter of Blattner v. Tofany, 34 A.D.2d 1066, ___, 312 N.Y.S.2d 173, 174 (3d Dep't 1970) (Petitioner's "arbitrary insistence that the sample be taken from his hip rather than his arm [together with other conduct] constituted a refusal").

Where a DWI suspect desires to consult with, but is unable to reach, his attorney, "the police officer's statement to him that his insistence on waiting for his attorney constituted a refusal was not misleading or inaccurate." People v. O'Rama, 78 N.Y.2d 270, 280, 574 N.Y.S.2d 159, 164 (1991). See also People v. Smith, 18 N.Y.3d 544, 551-52, 942 N.Y.S.2d 426, 431 (2012).

In Matter of Smith v. Commissioner of Motor Vehicles, 103 A.D.2d 865, ___, 478 N.Y.S.2d 103, 104 (3d Dep't 1984), a refusal was found where, after being arrested for DWI and read proper refusal warnings, "petitioner refused to accompany the officer, but instead surrendered the keys to his truck to him and left the scene on foot, announcing that he could be found at a local bar."

### § 41:28 Chemical test refusal must be "persistent"

VTL § 1194(2)(f) provides that:

> (f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [VTL § 1192] *but only upon a showing* that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and *that the person persisted in the refusal*.

(Emphases added).

The "persistence" requirement, while applicable to Court proceedings based upon a violation of VTL § 1192, is inapplicable to a DMV chemical test refusal hearing -- where "the only evidence of refusal necessary [i]s that the petitioner refused at least once to submit to a chemical test." Matter of Hahne v. New York State Dep't of Motor Vehicles, 63 A.D.3d 936, 882 N.Y.S.2d 434 (2d Dep't 2009). See also VTL § 1194(2)(c) (one of the issues to be determined at a DMV chemical test refusal hearing is "did such person refuse to submit to such chemical test or any portion thereof").

**§ 41:29 What constitutes a "persistent" refusal?**

In order for a refusal to be considered "persistent," the motorist must be "offered at least two opportunities to submit to the chemical test, 'at least one of which must take place after being advised of the sanctions for refusal.'" People v. Pagan, 165 Misc. 2d 255, ___, 629 N.Y.S.2d 656, 660 (N.Y. City Crim. Ct. 1995) (citation omitted). See also People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978) ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal the test is not to be given (§ 1194, subd. 2); the choice is the driver's"); People v. Rosado, 158 Misc. 2d 50, ___ & n.1, ___ & n.3, 600 N.Y.S.2d 624, 625 & n.1, 626 & n.3 (N.Y. City Crim. Ct. 1993); People v. Camagos, 160 Misc. 2d 880, ___, 611 N.Y.S.2d 426, 429 (N.Y. City Crim. Ct. 1993) ("The dictionary defines persistence as to continue steadfastly or often annoyingly, especially in spite of opposition"); People v. Garcia-Cepero, 22 Misc. 3d 490, ___, 874 N.Y.S.2d 689, 694 (Bronx Co. Sup. Ct. 2008). See generally People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 297-98 (Suffolk Co. Dist. Ct. 2007); People v. Davis, 8 Misc. 3d 158, ___, 797 N.Y.S.2d 258, 262-63 (Bronx Co. Sup. Ct. 2005); People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 559 (Nassau Co. Dist. Ct. 1988).

In People v. D'Angelo, 244 A.D.2d 788, ___, 665 N.Y.S.2d 713, 713 (3d Dep't 1997), the Appellate Division, Third Department, held that "defendant's words and conduct clearly evince a persistent refusal to submit to a breathalyzer test" where:

> [F]ollowing his arrest, defendant was taken to the City of Glens Falls Police Station, arriving at around 5:00 A.M. on June 1, 1995, where he was immediately provided with the requisite warning. Defendant initially agreed to take the test but, upon learning that he was going to be charged with a felony, changed his mind stating to the officer "What's the point?" The police then reread the warning to him, eliciting an unintelligible mumble from defendant who lay down on a bench and went to sleep. At 5:37 A.M. and 5:47 A.M., the arresting officer unsuccessfully attempted to rouse defendant to ask him to take the test.

See also People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, 258 (3d Dep't 2001); People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 297-98 (Suffolk Co. Dist. Ct. 2007).

**§ 41:30 Chemical test refusal need not be "knowing"**

At least two Departments of the Appellate Division have held that, for DMV purposes, a chemical test refusal does not have to be "knowing" in order to be valid. See, e.g., Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988); Matter of Carey v. Melton, 64 A.D.2d 983, 408 N.Y.S.2d 817 (2d Dep't 1978). The rationale for such a ruling was set forth in Carey:

> We note that there is evidence that the petitioner may not have fully comprehended the consequences of his refusal because he was so intoxicated by the consumption of alcohol and/or the inhalation of toxic fumes. Nevertheless, we do not construe the statutory warning contained in [VTL § 1194(2)] as requiring a "knowing" refusal by the petitioner. This interpretation would lead to the absurd result that the greater the degree of intoxication of an automobile driver, the less the degree of his accountability.

64 A.D.2d at ___, 408 N.Y.S.2d at 818.

By contrast, in Matter of Jentzen v. Tofany, 33 A.D.2d 532, ___, 314 N.Y.S.2d 297, 297 (4th Dep't 1969), the Appellate Division, Fourth Department, annulled a DMV refusal revocation where "petitioner did not make an understanding refusal to take the test."

### § 41:31 Refusal on religious grounds does not invalidate chemical test refusal

In People v. Thomas, 46 N.Y.2d 100, 109 n.2, 412 N.Y.S.2d 845, 850 n.2 (1978), the Court of Appeals made clear that:

> Proof . . . that might be explanatory of a particular defendant's refusal to take the test unrelated to any apprehension as to its results (*as, for instance, religious scruples* or individual syncopephobia) should be treated not as tending to establish any form of compulsion but rather as going to the probative worth of the evidence of refusal. Thus, a jury might in such circumstances reject the inference of consciousness of guilt which would otherwise have been available.

(Emphasis added) (citations omitted). See also People v. Sukram, 142 Misc. 2d 957, 539 N.Y.S.2d 275 (Nassau Co. Dist. Ct. 1989).

### § 41:32 Suppression of chemical test refusal

A refusal to submit to a chemical test is potentially suppressible on several grounds. For example, a chemical test refusal, like a chemical test result, can be suppressed:

(a) As the fruit of an illegal stop. See, e.g., Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010);

(b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);

(c) If it is obtained in violation of the right to counsel. See, e.g., People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or

(d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

In this regard, the Courts of this State have long recognized the need for a pre-trial suppression hearing on the issue of the admissibility of a defendant's alleged refusal to submit to a chemical test. See, e.g., People v. Boone, 71 A.D.2d 859, ___, 419 N.Y.S.2d 187, 187 (2d Dep't 1979) ("the denial, without a hearing, of defendant's motion to suppress his alleged refusal to submit to a chemical test" constituted reversible error); People v. Smith, 18 N.Y.3d 544, 547, 942 N.Y.S.2d 426, 428 (2012) (issue of admissibility of alleged chemical test refusal was addressed at pre-trial hearing); id. at 551, 942 N.Y.S.2d at 430 ("whether defendant's words or actions amounted to a refusal often constitutes a mixed question of law and fact that requires the court to view defendant's actions in light of all the surrounding circumstances and draw permissible inferences from equivocal words or conduct"); People v. Williams, 99 A.D.3d 955, ___, 952 N.Y.S.2d 281, 282 (2d Dep't 2012) ("The defendant correctly contends that the hearing court erred in denying his motion to suppress evidence of his refusal to take a breathalyzer test, as the officer administering the test did not advise the defendant that his refusal could be used against him at a trial, proceeding, or hearing resulting from the arrest"); People v. Guzman, 247 A.D.2d 552, ___, 668 N.Y.S.2d 918, 918 (2d Dep't 1998) (same); People v. Popko, 33 Misc. 3d 277, ___, 930 N.Y.S.2d 782, 784 (N.Y. City Crim. Ct. 2011) (Court held "combined Ingle and refusal hearing"); People v. Brito, 26 Misc. 3d 1097, 892 N.Y.S.2d 752 (Bronx Co. Sup. Ct. 2010); People v. Rodriquez, 26 Misc. 3d 238, 891 N.Y.S.2d 246 (Bronx Co. Sup. Ct. 2009); People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 294 (Suffolk Co. Dist. Ct. 2007) (Court held "a Dunaway/Huntley/Mapp and refusal hearing"); People v. Davis, 8 Misc. 3d 158, ___, 797 N.Y.S.2d 258, 259 (Bronx Co. Sup. Ct. 2005) ("pre-trial 'refusal hearings' have become common in New York criminal practice"); People v. Lynch, 195 Misc. 2d 814, ___, 762 N.Y.S.2d 474, 476 (N.Y. City Crim. Ct. 2003) ("the determination of the admissibility of a refusal to submit to a chemical test is best addressed at a hearing held prior to commencement of trial"); People v. An, 193 Misc. 2d 301, ___, 748 N.Y.S.2d 854, 855 (N.Y. City Crim. Ct. 2002) (Court held Dunaway-"Refusal" hearing); People v. Burtula, 192 Misc. 2d 597, ___, 747 N.Y.S.2d 692, 693 (Nassau Co. Dist. Ct. 2002) ("Whether this request is labeled one for 'suppression' or for a pre-trial determination into the admissibility of evidence, there exists a sufficient body of case law establishing that a defendant is entitled to such a hearing"); People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 493 (Monroe Co. Sup. Ct. 2001) (Court held "combined probable cause/Huntley and chemical test refusal hearing"); People v. Robles, 180 Misc. 2d 512, ___, 691 N.Y.S.2d 697, 699

(N.Y. City Crim. Ct. 1999) ("It has become common practice for defendants to request and for the courts to conduct pre-trial hearings on the issue of the admissibility of a defendant's refusal to consent to a chemical test"); People v. Coludro, 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y. City Crim. Ct. 1995); People v. Pagan, 165 Misc. 2d 255, 629 N.Y.S.2d 656 (N.Y. City Crim. Ct. 1995); People v. Camagos, 160 Misc. 2d 880, 611 N.Y.S.2d 426 (N.Y. City Crim. Ct. 1993); People v. McGorman, 159 Misc. 2d 736, ___, 606 N.Y.S.2d 566, 568 (N.Y. Co. Sup. Ct. 1993); People v. Ferrara, 158 Misc. 2d 671, 602 N.Y.S.2d 86 (N.Y. City Crim. Ct. 1993); People v. Rosado, 158 Misc. 2d 50, 600 N.Y.S.2d 624 (N.Y. City Crim. Ct. 1993); People v. Martin, 143 Misc. 2d 341, ___, 540 N.Y.S.2d 412, 416 (Newark Just. Ct. 1989) ("This Court thus holds that a defendant is entitled to a separate pre-trial hearing to determine whether his refusal to take a breathalizer [sic] test should be submitted to the jury"); People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 351 (Nassau Co. Dist. Ct. 1988) ("Where there is a denial by a defendant of a refusal to give his consent to take the test, this Court favors a pre-trial hearing"); People v. Cruz, 134 Misc. 2d 115, 509 N.Y.S.2d 1002 (N.Y. City Crim. Ct. 1986); People v. Delia, 105 Misc. 2d 483, 432 N.Y.S.2d 321 (Onondaga Co. Ct. 1980); People v. Hougland, 79 Misc. 2d 868, 361 N.Y.S.2d 827 (Suffolk Co. Dist. Ct. 1974). See generally People v. Reynolds, 133 A.D.2d 499, ___, 519 N.Y.S.2d 425, 427 (3d Dep't 1987) ("County Court, following a suppression hearing, did not err in denying defendant's motion to suppress evidence of his refusal to submit to a blood alcohol test after the accident"); People v. Scaccia, 4 A.D.3d 808, 771 N.Y.S.2d 772 (4th Dep't 2004) (same); People v. Cousar, 226 A.D.2d 740, 641 N.Y.S.2d 695 (2d Dep't 1996) (same); People v. Boudreau, 115 A.D.2d 652, 496 N.Y.S.2d 489 (2d Dep't 1985) (same). Cf. People v. Carota, 93 A.D.3d 1072, ___, 941 N.Y.S.2d 302, 307 (3d Dep't 2012); People v. Kinney, 66 A.D.3d 1238, 888 N.Y.S.2d 260 (3d Dep't 2009) (hearing held after both parties had rested but before case was submitted to jury).

The rationale for such a hearing was concisely set forth by the Court in Cruz, *supra*:

> A hearing held during trial, or a ruling made during the course of the trial, has little practical value to a defendant. Absent pre-trial suppression, the prosecutor is entitled to discuss the refusal to submit to the breathalyzer test with the jury in his opening statement. Once the jury is made aware of this evidence, the damage is done regardless of whether the prosecution is permitted to introduce that evidence at trial. A ruling made during trial excluding that evidence may thus be futile. Nor would curative instructions warning the jury not to

> consider the evidence eliminate the tremendous prejudicial effect. Therefore the ruling must be made pre-trial. That same conclusion was reached in People v. Delia, 105 Misc. 2d 483, 484, 432 N.Y.S.2d 321 (Co. Ct, Onondaga Cty, 1980) and People v. Houghland [sic], *supra*, the only reported cases which have dealt with the issue of pre-trial determination of the admissibility of this type of evidence.

134 Misc. 2d at ___, 509 N.Y.S.2d at 1004. See also Burtula, 192 Misc. 2d at ___, 747 N.Y.S.2d at 693-94.

At such a hearing, "the People should assume the burden of demonstrating by a fair preponderance of the evidence . . . that the defendant refused to consent to the test as mandated by V.T.L. 1194(1), (4) [currently VTL § 1194(2)(a), (f)]." People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 351 (Nassau Co. Dist. Ct. 1988). See also People v. Rodriguez, 26 Misc. 3d 238, ___, 891 N.Y.S.2d 246, 248 (Bronx Co. Sup. Ct. 2009); People v. Burnet, 24 Misc. 3d 292, ___, 882 N.Y.S.2d 835, 841 (Bronx Co. Sup. Ct. 2009); Davis, 8 Misc. 3d at ___, 797 N.Y.S.2d at 260 ("at a refusal hearing (in addition to addressing any special issues that may arise) the People in essence must meet a two part burden. First, they must show by a preponderance of the evidence that clear and proper refusal warnings were delivered to the defendant. Second, they must also show by a preponderance of the evidence that a true and persistent refusal then followed"); id. at ___, 797 N.Y.S.2d at 267 (same); Lynch, 195 Misc. 2d at ___, 762 N.Y.S.2d at 478-79; Burtula, 192 Misc. 2d at ___, 747 N.Y.S.2d at 694; Robles, 180 Misc. 2d at ___, 691 N.Y.S.2d at 699; Camagos, 160 Misc. 2d at ___, 611 N.Y.S.2d at 428. See generally People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 495-96 (Monroe Co. Sup. Ct. 2001).

### § 41:33 Invalid stop voids chemical test refusal

In Matter of Byer v. Jackson, 241 A.D.2d 943, ___, 661 N.Y.S.2d 336, 337 (4th Dep't 1997), petitioner's car was stopped by the police "after he turned right out of a parking lot without using his turn signal," which led to petitioner being arrested for, among other things, DWI. Petitioner thereafter refused to submit to a chemical test.

A DMV refusal hearing was held, following which petitioner's driver's license was revoked. On appeal, respondent conceded "that petitioner did not violate Vehicle and Traffic Law § 1163(a), the underlying predicate for the stop, because the statute does not require a motorist to signal a turn from a private driveway," but nonetheless contended "that the officer's

good faith belief that there was a violation of the Vehicle and Traffic Law, coupled with the surrounding circumstances, provided reasonable suspicion of criminality to justify the stop." Id. at ___, 661 N.Y.S.2d at 337-38.

The Appellate Division, Fourth Department, disagreed, holding that "[w]here the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal." Id. at ___, 661 N.Y.S.2d at 338. See also McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, ___, 908 N.Y.S.2d 507, 508 (4th Dep't 2010) (same).

### § 41:34 Probable cause to believe motorist violated VTL § 1192 must exist at time of arrest

One of the issues to be determined at a DMV refusal hearing is whether the police officer had reasonable grounds (*i.e.*, probable cause) to believe that the motorist had been driving in violation of VTL § 1192. See VTL § 1194(2)(c). In determining whether probable cause existed for the motorist's arrest, observations made, or evidence obtained, *subsequent to* the arrest cannot be considered. See, e.g., People v. Loria, 10 N.Y.2d 368, 373, 223 N.Y.S.2d 462, 467 (1961); People v. Oquendo, 221 A.D.2d 223, ___, 633 N.Y.S.2d 492, 493 (1st Dep't 1995); People v. Feingold, 106 A.D.2d 583, ___, 482 N.Y.S.2d 857, 859 (2d Dep't 1984); People v. Bruno, 45 A.D.2d 1025, ___, 358 N.Y.S.2d 183, 184 (2d Dep't 1974); People v. Garafolo, 44 A.D.2d 86, ___, 353 N.Y.S.2d 500, 502 (2d Dep't 1974); Matter of Obrist v. Commissioner of Motor Vehicles, 131 Misc. 2d 499, 500 N.Y.S.2d 909 (Onondaga Co. Sup. Ct. 1985).

In Obrist, *supra*, the police, who were waiting at petitioner's home to arrest him pursuant to a warrant, arrested petitioner upon his arrival. The police thereafter (a) suspected that petitioner was intoxicated, (b) requested that petitioner submit to a chemical test, and (c) upon petitioner's refusal to submit to such a test, *re-arrested* him for DWI. Petitioner ultimately brought an Article 78 proceeding challenging the revocation of his driver's license following a DMV refusal hearing.

In granting the petition, Supreme Court held that "[t]he pre-requisite that the arrest must be based upon probable cause of driving while intoxicated has not been met in this case," in that "[a]t the time of the arrest under the warrant, there was no evidence that [petitioner] was intoxicated. He did not stagger. His words were not slurred at the time he was taken into custody. At best, there was an odor of beer on his breath, and his face was slightly flushed." 131 Misc. 2d at ___, 500 N.Y.S.2d at 910. More specifically, the Court held that:

> The general rule is that there must be probable cause at the time of the arrest. That is, the arresting officer must have "reasonable grounds" for believing that the suspect is or has been under the influence of liquor while operating his vehicle. There was no evidence offered which could establish "reasonable grounds" sufficient to sustain an arrest. The arrest was on other grounds unrelated to a violation under this statute. It is not proper execution of the statutory requirements to make the arrest when the signs of intoxication are not present and then, at some later time decide to request the chemical test.
>
> This is not a case of placing form over substance but rather an insistance [sic] that the statutory requirements of this quasi criminal statute be strictly met.

Id. at ___, 500 N.Y.S.2d at 911 (citations omitted).

**§ 41:35 Procedure upon arrest -- Report of Refusal**

Where a person has been lawfully arrested for a suspected violation of VTL § 1192, VTL § 1194(2)(b)(1) provides, in pertinent part:

> (b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested . . ., refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

See also 15 NYCRR § 139.2(a). Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.2(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.2(c).

In Matter of Smith v. Commissioner of Motor Vehicles, 103 A.D.2d 865, ___, 478 N.Y.S.2d 103, 104 (3d Dep't 1984), the Appellate Division, Third Department, rejected a claim that the validity of the Report of Refusal was somehow affected by the fact that it was filled out by the chief of police rather than the arresting officer.

### § 41:36 Report of Refusal -- Verification

A Report of Refusal "may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to [PL § 210.45] and such form notice together with the subscription of the deponent shall constitute a verification of the report." VTL § 1194(2)(b)(1). See also 15 NYCRR § 139.2(a).

### § 41:37 Report of Refusal -- Contents

The officer's Report of Refusal must "set forth reasonable grounds to believe [1] such arrested person . . . had been driving in violation of any subdivision of [VTL § 1192] . . ., [2] that said person had refused to submit to such chemical test, and [3] that no chemical test was administered pursuant to the requirements of [VTL § 1194(3)]." VTL § 1194(2)(b)(2).

### § 41:38 Report of Refusal -- To whom is it submitted?

For individuals 21 years of age or older, the officer's Report of Refusal "shall be presented to the court upon arraignment of an arrested person." VTL § 1194(2)(b)(2). See also 15 NYCRR § 139.2(d) ("Upon the arraignment of the defendant, the police officer shall present to the court copies of the report of refusal to submit to chemical test").

For individuals under the age of 21, see Chapter 15, *supra*.

### § 41:39 Procedure upon arraignment -- Temporary suspension of license

At arraignment in a refusal case, the Court is required to temporarily suspend the defendant's driving privileges pending the outcome of a DMV refusal hearing. See VTL § 1194(2)(b)(3) ("For persons placed under arrest for a violation of any subdivision of [VTL § 1192], the license or permit to drive and any non-resident operating privilege shall, upon the basis of

such written report, be temporarily suspended by the court without notice pending the determination of a hearing as provided in [VTL § 1194(2)(c)]"). See also 15 NYCRR § 139.3(a).

Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.3(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.3(c). This procedure does not violate the Due Process Clause. See Matter of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (Monroe Co. Sup. Ct. 1981). See generally Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979).

However, "[i]f the department fails to provide for such hearing [15] days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section." VTL § 1194(2)(c). In addition, "[i]f the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated." 15 NYCRR § 127.9(c).

In other words, the temporary license suspension imposed at arraignment in a refusal case lasts *the shorter of* 15 days or until the DMV refusal hearing.

### § 41:40 Procedure upon arraignment -- Court must provide defendant with waiver form and notice of DMV refusal hearing date

VTL § 1194(2)(b)(4) provides that "[t]he court . . . shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner." 15 NYCRR § 139.3(d) provides more specificity in this regard:

> Upon arraignment . . ., the court shall complete a temporary suspension and notice of hearing form (adding the location and the next available hearing date and time, as provided by the commissioner), and give the appropriate copies to the defendant and the police officer.

See generally 15 NYCRR § 127.1(a) (general requirements of hearing notice); 15 NYCRR § 139.2(d) ("The police officer shall bring his or her own copy of such report to the refusal hearing at the location and on the date and time specified in the temporary suspension and notice of hearing form provided by the court").

The "temporary suspension and notice of hearing form" referenced in 15 NYCRR § 139.3(d) is a 2-sided document. The front side is entitled "Notice of Temporary Suspension and Notice of Hearing." The back side is entitled "Waiver of Hearing."

In terms of hearing date availability, 15 NYCRR § 139.4(a) provides that "[t]he commissioner shall provide to all magistrates, in advance, a schedule of hearing dates and locations and forms necessary to carry out the provisions of this Part."

### § 41:41 Effect of failure of Court to schedule DMV refusal hearing

The arraigning Court will occasionally fail to schedule a DMV refusal hearing, in violation of VTL § 1194(2)(b)(4) and 15 NYCRR § 139.3(d). In this regard, 15 NYCRR § 127.9(a) provides that a chemical test refusal hearing "may be scheduled by the department if the court fails to do so."

### § 41:42 Effect of delay by Court in forwarding Report of Refusal to DMV

In Matter of Mullen v. New York State Dep't of Motor Vehicles, 144 A.D.2d 886, 535 N.Y.S.2d 206 (3d Dep't 1988), Town Court failed to temporarily suspend petitioner's driver's license at arraignment and/or forward the Report of Refusal to DMV within 48 hours, as is required by VTL § 1194(2). Approximately 10 months later, following a Huntley/probable cause hearing, the Court finally filed the Report of Refusal. Petitioner sought a writ of prohibition, claiming that, as a result of Town Court's delay in forwarding the Report of Refusal to DMV, "respondents never obtained jurisdiction to review her refusal." Id. at ___, 535 N.Y.S.2d at 207. The Appellate Division, Third Department, disagreed. In so holding, the Court reasoned that:

> It is well established that mere delay in scheduling a refusal hearing will not oust respondents of jurisdiction. . . . [W]e cannot accept petitioner's premise that the 48-hour transfer provision constitutes a jurisdictional prerequisite. In our view, the time schedules specified in Vehicle and Traffic Law § 1194(2) are directory only. By providing for an immediate license suspension procedure in the event of a test refusal, the Legislature was clearly acting "to protect the public, not the impaired driver."

Id. at ___, 535 N.Y.S.2d at 207 (citation omitted).

## § 41:43 Effect of delay by DMV in scheduling refusal hearing

In Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, 459 N.Y.S.2d 494 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983), the refusal paperwork was properly forwarded to DMV by the arraigning Court. Nonetheless, DMV did not schedule a refusal hearing until approximately 7½ months later. Following the refusal hearing, petitioner's driver's license was revoked. Petitioner filed an Article 78 proceeding, claiming "that he was denied his right to a hearing and determination within a reasonable time under the State Administrative Procedure Act." Id. at ___, 459 N.Y.S.2d at 496. The Appellate Division, Fourth Department, disagreed. In so holding, the Court reasoned that:

> The statute [VTL § 1194] was designed to enable the authorities to deal promptly and effectively with the scourge of drunken drivers by immediate revocation of their licenses either upon chemical proof of intoxication or upon refusal to submit to the blood test. Time schedules specified in similar legislation for performance of certain acts on the part of an administrative agency have been held to be directory only. . . .
>
> No physical characteristic or condition could be more closely related to incompetence to operate a motor vehicle than inebriation, and no aspect of motor vehicle regulation can be more important to the welfare of both operators and the public than keeping inebriated drivers off the public highways. . . . [Recent amendments to VTL § 1194] should more effectively accomplish the intent to protect the public, not the impaired driver.

Id. at ___-___, 459 N.Y.S.2d at 496-97 (citations omitted). See also Matter of Maxwell v. Commissioner of Motor Vehicles, 100 A.D.2d 746, 473 N.Y.S.2d 940 (4th Dep't 1984), rev'g 109 Misc. 2d 62, 437 N.Y.S.2d 554 (Erie Co. Sup. Ct. 1981); Matter of Tzetzo v. Commissioner of Motor Vehicles, 97 A.D.2d 978, 468 N.Y.S.2d 787 (4th Dep't 1983); Matter of Brown v. Tofany, 33 A.D.2d 984, 307 N.Y.S.2d 268 (4th Dep't 1970).

In affirming the Appellate Division, the Court of Appeals noted that, although a lengthy delay by DMV in scheduling a refusal hearing is not *jurisdictional* in nature, in an appropriate case such a delay could result in a finding of an

"erroneous exercise of authority" by the Commissioner. Matter of Geary v. Commissioner of Motor Vehicles, 59 N.Y.2d 950, 952, 466 N.Y.S.2d 304, 304 (1983). See also Matter of Correale v. Passidomo, 120 A.D.2d 525, ___, 501 N.Y.S.2d 724, 725 (2d Dep't 1986) ("In order to successfully argue that a delay in scheduling a refusal hearing pursuant to Vehicle and Traffic Law § 1194 constituted a violation of the State Administrative Procedure Act § 301, the petitioner must show that he was substantially prejudiced by such delay"). See generally Matter of Reed v. New York State Dep't of Motor Vehicles, 59 A.D.2d 974, ___, 399 N.Y.S.2d 332, 333 (3d Dep't 1977) (DMV refusal revocation is "a civil, not criminal, sanction, and, therefore, constitutional speedy trial rights are not in issue"); Matter of Minnick v. Melton, 53 A.D.2d 1016, 386 N.Y.S.2d 488 (4th Dep't 1976) (same).

In any event, DMV regulations enacted subsequent to Geary expressly provide that a chemical test refusal hearing must be commenced within "[6] months from the date the department receives notice of [the] refusal," 15 NYCRR § 127.2(b)(2), absent (a) "reasonable grounds for postponing the commencement of [the] hearing," and (b) "provided the respondent is given prior notice thereof and an explanation of the grounds for such postponement." 15 NYCRR § 127.2(c). In such a case, "[t]he reasonableness of such postponement shall be reviewable by the Administrative Appeals Board established pursuant to [VTL] article 3-A." 15 NYCRR § 127.2(c).

In Matter of Hildreth v. New York State Dep't of Motor Vehicles Appeals Bd., 83 A.D.3d 838, ___, 921 N.Y.S.2d 137, 139-40 (2d Dep't 2011), the Appellate Division, Second Department, rejected petitioner's claim that his re-scheduled refusal hearing "should have been dismissed for failure to hold a hearing within a reasonable time as required under the State Administrative Procedure Act § 301 or within six months from the date the DMV received notice of his chemical test refusal as required under 15 NYCRR 127.2(b)(2)." In so holding, the Court reasoned that:

> Time limitations imposed on administrative agencies by their own regulations are not mandatory. Absent a showing of substantial prejudice, a petitioner is not entitled to relief for an agency's noncompliance. Accordingly, a petitioner must demonstrate substantial prejudice in order to challenge a delayed chemical test refusal hearing under section 301(1) of the State Administrative Procedure Act. As the petitioner retained his driving privileges while awaiting the hearing, he was not prejudiced by the delay.

Id. at ___, 921 N.Y.S.2d at 140 (citations omitted).

### § 41:44 Report of Refusal must be forwarded to DMV within 48 hours of arraignment

VTL § 1194(2)(b)(3) provides that "[c]opies of such report must be transmitted by the court to the commissioner. . . . Such report shall be forwarded to the commissioner within [48] hours of such arraignment." See also 15 NYCRR § 139.3(d) ("Within 48 hours of the arraignment, the court must forward copies of both the refusal report and the temporary suspension and notice of hearing form to the commissioner").

### § 41:45 Forwarding requirement cannot be waived -- even with consent of all parties

VTL § 1194(2)(b)(3) expressly provides that copies of the Report of Refusal "*must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties*." (Emphasis added). See also 15 NYCRR § 139.3(d) ("Timely submission of the refusal report to the Commissioner of Motor Vehicles may not be waived even with consent of all parties"). This section prohibits the parties from negotiating a plea bargain pursuant to which the Report of Refusal is not forwarded to DMV -- which would allow the defendant to avoid the civil consequences of his or her refusal to submit to a chemical test.

### § 41:46 DMV regulations pertaining to chemical test refusals

VTL § 1194(2)(e) mandates that DMV enact regulations pertaining to chemical test refusals:

> (e) Regulations. The commissioner shall promulgate such rules and regulations as may be necessary to effectuate the provisions of [VTL § 1194(1) and (2)].

Pertinent DMV regulations are set forth at 15 NYCRR Parts 127, 134, 135, 136, 139 and 155.

### § 41:47 DMV refusal hearings -- Generally

VTL § 1194(2)(c) provides for a Due Process hearing prior to the imposition of civil sanctions for refusal to submit to a chemical test:

> (c) Hearings. Any person whose license or permit to drive or any non-resident driving privilege has been suspended pursuant to [VTL § 1194(2)(b)] is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner.

## § 41:48 DMV refusal hearings -- Waiver of right to hearing

VTL § 1194(2)(c) provides that "[a]ny person may waive the right to a [DMV refusal] hearing under this section." See also 15 NYCRR § 139.4(c) (waiver must be in writing). In this regard, VTL § 1194(2)(b)(4) provides that "[i]f a hearing, as provided for in [VTL § 1194(2)(c)] . . . is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, *as of the date of receipt of such waiver* in accordance with the provisions of [VTL § 1194(2)(d)]." (Emphasis added). See also 15 NYCRR § 139.4(c) ("Any such waiver shall constitute an admission that a chemical test refusal occurred as contemplated by [VTL §] 1194 . . ., and such waiver shall result in administrative sanctions provided by law for the chemical test refusal").

As is noted in § 41:40, *supra*, at arraignment in a refusal case the Court is required to provide the defendant with, among other things, a "waiver" form. See VTL § 1194(2)(b)(4). The waiver form is located on the reverse side of the form providing the defendant with notice of the date and time of the DMV refusal hearing. However, some Courts make (and utilize) photocopies of the "Notice of Temporary Suspension and Notice of Hearing" form -- which tend to be blank on the back side. In such a case, if the defendant wishes to waive his or her right to a refusal hearing, defense counsel should specifically request a "Waiver of Hearing" form from the Court.

The waiver form allows the defendant to "plead guilty" to, and accept the civil consequences of, refusing to submit to a chemical test. This raises the obvious question -- under what circumstances would it be in a defendant's best interest to execute the waiver form?

Since the license revocation which results from a chemical test refusal is a "civil" or "administrative" penalty separate and distinct from the license suspension/revocation which results from a VTL § 1192 conviction in criminal Court, the suspension/revocation periods run separate and apart from each other (to the extent that they do not overlap). In other words, to the extent that a VTL § 1192 suspension/revocation and a chemical test refusal revocation overlap, DMV runs the suspension/revocation periods *concurrently*; but to the extent that the suspension/revocation periods do *not* overlap, DMV runs the periods *consecutively*. See § 41:11, *supra*.

Thus, if the defendant is not interested in contesting either the DWI charge or the alleged chemical test refusal, defense counsel should attempt to minimize the amount of time that the defendant's driving privileges will be suspended/revoked. In this regard, the best course of action is to

negotiate a plea bargain which will be entered at the time of arraignment (or as soon thereafter as possible), and to execute the Waiver of Hearing form and mail it to DMV immediately.

### § 41:49 DMV refusal hearings -- Failure of motorist to appear at hearing

The failure of the motorist to appear at a scheduled DMV refusal hearing "shall constitute a waiver of such hearing, provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable." VTL § 1194(2)(c). See also 15 NYCRR § 127.8; 15 NYCRR § 127.9(b); 15 NYCRR § 139.4(c) (request for new hearing must be in writing).

"However, any action taken at the original hearing, or in effect at that time, may be continued pending such rescheduled hearing." 15 NYCRR § 127.8. In addition, "[a] respondent who has waived a hearing by failing to appear may be suspended pending attendance at an adjourned hearing or a final determination." Id. In such a case, the period of license suspension pending the adjourned hearing will *not* be credited toward any license revocation resulting from the hearing.

Even though the respondent's failure to appear at a chemical test refusal hearing constitutes a waiver of the hearing, the DMV hearing officer "may receive the testimony of available witnesses and enter evidence into the record." 15 NYCRR § 127.8. 15 NYCRR § 127.9(b) is more specific in this regard:

> (b) If no adjournment has been granted, and the respondent fails to appear for a scheduled hearing, the hearing officer may take the testimony of the arresting officer and any other witnesses present and consider all relevant evidence in the record. If such testimony and evidence is sufficient to find that respondent refused to submit to a chemical test, the hearing officer shall revoke the respondent's driver's license, permit or privilege of operating a vehicle. If, following such a determination, respondent petitions for a rehearing, pursuant to [15 NYCRR § 127.8] and [VTL § 1194(2)(c)], *it shall be the responsibility of the respondent to insure the presence* [*i.e.*, subpoena] *of any witness he or she wishes to question or cross-examine*.

(Emphasis added).

## § 41:50 DMV refusal hearings -- Failure of arresting officer to appear at hearing

Not infrequently, the respondent will appear for the DMV refusal hearing at the date and time set forth in the notice of hearing form, but the arresting officer will fail to appear. Such a situation is governed by 15 NYCRR § 127.9(c) and case law. 15 NYCRR § 127.9(c) provides that:

> (c) If the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated. *At any subsequent hearing, the hearing officer may make findings of fact and conclusions of law based upon the chemical test refusal report and any other relevant evidence in the record, notwithstanding the police officer's nonappearance*.

(Emphasis added).

In other words, even if the arresting officer fails to appear for the DMV refusal hearing not just once, but twice, the respondent can still lose the hearing based solely upon the contents of the officer's written Report of Refusal (assuming that the Report is filled out properly and sets forth a *prima facie* case). This procedure was condoned in Matter of Gray v. Adduci, 73 N.Y.2d 741, 742-43, 536 N.Y.S.2d 40, 41 (1988) (over the persuasive dissent of Judge Kaye):

> Hearsay evidence can be the basis of an administrative determination. Here, the arresting officer's written report of petitioner's refusal is sufficiently relevant and probative to support the findings of the Administrative Law Judge that petitioner refused to submit to the chemical test after being warned of the consequences of such refusal. . . .
>
> Petitioner's additional claim that the Commissioner's determination was made without cross-examination in violation of the State Administrative Procedure Act § 306(3), and of petitioner's right to due process is without merit. Petitioner had the right to call the officer as a witness (see, State Administrative Procedure Act § 304[2]). Even though the Administrative Law Judge had

> adjourned the hearing on prior occasions due to the absence of the police officer, this inconvenience cannot be determinative as a matter of law. Petitioner always had it within his power to subpoena the officer at any time. Even after the Administrative Law Judge decided to introduce the written report on his own motion and proceed with the hearing, petitioner's sole objection voiced was on hearsay grounds. He never claimed on the record before the Administrative Law Judge who was in the best position to afford him a remedy, that he had been misled, prejudiced or biased by the Judge's actions. Indeed, petitioner could have sought an adjournment to subpoena the officer. That he chose not to, was a tactical decision, which is not dispositive of the outcome.

(Citations omitted).

Gray makes clear that before a respondent can lose a DMV refusal hearing based solely upon a non-appearing police officer's Report of Refusal, he or she has both (a) the right to subpoena and cross-examine the arresting officer, and (b) the right to an adjournment for the purpose of subpoenaing the officer. If the respondent requests an adjournment to subpoena the officer (in compliance with Gray), and the officer fails to appear in response to such subpoena, Due Process requires that the refusal charge be dismissed. See In the Matter of the Administrative Appeal of Thomas A. Deyhle, Case No. D95-33398, Docket No. 18657 (DMV Appeals Board decision dated August 1, 1997). Our thanks to Glenn Gucciardo, Esq., of Northport, New York, for alerting us to this important decision.

The respondent also has the option of testifying, as well as the right to call "defense" witnesses and to present relevant evidence. In such a case, the officer's Report of Refusal "may be overcome by contrary, substantial evidence of the motorist or others." See Memorandum from DMV Administrative Office Director Sidney W. Berke to All Safety Administrative Law Judges, dated June 5, 1986, set forth at Appendix 44. See also Appendix 42.

Notably, although the contents of the officer's written Report of Refusal can provide sufficient evidence to sustain a refusal revocation where the officer *fails to appear* for a DMV refusal hearing, where the officer does appear for the hearing and testifies, but fails to demonstrate that complete refusal warnings were administered, the submission into evidence of the Report of Refusal (which contains the complete refusal warnings pre-printed thereon) cannot "cure" this defect. See Matter of Maxfield v. Tofany, 34 A.D.2d 869, ___, 310 N.Y.S.2d 783, 785 (3d

Dep't 1970); Matter of Maines v. Tofany, 61 Misc. 2d 546, ___, 306 N.Y.S.2d 50, 52 (Broome Co. Sup. Ct. 1969). Cf. Matter of McGowan v. Foschio, 82 A.D.2d 1015, ___, 442 N.Y.S.2d 154, 156 (3d Dep't 1981) (Report of Refusal was properly used to refresh officer's recollection as to content of refusal warnings; *not* as affirmative proof of the contents therein); Matter of Babcock v. Melton, 57 A.D.2d 554, ___, 393 N.Y.S.2d 76, 77 (2d Dep't 1977) ("Alcohol/Drug Influence Report" form was properly admitted into evidence "since it was admitted only to indicate the exact words of the [refusal] warning").

### § 41:51 DMV refusal hearings -- Failure of either party to appear at hearing

Where neither the arresting officer nor the respondent appear for a scheduled DMV refusal hearing, the respondent will lose the "hearing" based upon either (a) a waiver theory, see § 41:49, *supra*, and/or (b) the contents of the officer's written Report of Refusal (assuming that the Report is filled out properly and sets forth a *prima facie* case). See Matter of Whelan v. Adduci, 133 A.D.2d 273, 519 N.Y.S.2d 62 (2d Dep't 1987). See generally Matter of Gray v. Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988).

### § 41:52 DMV refusal hearings -- Should defense counsel bring a stenographer?

In the past, the authors recommended that defense counsel should bring a stenographer to a DMV chemical test refusal hearing. The reason was primarily based upon the fact that although DMV refusal hearings are tape recorded by the DMV hearing officer, the quality of the recording equipment was generally poor and thus the recordings were often unreliable. This has changed.

Accordingly, it is no longer critical to bring one's own stenographer to a refusal hearing, with one important exception: where time is of the essence in obtaining the hearing transcript. In this regard, it generally takes a long time -- sometimes too long -- to obtain a refusal hearing transcript via the official transcription service utilized by DMV.

Where counsel chooses to hire a private stenographer at a DMV refusal hearing, it should be kept in mind that the stenographer's minutes are *not* the official record of the hearing. Rather, the DMV tape recording is the official record. While the ALJ will not object to the stenographer's presence, he or she will object if the stenographer unduly impedes the proceedings (e.g., by frequently interrupting, asking witnesses to speak up or slow down, etc.). As such, in order to avoid an unpleasant confrontation with the ALJ, counsel should "prep" the

stenographer ahead of time as to his or her role in the proceedings.

### § 41:53 DMV refusal hearings -- 15-day rule

At arraignment in a refusal case, the Court is required to temporarily suspend the defendant's driving privileges pending the outcome of a DMV refusal hearing. See VTL § 1194(2)(b)(3) ("For persons placed under arrest for a violation of any subdivision of [VTL § 1192], the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court without notice pending the determination of a hearing as provided in [VTL § 1194(2)(c)]"). See also 15 NYCRR § 139.3(a).

Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.3(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.3(c). This procedure does not violate the Due Process Clause. See Matter of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (Monroe Co. Sup. Ct. 1981). See generally Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979).

However, "[i]f the department fails to provide for such hearing [15] days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section." VTL § 1194(2)(c). In addition, "[i]f the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated." 15 NYCRR § 127.9(c).

In other words, the temporary license suspension imposed at arraignment in a refusal case lasts *the shorter of* 15 days or until the DMV refusal hearing.

### § 41:54 DMV refusal hearings -- Time and place of hearing

15 NYCRR § 139.4(b) provides that "[t]he refusal hearing shall commence at the place provided in the notice of hearing form and as close as practicable to the designated time. If the hearing cannot be commenced due to the absence of a hearing officer or the unavailability of the planned hearing site, it will be rescheduled by the department, with notice to the police officer and person accused of the refusal." See also 15 NYCRR § 127.2(a).

## § 41:55 DMV refusal hearings -- Right to counsel

"A respondent may be represented by counsel or, in the discretion of the hearing officer, by any other person of his or her choosing." 15 NYCRR § 127.4(a). "Any person representing the respondent must conform to the standards of conduct required of attorneys appearing before courts of this State." Id. "Failure to conform to such standards shall be grounds for prohibiting the continued appearance of such person on behalf of the respondent." Id.

## § 41:56 DMV refusal hearings -- Adjournment requests

"Adjournment requests for hearings held pursuant to [VTL § 1194] shall be considered in accordance with [15 NYCRR §§ 127.7 and 127.9]. All other requests for adjournments shall be addressed to the hearing officer, who may order a temporary suspension of the license, permit, [or] nonresident operating privilege . . . pursuant to law and [15 NYCRR] Part 127." 15 NYCRR § 139.4(b). In this regard, 15 NYCRR § 127.7 provides, in pertinent part:

> (a) Adjournments of hearings may only be granted by the hearing officer responsible for the particular hearing, or by the Safety Hearing Bureau or the Division of Vehicle Safety, as appropriate.
>
> (b) It is the department's general policy to grant a request for adjournment for good cause if such request is received at least [7] days prior to the scheduled date of hearing and if no prior requests for adjournment have been made. Notwithstanding this policy, requests for adjournments made more than [7] days prior to hearing may be denied by the hearing officer, or supervisor of the hearing officer or by the Safety Hearing Bureau or Division of Vehicle Safety, in their discretion. Grounds for such a denial include, but are not limited to, such a request being a second or subsequent request for adjournment, or where there is reason to believe such request is merely an attempt to delay the holding of a hearing, or where an adjournment will significantly affect the availability of other witnesses scheduled to testify.
>
> (c) Any motorist or designated representative requesting an adjournment should obtain the

name and title of the person granting such request. This information will be required in the event of any dispute as to whether an adjournment was in fact granted. Any request which is not specifically granted shall be deemed denied.

(d) Requests for adjournments within [7] days of a scheduled hearing must be made directly to the hearing officer. Such requests will generally not be granted.

(e)(1) Except as provided for in paragraphs (2) and (3) of this subdivision, in any case where an adjournment is granted, any suspension or revocation of a license, permit or privilege already in effect may be continued pending the adjourned hearing. In addition, in the event no such action is in effect, a temporary suspension of such license, permit or privilege may be imposed at the time the adjournment is granted provided that the records of the department or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard.

(2) Adjournment of a chemical test refusal hearing held pursuant to Vehicle and Traffic Law, section 1194. Where an adjournment of a chemical test refusal hearing is granted at the request of the respondent, any suspension of a respondent's license, permit or privilege already in effect shall be continued pending the adjourned hearing. In addition, in the event no such suspension is in effect when the adjournment is granted, a temporary suspension of such license, permit or privilege shall be imposed and shall take effect on the date of the originally scheduled hearing. Such suspension shall not be continued or imposed if the hearing officer affirmatively finds, on the record, that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.

(3) Continuance of a chemical test refusal hearing held pursuant to Vehicle and Traffic Law, section 1194. If a chemical test refusal hearing is continued at the discretion of the hearing officer, in order to complete testimony, to subpoena witnesses or for any other reason, and if the respondent's license, permit or privilege was suspended pending such hearing, such suspension shall remain in effect pending the continued hearing unless the hearing officer affirmatively finds on the record that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record. If respondent's license, permit or privilege was not suspended pending the hearing, the hearing officer may suspend such license, permit or privilege, based upon the testimony provided and evidence submitted at such hearing, if the hearing officer affirmatively finds, on the record, that there is reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.

(4) In addition to any grounds for suspension authorized pursuant to paragraphs (2) and (3) of this subdivision, a hearing officer must impose a suspension or continue a suspension of a respondent's driver's license, pursuant to paragraphs (2) and (3) of this subdivision, if the respondent's record indicates that:

> (i) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of the operation of a motor vehicle.
>
> (ii) The person has [2] or more revocations and/or suspensions of his driver's license within the last [3] years, other than a suspension that may be terminated

> by performance of an act by the person.
>
> (iii) The person has been convicted more than once of reckless driving within the last [3] years.
>
> (iv) The person has [3] or more alcohol-related incidents within the last 10 years, including any conviction of Vehicle and Traffic Law, section 1192, any finding of a violation of section 1192-a of such law, and a refusal to submit to a chemical test. If a refusal that arises out of the same incident as a section 1192 conviction, this shall count as [1] incident.

The provisions of 15 NYCRR § 127.7 govern requests for adjournments of chemical test refusal hearings "[n]otwithstanding the fact that such hearings may be held less than [7] days from the date on which the respondent is arraigned in court." 15 NYCRR § 127.9(a).

If an adjournment is granted but the ALJ suspends the motorist's driving privileges during the time period of the adjournment, such suspension period will *not* be credited toward any revocation period ultimately imposed by DMV for the chemical test refusal.

### § 41:57 DMV refusal hearings -- Responsive pleadings

DMV regulations provide that "[n]o pre-hearing answers or responsive pleadings are permitted." 15 NYCRR § 127.1(a).

### § 41:58 DMV refusal hearings -- Pre-hearing discovery

Pre-hearing discovery is governed by 15 NYCRR § 127.6(a):

> Prior to a hearing, a respondent may make a request to review nonconfidential information in the hearing file including information which is not protected by law from disclosure. If the file has been sent to the hearing officer or is scheduled to be sent within [7] days of receipt of a request by the Safety Hearing Bureau, examination of the information will be arranged by the hearing officer. The examination will be scheduled for a time at least [5] days prior to the

> hearing unless a shorter time is mutually agreed between the hearing officer and the requestor. If the file has not been sent to the hearing officer and is not scheduled to be sent within [7] days of receipt of a request by the Safety Hearing Bureau, the file will be made available for examination at the Safety Hearing Bureau before the usual date scheduled for sending the file to the hearing officer. A respondent may elect to examine the file after it is received by the hearing officer rather than while it is in the custody of the Safety Hearing Bureau. If a request to examine the file is received less than [7] days prior to the hearing date, the requestor will be afforded an opportunity to examine the file immediately prior to commencement of the hearing or at an earlier time as may be agreed to in the discretion of the hearing officer.

### § 41:59 DMV refusal hearings -- Recusal of ALJ

Requests for recusal of the DMV ALJ are governed by 15 NYCRR § 127.5(a):

> A respondent or designated representative may request recusal of an assigned hearing officer. The request and the reason for it must be made to the assigned hearing officer at the beginning of the hearing or as soon thereafter as the requestor receives information which forms the basis for such request. Denial of a request for recusal shall be reviewable by the Administrative Appeals Board . . . under procedures established pursuant to [VTL article] 3-A.

### § 41:60 DMV refusal hearings -- Conduct of hearing

Specific procedures for the conduct of DMV refusal hearings are set forth throughout 15 NYCRR Part 127. Refusal hearings are also governed generally by Article 3 of the State Administrative Procedure Act, by case law, and by the Constitutional right to Due Process. 15 NYCRR § 127.5(c) provides that:

> The order of proof at a hearing shall be determined by the hearing officer. Testimony shall be given under oath or affirmation. The hearing officer, in his or her discretion, may exclude any witnesses, other

> than a respondent or a representative of the department, if one is present, during other testimony. The hearing officer may also admit any relevant evidence in addition to oral testimony. Any witness may be questioned and/or cross-examined by the hearing officer, by his or her own counsel or representative, and by the party who did not call the witness.

"The privileges set forth in [CPLR article 45] shall be applicable in hearings conducted pursuant to this Part." 15 NYCRR § 127.6(c). "The provisions of [CPLR § 2302], regarding the issuance of subpoenas, are applicable to hearings conducted in accordance with this Part." 15 NYCRR § 127.11(b). See also State Administrative Procedure Act § 304(2); Matter of Gray v. Adduci, 73 N.Y.2d 741, 743, 536 N.Y.S.2d 40, 41 (1988). In all other respects, "the provisions of the Civil Practice Law and Rules are not binding upon the conduct of administrative hearings." 15 NYCRR § 127.11(a).

"Rules governing the admissibility of evidence in a court of law are not applicable to hearings held by the department." 15 NYCRR § 127.6(b). "Evidence which would not be admissible in a court, such as hearsay, is admissible in a departmental hearing." Id.

"The provisions of the Criminal Procedure Law are not binding upon the conduct of administrative hearings." 15 NYCRR § 127.11(a). "The provisions of those laws regarding forms of pleading, motion practice, discovery procedures, including demands for bills of particulars, and other matters are not applicable to hearings conducted in accordance with this Part." Id.

"[U]nder no circumstances shall the respondent be compelled to testify. However, *the hearing officer may draw a negative inference from the failure to testify*." 15 NYCRR § 127.5(b) (emphasis added).

15 NYCRR § 127.5(c) expressly provides that the ALJ can question, and indeed cross-examine, witnesses at a refusal hearing. This procedure was upheld in Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 812 (4th Dep't 2008):

> Petitioner . . . contends that he did not receive an impartial hearing because the administrative law judge (ALJ) acted as an advocate for respondent by questioning the witnesses. We reject that contention. The ALJ's questioning concerned whether the

> officer had reasonable grounds to arrest petitioner for DWI, whether petitioner was given a sufficient warning that his refusal to submit to a chemical test would result in the immediate suspension and subsequent revocation of his license, and whether petitioner refused to submit to a chemical test (see Vehicle and Traffic Law § 1194[2][c]). There is no indication in the record that the ALJ was not impartial.

**§ 41:61 DMV refusal hearings -- Due Process**

The imposition of civil sanctions upon a motorist for his or her refusal to submit to a chemical test "is unquestionably legitimate, assuming appropriate procedural protections." South Dakota v. Neville, 459 U.S. 553, 560, 103 S.Ct. 916, 920 (1983). In this regard, the Court of Appeals has repeatedly held that:

> It is settled that even where administrative proceedings are at issue, "no essential element of a fair trial can be dispensed with unless waived." In addition, "the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

Matter of McBarnette v. Sobol, 83 N.Y.2d 333, 339, 610 N.Y.S.2d 460, 462-63 (1994) (citations omitted). See also Matter of Simpson v. Wolansky, 38 N.Y.2d 391, 395, 380 N.Y.S.2d 630, 634 (1975); Matter of Sowa v. Looney, 23 N.Y.2d 329, 333, 296 N.Y.S.2d 760, 764 (1968); Matter of Hecht v. Monaghan, 307 N.Y. 461, 470 (1954). See generally Matter of Maxfield v. Tofany, 34 A.D.2d 869, ___, 310 N.Y.S.2d 783, 785 (3d Dep't 1970).

Similarly, the Supreme Court has both (a) made clear that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process," and (b) "identified these rights as among the minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). The Chambers Court also made clear that:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy

> of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." . . . [I]ts denial or significant diminution calls into question the ultimate "integrity of the fact-finding process."

Id. at 295, 93 S.Ct. at 1046 (citations omitted). See also Davis v. Alaska, 415 U.S. 308, 315, 316, 94 S.Ct. 1105, 1110 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness").

Also inherent in the right of cross-examination is the ability to "test the witness' recollection [and] to 'sift' his conscience," Chambers, 410 U.S. at 295, 93 S.Ct. at 1045; see also People ex rel. McGee v. Walters, 62 N.Y.2d 317, 322, 476 N.Y.S.2d 803, 806 (1984), and to "expose intentionally false swearing and also to bring to light circumstances bearing upon inaccuracies of the witnesses in observation, recollection and narration, and to lay the foundation for impeachment of the witnesses." Hecht, 307 N.Y. at 474.

The fundamental right of cross-examination is also both (a) codified in State Administrative Procedure Act § 306(3) ("A party shall have the right of cross-examination"), which is applicable to DMV refusal hearings, and (b) contained in DMV's regulations. See 15 NYCRR § 127.5(c); 15 NYCRR § 127.9(b). See generally Matter of Epstein, 267 A.D. 27, ___, 44 N.Y.S.2d 921, 922 (3d Dep't 1943) ("Generally speaking, in quasi judicial proceedings before administrative agencies where the same agency is both the prosecutor and judge, with the resultant tendency to predetermination, practically the only shield left to the accused is his right of cross-examination. Deprived of this, he stands defenseless before a tribunal predisposed to conviction. This right should therefore be preserved in full vigor").

Finally, where Due Process is concerned, the underlying merits of the case are irrelevant: "'To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'" Hecht, 307 N.Y. at 470 (citation omitted).

## § 41:62 DMV refusal hearings -- Applicability of Rosario rule

It appears clear that the Rosario rule, in sum or substance, is applicable to administrative proceedings where a violation of law is alleged and a "license" is at stake. See, e.g., Matter of Inner Circle Restaurant, Inc. v. New York State Liquor Auth., 30 N.Y.2d 541, ___, 330 N.Y.S.2d 389, 390 (1972) ("Upon the new hearing which our reversal mandates the police officer's memorandum book should be made available"); Matter of Fenimore Circle Corp. v. State Liquor Auth., 27 N.Y.2d 716, 314 N.Y.S.2d 180 (1970) ("The State Liquor Authority Hearing Officer should have permitted petitioner's counsel to examine the statements made by Trooper Smith, when that witness took the stand, for purposes of cross-examination, there being no indication that they contained matter that must be kept confidential or that their disclosure would be inimical to the public interest"); People ex rel. Deyver v. Travis, 172 Misc. 3d 83, ___, 657 N.Y.S.2d 306, 307 (Erie Co. Sup. Ct.) ("requiring the production of a witness' notes before an administrative hearing is not so much a grant of a full discovery right to prior written or recorded statements of witnesses . . . but rather, is merely a conformance with the Relator's statutory right to effective cross-examination. Such production, which is neither burdensome nor destructive to the hearing process but which is essential to a knowledgeable examination of the facts to which the witness has just testified, constitutes only fundamental fairness in a quasi-judicial process"), aff'd for the reasons stated in the opinion below, 244 A.D.2d 990, 668 N.Y.S.2d 966 (4th Dep't 1997).

In Matter of Inner Circle Restaurant, Inc., *supra*, the Court of Appeals cited Matter of Garabendian v. New York State Liquor Auth., 33 A.D.2d 980, 307 N.Y.S.2d 270 (4th Dep't 1970), which held that:

> In People v. Rosario, . . . it was held that in a criminal trial a defendant is entitled to examine any pre-trial statement of a witness as long as the statement relates to the subject matter of the witness' testimony and is not confidential. We conclude that a similar rule should be applied in this proceeding which, at least in form, is not of a criminal character but, like a criminal proceeding, is brought to penalize for the commission of an offense against the law.
>
> There should be a new hearing at which the reports of any police officers testifying thereat should be made available to petitioners prior to the commencement of cross-examination.

33 A.D.2d at ___, 307 N.Y.S.2d at 271 (citations omitted).

The position of the Department of Motor Vehicles appears to be that the Rosario rule is inapplicable to DMV refusal hearings. Nonetheless, 15 NYCRR § 127.6, which governs "discovery" and "evidence" at DMV refusal hearings, provides in pertinent part:

> (a) Prior to a hearing, a respondent may make a request to review nonconfidential information in the hearing file including information which is not protected by law from disclosure. . . . The examination will be scheduled for a time at least five days prior to the hearing unless a shorter time is mutually agreed between the hearing officer and the requestor. . . . If a request to examine the file is received less than seven days prior to the hearing date, the requestor will be afforded an opportunity to examine the file immediately prior to commencement of the hearing or at an earlier time as may be agreed to in the discretion of the hearing officer.

In addition, most DMV hearing officers will allow defense counsel to review any documents that a testifying police officer has either (a) brought to the hearing and reviewed prior to testifying, and/or (b) used to refresh his or her recollection while testifying.

### § 41:63 DMV refusal hearings -- Issues to be determined at hearing

VTL § 1194(2)(c) provides that:

> The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of [VTL § 1192]; (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of

> the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof.

Proof with regard to the chemical test rules and regulations of the arresting officer's police department is not required at a DMV refusal hearing. Matter of Goebel v. Tofany, 44 A.D.2d 615, ___, 353 N.Y.S.2d 73, 75 (3d Dep't 1974). See also Matter of Strack v. Tofany, 46 A.D.2d 712, ___, 360 N.Y.S.2d 312, 313 (3d Dep't 1974); Matter of Manley v. Tofany, 70 Misc. 2d 910, ___, 335 N.Y.S.2d 338, 342-43 (Chenango Co. Sup. Ct. 1972).

### § 41:64 DMV refusal hearings -- DMV action where evidence fails to establish all 4 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds on any one of said issues in the negative, the hearing officer shall immediately terminate any suspension arising from such refusal." VTL § 1194(2)(c). This is referred to as "closing out" the hearing.

### § 41:65 DMV refusal hearings -- DMV action where evidence establishes all 4 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of [VTL § 1194(2)(d)]." VTL § 1194(2)(c). See generally Matter of Van Woert v. Tofany, 45 A.D.2d 155, 357 N.Y.S.2d 175 (3d Dep't 1974) (VTL § 1194 applies to motorists operating motor vehicles in New York regardless of whether they possess valid out-of-state driver's licenses).

### § 41:66 DMV refusal hearings -- Decision following hearing

"At the conclusion of all proceedings necessary to determine whether the respondent has violated [VTL § 1194(2)], the hearing officer must, as provided in [15 NYCRR § 127.10], either render or reserve decision." 15 NYCRR § 127.5(d). In this regard, 15 NYCRR § 127.10 provides:

> (a) The hearing officer may announce his or her decision at the conclusion of the hearing or may reserve decision. A written determination of the case, specifying the findings of fact, conclusions of law and disposition, including any penalty or penalties imposed, shall be sent to the respondent and his or her designated representative by first-class mail.

> (b) Except where otherwise specified by statute, the effective date of any penalty or sanction shall be a date established by the hearing officer, which shall in no event be more than 60 days from the date of the determination.
>
> (c) If the hearing officer does not render a decision within 45 days of the conclusion of the hearing, the respondent may serve a demand for decision on the hearing officer. Upon receipt of such demand, the hearing officer must render a decision within 45 days, or the charges shall be deemed dismissed.

"[A] decision by a hearing officer shall be based upon substantial evidence." 15 NYCRR § 127.6(b).

In Matter of Fermin-Perea v. Swarts, 95 A.D.3d 439, ___, 943 N.Y.S.2d 96, 98-99 (1st Dep't 2012):

> The arresting officer's refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and "a strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.
>
> Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law. However,

> where, as here, a field sobriety test conducted less than 30 minutes after the officer's initial observations, convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record. . . . Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.
>
> The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while intoxicated or impaired. Here, while the officer's initial observations are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter -- a more objective measure of intoxication -- necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is reasonable and plausible." Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test.

(Citations omitted).

Clearly, the majority of the Fermin-Perea Court believed that the arresting officer's Report of Refusal was not credible.

## § 41:67 DMV refusal hearings -- Appealing adverse decision

"A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to [VTL § 1194(2)(c)] may appeal the findings of the hearing officer in accordance with the provisions of [VTL Article 3-A (*i.e.*, VTL §§ 260-63)]." VTL § 1194(2)(c). See also VTL § 261(1); 15 NYCRR § 127.12. Appeals are filed with the DMV Administrative Appeals Board, see VTL § 261(3), using form AA-33A (entitled "New York State Department of Motor Vehicles Appeal Form"), at the following address:

Appeals Processing Unit
PO Box 2935
Albany, NY 12220-0935

Appeals are submitted to the Appeals Board in writing only. "The fact that personal appearances are apparently not permitted before that entity deprive[s] [a petitioner] of no rights." Matter of Jason v. Melton, 60 A.D.2d 707, ___, 400 N.Y.S.2d 878, 879 (3d Dep't 1977).

The appeal form, together with a non-refundable $10 filing fee, must be filed within 60 days after *written* notice is given by DMV of the ALJ's disposition of the refusal hearing. See VTL § 261(2); VTL § 261(4). See also 15 NYCRR § 155.3(a).

DMV refusal hearings are tape recorded by the DMV hearing officer, who is provided by the Department with tape recording equipment which is, to be kind, not state-of-the-art. Despite the fact that such tapes (a) frequently contain portions which are inaudible, and (b) are occasionally misplaced or even lost, they nonetheless constitute the "official record" of the hearing, even if the respondent brings his or her own stenographer to the hearing.

In this regard, a timely filed appeal of a DMV refusal hearing disposition is not considered "finally submitted" (and will not be considered by the Appeals Board) until the respondent orders and obtains a transcript of the tape recording of the hearing (*at a non-refundable cost of $3.19 a page*). See VTL § 261(3). See also DMV Form AA-33A; Matter of Nolan v. Adduci, 166 A.D.2d 277, ___, 564 N.Y.S.2d 118, 119 (1st Dep't 1990). Once the transcript is received, the respondent has an additional 30 days within which to submit further argument in support of the appeal.

At the time that the appeal is filed, the respondent can request a "stay" pending the outcome of the appeal. Where such a request is made:

> The appeals board, or chairman thereof, upon the request of any person who has filed an appeal, may, in its discretion, grant a stay pending a determination of the appeal. *Whenever a determination has not been made within [30] days after an appeal has been finally submitted, a stay of execution will be deemed granted by operation of law, and the license, certificate, permit or privilege affected will be automatically restored pending final determination*.

VTL § 262 (emphasis added). See also 15 NYCRR § 155.5(b).

If the respondent is dissatisfied with the outcome of the administrative appeal, he or she can seek judicial review via a CPLR Article 78 proceeding. See VTL § 263. See also 15 NYCRR § 155.6(b). However, "[n]o determination of the commissioner or a member of the department which is appealable under the provisions of this article shall be reviewed in any court unless an appeal has been filed and determined in accordance with this article." VTL § 263. See also Matter of Winters v. New York State Dep't of Motor Vehicles, 97 A.D.2d 954, 468 N.Y.S.2d 749 (4th Dep't 1983); Matter of Giambra v. Commissioner of Motor Vehicles, 59 A.D.2d 648, ___, 398 N.Y.S.2d 301, 302 (4th Dep't 1977).

There are two exceptions to the requirement that the respondent exhaust administrative remedies prior to filing an Article 78 proceeding challenging the outcome of a DMV refusal hearing. First:

> The requirement of filing an appeal from a determination of the commissioner with the appeals board before a judicial review of such determination may be commenced shall apply only if the appellant is provided with written notification as to the existence of [VTL Article 3-A] and this Part prior to or with the written notice of the determination of the commissioner.

15 NYCRR § 155.7. See Matter of Laugh & Learn, Inc. v. State of N.Y. Dep't of Motor Vehicles, 263 A.D.2d 854, 693 N.Y.S.2d 723 (3d Dep't 1999).

Second, VTL § 263 provides that "the refusal of an appeals board to grant a stay pending appeal shall be deemed a final determination for purposes of appeal."

In Matter of Dean v. Tofany, 48 A.D.2d 964, 369 N.Y.S.2d 550 (3d Dep't 1975), the petitioner, who was appealing a chemical test refusal revocation to the Appellate Division, died

subsequent to oral argument. The Court held that, due to petitioner's death, the proceeding was moot, and dismissed the petition.

### § 41:68 Failure to pay civil penalty or driver responsibility assessment

VTL § 1194(2)(d)(2), which governs the civil penalties imposed for chemical test refusals, provides that "[n]o new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid." See also VTL § 1196(5); 15 NYCRR § 139.4(d) ("No new license, permit or privilege (other than a conditional license, permit or privilege issued pursuant to Part 134 of this Title) shall be issued, or restored, until such civil penalty has been paid"); 15 NYCRR § 134.11.

If a person fails to pay the driver responsibility assessment, DMV will suspend his or her driver's license (or privilege of obtaining a driver's license). VTL § 1199(4). See also § 46:47, *infra*. "Such suspension shall remain in effect until any and all outstanding driver responsibility assessments have been paid in full." Id.

### § 41:69 Chemical test refusals and 20-day Orders

Where a license suspension/revocation is required to be imposed for a conviction of DWAI or DWI, see VTL § 1193(2)(a), (b), the Court is required to suspend/revoke the defendant's driver's license at the time of sentencing, at which time the defendant is required to surrender his or her license to the Court. See VTL § 1193(2)(d)(1). Similar provisions apply where a license suspension is required to be imposed for DWAI Drugs. See VTL § 510(2)(b)(v); VTL § 510(2)(b)(vi).

Although the license suspension/revocation takes effect immediately, see VTL § 1193(2)(d)(1); VTL § 510(2)(b)(vi), under certain circumstances the sentencing Court may issue a so-called "20-day Order," which makes the "license suspension or revocation take effect [20] days after the date of sentencing." VTL § 1193(2)(d)(2). See also VTL § 510(2)(b)(vi); Chapter 49, *infra*.

In VTL § 1192 cases, a 20-day Order is only appropriately granted to a defendant who is eligible for *both* (a) the DDP, *and* (b) a conditional or restricted use license. This is because the purpose of the 20-day Order is to continue the defendant's driving privileges during the time period that it takes for the Court to send, and DMV to receive and process, the paperwork required for the defendant to sign up for the DDP and obtain a conditional/restricted use license.

In addition, a 20-day Order merely continues the defendant's *existing* driving privileges for 20 days. Thus, if the defendant has any pre-existing suspension/revocation on his or her driver's license (other than the suspension/revocation caused by the instant VTL § 1192 conviction), a 20-day Order is useless (as it merely "continues" nonexistent driving privileges).

In the test refusal context, a chemical test refusal does not affect a person's *eligibility* for a 20-day Order, but in many cases a test refusal will render a 20-day Order *ineffective*. For example, if the defendant in a refusal case enters a VTL § 1192 plea at arraignment, the Court is required to issue a temporary suspension of the defendant's driving privileges at that time -- independent of the VTL § 1192 suspension/revocation -- based upon the alleged chemical test refusal. See VTL § 1194(2)(b)(3); 15 NYCRR § 139.3(a); § 41:39, *supra*; § 41:53, *supra*. In such a case, a 20-day Order would continue nonexistent driving privileges, and would thus be a legal nullity (at least until the temporary suspension is terminated).

Similarly, if the defendant's VTL § 1192 plea is entered subsequent to a DMV chemical test refusal revocation, a 20-day Order would continue nonexistent driving privileges and would be a legal nullity.

Conversely, a valid 20-day Order would become invalid if the defendant's driving privileges are revoked at a DMV refusal hearing held during the 20 day lifespan of the Order.

### § 41:70 Chemical test refusals and the Drinking Driver Program

A conditional license allows a person to drive to, from and during work (among other places) during the time period that the person's driving privileges are suspended or revoked as a result of an alcohol-related traffic offense. See VTL § 1196(7). See also Chapter 50, *infra*. To be eligible for a conditional license, a person must, among other things, participate in the so-called Drinking Driver Program ("DDP").

However, eligibility for the DDP requires an alcohol or drug-related *conviction*. In this regard, VTL § 1196(4) provides, in pertinent part, that:

> *Participation in the [DDP] shall be limited to those persons convicted of alcohol or drug-related traffic offenses* or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses, or persons found to have been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a], who choose to

> participate and who satisfy the criteria and meet the requirements for participation as established by [VTL § 1196] and the regulations promulgated thereunder.

(Emphasis added). See also 15 NYCRR § 134.2.

Thus, a person who refuses to submit to a chemical test and whose driving privileges are revoked by DMV as a result thereof (and who is otherwise eligible for a conditional license), will not be able to obtain a conditional license unless and until the person obtains a VTL § 1192 conviction. As a result, many people who lose their refusal hearings (and who need to drive to earn a living) are virtually forced to accept a DWAI or DWI plea in criminal Court in order to obtain a conditional license. This seemingly unfair restriction on conditional license eligibility has been found to be Constitutional. See Matter of Miller v. Tofany, 88 Misc. 2d 247, ___-___, 387 N.Y.S.2d 342, 345-46 (Broome Co. Sup. Ct. 1975).

By contrast, a policy pursuant to which participants in the DDP who had refused to submit to a chemical test were, for that reason alone, automatically referred for additional evaluation and treatment was found to be illegal. See People v. Ogden, 117 Misc. 2d 900, ___-___, 459 N.Y.S.2d 545, 547-48 (Batavia City Ct. 1983).

### § 41:71 Successful DDP completion does not terminate refusal revocation

Ordinarily, upon successful completion of the Drinking Driver Program ("DDP"), "a participant may apply to the commissioner . . . for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course." VTL § 1196(5). In other words, successful DDP completion generally allows the defendant to apply for reinstatement of his or her full driving privileges.

However, in a further attempt to encourage DWI suspects to submit to properly requested chemical tests, the Legislature enacted VTL § 1194(2)(d)(3), which applies where an underlying revocation is for a chemical test refusal:

> (3) Effect of rehabilitation program. No period of revocation arising out of this section may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

See also VTL § 1196(5); 15 NYCRR § 136.3(a).

### § 41:72 Chemical test refusals and conditional licenses

As § 41:70 makes clear, eligibility for a conditional license is contingent upon, among other things, eligibility for the DDP. In addition, even if a person is eligible for the DDP, a conditional license will be denied where, among other things, the person (a) has 3 or more alcohol-related convictions or incidents within the previous 10 years (in this regard, a chemical test refusal is an alcohol-related incident), see 15 NYCRR § 134.7(a)(11), and/or (b) is convicted of DWAI Drugs in violation of VTL § 1192(4) (in which case, the person may be eligible for a restricted use license). See 15 NYCRR § 134.7(a)(10); 15 NYCRR § 135.5(d); § 41:73, *infra*.

If the person does receive a conditional license, a chemical test refusal revocation has a significant impact on when DMV will allow the person's full, unrestricted driving privileges to be restored. The reason for this is that successful completion of the DDP does not terminate a refusal revocation. See § 41:71, *supra*. However, DMV will allow the person to continue to use his or her conditional license pending the expiration of the refusal revocation period (provided that the person does not violate any of the conditions of the conditional license). See generally VTL § 1196(7)(e), (f); 15 NYCRR § 134.9(d)(1).

### § 41:73 Chemical test refusals and restricted use licenses

A restricted use license is very similar to a conditional license, with the exception that to be eligible for a restricted use license the underlying suspension/revocation must be imposed pursuant to VTL § 510 or VTL § 318. See VTL § 530; 15 NYCRR § 135.1(a); 15 NYCRR § 135.2; 15 NYCRR § 135.5(b); 15 NYCRR § 135.5(d); 15 NYCRR § 135.9(b).

VTL § 510(2)(b)(v) provides for a mandatory 6-month driver's license suspension upon conviction of various drug crimes. Included in the list of such crimes is DWAI Drugs, in violation of VTL § 1192(4). The inclusion of DWAI Drugs under this provision was redundant, in that a conviction of DWAI Drugs had already resulted in a license revocation. See VTL § 1193(2)(b)(2), (3).

Adding to the confusion, although VTL § 510(6)(i) provides that, where a person's driver's license is suspended pursuant to VTL § 510(2)(b)(v) for a violation of VTL § 1192(4), "the commissioner may issue a restricted use license pursuant to [VTL § 530]," VTL § 530(2) clearly and expressly states that a restricted use license is *not* available (but a conditional license may be available) to a person whose driver's license is

revoked for either (a) a conviction of VTL § 1192(4), and/or (b) refusal to submit to a chemical test.

In this regard, DMV Counsel's Office advises that DMV interprets VTL § 510(2)(b)(v) and VTL § 510(6)(i) as having (a) shifted the licensing consequences of DWAI Drugs from VTL § 1193 to VTL § 510, (b) shifted the license eligibility of a person convicted of DWAI Drugs from a conditional license (see VTL § 1196) to a restricted use license (see VTL § 530), and (c) superseded the language of VTL § 530(2) to the extent that it prohibits the issuance of a restricted use license to a person whose driver's license is revoked for either (i) a conviction of DWAI Drugs, and/or (ii) refusal to submit to a chemical test in conjunction with a conviction of DWAI Drugs. See also 15 NYCRR § 134.7(a)(10); 15 NYCRR § 135.5(d).

In other words, a person whose driver's license is revoked for refusal to submit to a chemical test in conjunction with a conviction of DWAI Drugs (who is otherwise eligible for a restricted use license) is eligible for a restricted use license. As with a conditional license, eligibility for a restricted use license requires eligibility for, and participation in, the DDP. See 15 NYCRR § 135.5(d). See also VTL § 1196(4); 15 NYCRR § 134.2; Chapter 50, *infra*.

In addition, as with a conditional license, a chemical test refusal revocation has a significant impact on when DMV will allow the person's full, unrestricted driving privileges to be restored. The reason for this is that successful completion of the DDP does not terminate a refusal revocation. See § 41:71, *supra*. However, DMV will allow the person to continue to use his or her restricted use license pending the expiration of the refusal revocation period (provided that the person does not violate any of the restrictions of the restricted use license). See generally VTL § 530(3).

Our thanks to Ida L. Traschen, Esq. of DMV Counsel's Office, for clarifying this confusing topic.

### § 41:74 Chemical test refusals as consciousness of guilt

Where a defendant refuses to submit to a chemical test in violation of VTL § 1194(2), evidence of the refusal is admissible against the defendant to show his or her "consciousness of guilt." See, e.g., VTL § 1194(2)(f); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845 (1978). In People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978), the Appellate Division, Fourth Department, stated:

> [I]t has long been recognized that the conduct of the accused indicative of a guilty mind has been admissible against him on the theory that an inference of guilt may be drawn from consciousness of guilt. Evidence of the defendant's refusal to blow air into a bag is conduct which may be admitted on the same principle that evidence of an accused's flight or concealment is admissible to show consciousness of guilt. The defendant's refusal to submit to the test constitutes the destruction of incriminating evidence because of the rapid rate at which the body eliminates alcohol from the blood. There is no real difference between a defendant who flees to avoid or escape custody and one who, although in custody, wrongfully withholds his body (the source of incriminating evidence) from examination. The inference of guilt is not illogical or unjustified. As Judge Jasen points out in his concurring opinion in People v. Paddock, 29 N.Y.2d 504, 323 N.Y.S.2d 976, 272 N.E.2d 486, "It should be quite obvious that the primary reason for a refusal to submit to a chemical test is that a person fears its results."

(Citations and footnote omitted). See also Thomas, 46 N.Y.2d at 106, 412 N.Y.S.2d at 848 ("Realistically analyzed such testimony is relevant only in consequence of the inference it permits that defendant refused to take the test because of his apprehension as to whether he would pass it"); Smith, 18 N.Y.3d at 550, 942 N.Y.S.2d at 430 (same); People v. Beyer, 21 A.D.3d 592, ___, 799 N.Y.S.2d 620, 623 (3d Dep't 2005); People v. Gallup, 302 A.D.2d 681, ___, 755 N.Y.S.2d 498, 500 (3d Dep't 2003); Bazza v. Banscher, 143 A.D.2d 715, ___, 533 N.Y.S.2d 285, 286 (2d Dep't 1988) ("Banscher's refusal to submit to a breathalyzer test is admissible as an admission by conduct and serves as circumstantial evidence indicative of a consciousness of guilt"); People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983); People v. Ferrara, 158 Misc. 2d 671, ___, 602 N.Y.S.2d 86, 89 (N.Y. City Crim. Ct. 1993) ("Evidence of a defendant's refusal to take a chemical test is relevant to demonstrate a defendant's consciousness of guilt").

> Proof . . . that might be explanatory of a particular defendant's refusal to take the test unrelated to any apprehension as to its results (as, for instance, religious scruples or individual syncopephobia) should be treated not as tending to establish any form of compulsion but rather as going to the

> probative worth of the evidence of refusal. Thus, a jury might in such circumstances reject the inference of consciousness of guilt which would otherwise have been available.

Thomas, 46 N.Y.2d at 109 n.2, 412 N.Y.S.2d at 850 n.2 (citations omitted).

"Needless to say, refusal evidence is probative of a defendant's consciousness of guilt only if the defendant actually declined to take the test." People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012).

**§ 41:75 Test refusals -- Jury charge**

The "pattern jury instruction" for a chemical test refusal contained in the Office of Court Administration's Criminal Jury Instructions, *Second Edition* ("CJI"), provides as follows:

> **Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.**

See CJI, at p. VTL 1192-1007 (footnote omitted); CJI, at p. VTL 1192-1021 (footnote omitted). The only cite listed for this instruction is People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845 (1978). It is safe to say that this instruction is both (a) insufficient as a general matter, and (b) incorrect in at least one important respect.

As a general matter, the CJI chemical test refusal instruction provides insufficient guidance to the jury as to the probative value of so-called "consciousness of guilt" evidence. In this regard, in People v. Kurtz, 92 A.D.2d 962, ___, 460 N.Y.S.2d 642, 642-43 (3d Dep't 1983), the Appellate Division, Third Department, upheld the trial court's charge to the jury "that defendant's refusal to take the test 'raised an inference that * * * he was afraid that he could not pass the test' and this 'raises an inference of consciousness of guilt' which by itself was insufficient to convict, but which could be considered

along with all the other evidence in determining whether the prosecution had proven its case beyond a reasonable doubt." The Court also cautioned that:

> It is also worth noting that [VTL § 1194] deals only with an inference which can be either accepted or rejected by the jury in light of the other evidence presented and can never be the sole basis for guilt. Here, the trial court made this eminently clear to the jurors and kept the burden of proof . . . squarely upon the prosecution.

Id. at ___, 460 N.Y.S.2d at 643. See also People v. Selsmeyer, 128 A.D.2d 922, ___, 512 N.Y.S.2d 733, 734 (3d Dep't 1987).

Similarly, both the Court of Appeals and the Appellate Division, Second Department, have made clear that, to be sufficient, a consciousness of guilt jury charge must "closely instruct" the jury as to the comparative weakness of such evidence on the issue of guilt. See, e.g., People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983) ("As the Court of Appeals has stated in respect to another example of assertive conduct, '[t]his court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged' (People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626, 196 N.E.2d 263)"); People v. Berg, 92 N.Y.2d 701, 706, 685 N.Y.S.2d 906, 909 (1999) ("the inference of intoxication arising from failure to complete [certain field sobriety tests] successfully 'is far stronger than that arising from a refusal to take the test'") (citation omitted); People v. MacDonald, 89 N.Y.2d 908, 910, 653 N.Y.S.2d 267, 268 (1996) ("testimony regarding defendant's attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt, particularly in light of the trial court's limiting instructions to the jury on this point").

Since the CJI pattern jury instruction for a chemical test refusal fails to closely instruct the jury as to the comparative weakness of such evidence on the issue of guilt, and/or provide any limiting instructions to the jury on this point, it clearly does not satisfy MacDonald, Yazum, Powell, and/or Kurtz.

Aside from a general objection to the CJI chemical test refusal instruction, a specific objection should be made to the inclusion of the phrase "and there is no innocent explanation for such refusal" in the instruction. Not only does this language improperly shift the burden of proof to the defendant, such burden shifting is particularly prejudicial because it comes from the Court as opposed to the prosecution.

In addition, the "innocent explanation" language is misleading. In this regard, the CJI pattern instruction appears to instruct the jury that, if the defendant does in fact offer an innocent explanation for his or her refusal, the jury *cannot* infer "that the defendant refused to submit to [the] chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law." However, Thomas clearly states that a defendant's innocent explanation for refusal to submit to a chemical test goes to the weight to be given to the refusal, not its admissibility. See People v. Thomas, 46 N.Y.2d 100, 109 n.2, 412 N.Y.S.2d 845, 850 n.2 (1978).

At a minimum, defense counsel should request that the Court also read the generic CJI "consciousness of guilt" pattern jury instruction (*i.e.*, the consciousness of guilt instruction that applies to *all* consciousness of guilt situations). This charge, which can be found at "http://www.courts.state.ny.us/cji/" under the heading "*GENERAL CHARGES*," provides as follows:

**CONSCIOUSNESS OF GUILT**

> In this case the People contend that (*briefly specify the defendant's conduct; e.g. the defendant fled New York shortly after the crime*), and that such conduct demonstrates a consciousness of guilt.
>
> You must decide first, whether you believe that such conduct took place, and second, if it did take place, whether it demonstrates a consciousness of guilt on the part of the defendant.
>
> In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt.
>
> The weight and importance you give to evidence offered to show consciousness of guilt depends on the facts of the case. Sometimes such evidence is only of slight value, and standing alone, it may never be the basis for a finding of guilt.

(Footnotes omitted).

Unlike the consciousness of guilt portion of the DWI jury instruction, see *supra*, this instruction properly instructs the jury as to the weight to afford consciousness of guilt evidence. It also explains where the "innocent explanation" language in the DWI jury instruction comes from, and places such language in proper context.

In People v. Vinogradov, 294 A.D.2d 708, ___, 742 N.Y.S.2d 698, 700 (3d Dep't 2002), "County Court instructed the jury that asking defendant if he was willing to submit to a breathalyzer test after defendant had declined to speak without an attorney was not a violation of defendant's constitutional right to remain silent." The Appellate Division, Third Department, found that this "instruction was an accurate statement of the law, given the specific facts presented here." Id. at ___, 742 N.Y.S.2d at 700.

**§ 41:76 Chemical test refusals and the 5th Amendment**

The 5th Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." It is well settled that, in the absence of Miranda warnings, or an exception thereto, a Court must suppress most verbal statements of a defendant that are both (a) communicative or testimonial in nature, and (b) elicited during custodial interrogation. See Pennsylvania v. Muniz, 496 U.S. 582, 590, 110 S.Ct. 2638, 2644 (1990). Although test refusals are "communicative or testimonial" in nature, see, e.g., People v. Thomas, 46 N.Y.2d 100, 106-07, 412 N.Y.S.2d 845, 849 (1978); People v. Peeso, 266 A.D.2d 716, ___, 699 N.Y.S.2d 136, 138 (3d Dep't 1999), case law has virtually -- but not completely -- eliminated the circumstances under which a request that a DWI suspect submit to sobriety and/or chemical testing constitutes a "custodial interrogation."

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the Supreme Court held that, although the protections of Miranda v. Arizona apply to misdemeanor traffic offenses, persons detained during "ordinary" or "routine" traffic stops are not "in custody" for purposes of Miranda. See also Pennsylvania v. Bruder, 488 U.S. 9, 109 S.Ct. 205 (1988). Note, however, that Berkemer "did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not 'delay formally arresting detained motorists, and . . . subject them to sustained and intimidating interrogation at the scene of their initial detention.'" Bruder, 488 U.S. at 10 n.1, 109 S.Ct. at 207 n.1 (quoting Berkemer). In other words, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Berkemer, 468 U.S. at 440, 104 S.Ct. at 3150.

In South Dakota v. Neville, 459 U.S. 553, 564 n.15, 103 S.Ct. 916, 923 n.15 (1983), the Supreme Court held that "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda." See also id. at 564, 103 S.Ct. at 923 ("We hold . . . that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination"); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("It is . . . settled that Miranda warnings are not required in order to admit the results of chemical analysis tests, or a defendant's refusal to take such tests"); People v. Thomas, 46 N.Y.2d 100, 103, 412 N.Y.S.2d 845, 846 (1978); People v. Craft, 28 N.Y.2d 274, 321 N.Y.S.2d 566 (1971); People v. Boudreau, 115 A.D.2d 652, ___, 496 N.Y.S.2d 489, 491 (2d Dep't 1985); Matter of Hoffman v. Melton, 81 A.D.2d 709, ___, 439 N.Y.S.2d 449, 450-51 (3d Dep't 1981); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978); People v. Dillin, 150 Misc. 2d 311, ___, 567 N.Y.S.2d 991, 992 (N.Y. City Crim. Ct. 1991).

In Berg, *supra*, the Court of Appeals extended the rationale of Neville and Thomas to the refusal to submit to field sobriety tests, holding that "evidence of defendant's refusal to submit to certain field sobriety tests [is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause." 92 N.Y.2d at 703, 685 N.Y.S.2d at 907. Stated another way, the Court held that "defendant's refusal to perform the field sobriety tests [is] not compelled, and therefore [is] not the product of custodial interrogation." Id. at 704, 685 N.Y.S.2d at 908. See also People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983).

### § 41:77 Chemical test refusals and the right to counsel

In People v. Smith, 18 N.Y.3d 544, 549-50, 942 N.Y.S.2d 426, 429-30 (2012), the Court of Appeals summarized the law in this area:

> Vehicle and Traffic Law § 1194 does not address whether a motorist has a right to consult with a lawyer prior to determining whether to consent to chemical testing. However, if the motorist is arrested for driving while intoxicated or a related offense, this Court has recognized a limited right to counsel associated with the criminal proceeding. In People v. Gursey, we held

> that if a defendant arrested for driving while under the influence of alcohol asks to contact an attorney before responding to a request to take a chemical test, the police "may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand." If such a request is made, and it is feasible for the police to allow defendant to attempt to reach counsel without unduly delaying administration of the chemical test, a defendant should be afforded such an opportunity. As we explained in Gursey, the right to seek the advice of counsel -- typically by telephone -- could be accommodated in a matter of minutes and in most circumstances would not substantially interfere with the investigative procedure. That being said, we made clear that there is no absolute right to refuse to take the test until an attorney is actually consulted, nor can a defendant use a request for legal consultation to significantly postpone testing. "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise," a defendant who has asked to consult with an attorney can be required to make a decision without the benefit of counsel's advice on the question. Where there has been a violation of the limited right to counsel recognized in Gursey, any resulting evidence may be suppressed at the subsequent criminal trial.

(Citations omitted). See also People v. Shaw, 72 N.Y.2d 1032, 1033-34, 534 N.Y.S.2d 929, 930 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); Matter of Boyce v. Commissioner of N.Y. State Dep't of Motor Vehicles, 215 A.D.2d 476, ___, 626 N.Y.S.2d 537, 538 (2d Dep't 1995) ("an individual may not condition his or her consent to a chemical test to determine blood alcohol content on first consulting with counsel"); Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 811 (4th Dep't 2008) (same); Matter of Cook v. Adduci, 205 A.D.2d 903, 613 N.Y.S.2d 475 (3d Dep't 1994) (same); Matter of Wilkinson v. Adduci, 176 A.D.2d 1233, 576 N.Y.S.2d 728 (4th Dep't 1991) (same); Matter of Nolan v. Adduci, 166 A.D.2d 277, 564 N.Y.S.2d 118 (1st Dep't 1990) (same); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, 535 N.Y.S.2d 203 (3d Dep't 1988) (same); Matter of Smith v. Passidomo, 120 A.D.2d 599, ___, 502

N.Y.S.2d 73, 74 (2d Dep't 1986) (same); Matter of Brady v. Tofany, 29 N.Y.2d 680, 325 N.Y.S.2d 415 (1971) (same); Matter of Finocchairo v. Kelly, 11 N.Y.2d 58, 226 N.Y.S.2d 403 (1962); People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 558 (Nassau Co. Dist. Ct. 1988); Matter of Leopold v. Tofany, 68 Misc. 2d 3, __, 325 N.Y.S.2d 24, 27 (N.Y. Co. Sup. Ct.), aff'd, 38 A.D.2d 550, 327 N.Y.S.2d 999 (1st Dep't 1971). See generally People v. Wassen, 150 Misc. 2d 662, 569 N.Y.S.2d 877 (N.Y. City Crim. Ct. 1991) (lawyer under arrest not "available"); People v. Wilmot-Kay, 134 Misc. 2d 1081, 514 N.Y.S.2d 313 (Brighton Just. Ct. 1987) (defendant's breath test result suppressed where isolation of in-custody defendant from her sister amounted to a violation of right to counsel).

A request for assistance of counsel must be specific in order to invoke the right to counsel. See, e.g., People v. Hart, 191 A.D.2d 991, ___, 594 N.Y.S.2d 942, 943 (4th Dep't 1993). See generally Shaw, 72 N.Y.2d at 1034, 534 N.Y.S.2d at 930.

At least one Court has held that the right to effective assistance of counsel is violated where the police do not permit the defendant "to conduct a *private* phone conversation with his attorney concerning a breathalyzer test." People v. Iannopollo, 131 Misc. 2d 15, ___, 502 N.Y.S.2d 574, 577 (Ontario Co. Ct. 1983) (emphasis added). In People v. Youngs, 2 Misc. 3d 823, ___, 771 N.Y.S.2d 282, 284 (Yates Co. Ct. 2003), the Court distinguished Iannopollo, finding that, in the particular circumstances presented, "private access to the defendant's attorney would have unduly interfered with the matter at hand," and thus was not required under either Shaw or Gursey.

If the police do not honor a DWI suspect's request to speak with an attorney, and/or fail to take adequate steps to enable the suspect to attempt to reach an attorney, a motion to suppress the suspect's subsequent chemical test refusal (or chemical test result, if the test is taken) will likely be granted. See, e.g., People v. Mora-Hernandez, 77 A.D.3d 531, 909 N.Y.S.2d 435 (1st Dep't 2010); People v. Cole, 178 Misc. 2d 166, 681 N.Y.S.2d 447 (Brighton Just. Ct. 1998); People v. Anderson, 150 Misc. 2d 339, 568 N.Y.S.2d 306 (Nassau Co. Dist. Ct. 1991); People v. Martin, 143 Misc. 2d 341, ___, 540 N.Y.S.2d 412, 415 (Newark Just. Ct. 1989); People v. Stone, 128 Misc. 2d 1009, ___, 491 N.Y.S.2d 921, 925 (N.Y. City Crim. Ct. 1985); People v. Rinaldi, 107 Misc. 2d 916, 436 N.Y.S.2d 156 (Chili Just. Ct. 1981).

In Mora-Hernandez, *supra*, the Appellate Division, First Department, held that:

> The court properly granted defendant's motion to suppress the results of a breathalyzer test and the videotape made of the test on the ground that the officers violated his

> right to counsel. The police ignored defendant's repeated requests for counsel prior to the administration of the test. A defendant who has been arrested for driving while intoxicated and requests assistance of counsel generally has the right to consult with an attorney before deciding whether to consent to a sobriety test. As in People v. Gursey, the officers prevented defendant from contacting his lawyer when there was no indication that granting defendant's request would have substantially interfered with the investigative procedure. The record contradicts the People's contention that defendant voluntarily abandoned his request for counsel when he agreed to take the test.

77 A.D.3d at ___, 909 N.Y.S.2d at 435-36 (citations omitted).

In Martin, *supra*, the Court held that:

> [T]he denial of access to counsel, after a request for such access is made, is at least as serious a breach of defendant's rights as the failure adequately to advise a defendant of the consequences of his refusal to take the test. I therefore hold that if a defendant is denied access to counsel for the purpose of consulting on the decision of whether or not to submit to a chemical test to determine the alcohol content of his blood, a refusal to submit to such a test may not be used as evidence against the defendant at a subsequent trial. It follows, of course, that the prosecutor may not comment on such refusal, nor shall there be a charge to the jury on such subject.

143 Misc. 2d at ___, 540 N.Y.S.2d at 415.

In Cole, *supra*, defendant stated that he wanted to speak with his attorney prior to deciding whether or not to take a requested breath test. In response to defendant's request, the police attempted to reach defendant's attorney, but only at his office phone number (where he was not likely to be, given that it was approximately 3:00 AM). Notably, the attorney's home phone number was also listed in the phone book. Under these circumstances, the Court granted defendant's motion to suppress his breath test result on the ground that the police failed to satisfy their responsibility under Gursey. In so holding, the Court reasoned that:

> The right to consult with counsel cannot be realized if counsel cannot be contacted. Where the defendant is in custody and is reliant on a law enforcement officer to contact the attorney, the officer must make a reasonable attempt to reach defendant's lawyer. If the contact is attempted well outside of normal business hours, efforts to reach the lawyer only at the office when the home phone number is readily available are not reasonable and therefore are insufficient. A reasonable effort in such circumstances requires the officer to locate the lawyer's home phone number if it is listed in either the yellow or the white pages of the phone book. Anything less deprives defendant of his right to access to counsel.

178 Misc. 2d at ___, 681 N.Y.S.2d at 449.

In People v. O'Reilly, 16 Misc. 3d 775, 842 N.Y.S.2d 292 (Suffolk Co. Dist. Ct. 2007), the Court suppressed the defendant's refusal to submit to a chemical test under the following circumstances:

> [T]he defendant invoked his right to counsel when first asked if he would submit to a chemical test of his blood, and again when he was read the Miranda warnings, also stating that he did not wish to speak to the officer without his attorney present. A defendant has a qualified right to consult with a lawyer before deciding whether to consent to a chemical test, provided he makes such a request and no danger of delay is posed. Although the defendant received a telephone call at 1:03 a.m., it cannot be determined from the record whether the person he spoke with was an attorney. The record does establish that John Demonico called the precinct at 1:36 a.m. and identified himself as the defendant's attorney.
>
> Officer Talay's two requests that the defendant submit to a chemical test, made before the 1:36 a.m. call by defendant's attorney, were made in violation of the defendant's qualified right to counsel, since the record does not clearly show that the defendant was able to speak with an attorney before the requests were made. After

> counsel's call at 1:36 a.m., the officer improperly asked the defendant to disclose the content of a privileged communication by asking him if his attorney had advised him to take a chemical test or not, interpreting the defendant's negative response to his question as a refusal.
>
> The defendant's negative response to the officer's improper question was obtained in violation of his Sixth Amendment right to counsel, and the statement itself is subject to suppression on that ground. In addition, it is not clear that this statement was intended to express the defendant's refusal to take the test. The defendant's answer "no" was ambiguous, as the defendant could have meant either that his attorney had not told him whether or not to take the test, or that his attorney had advised him not to take it. Evidence of a defendant's refusal to submit to a chemical test is not admissible at trial unless the People show that the defendant "was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that [he] persisted in the refusal." The People have not met their burden of demonstrating that the defendant refused to take the chemical test and that he persisted in his refusal, and this evidence shall not be admitted at trial.

Id. at ___, 842 N.Y.S.2d at 297-98 (citations omitted).

By contrast, in People v. O'Rama, 162 A.D.2d 727, ___, 557 N.Y.S.2d 124, 125 (2d Dep't 1990), rev'd on other grounds, 78 N.Y.2d 270, 574 N.Y.S.2d 159 (1991), the Appellate Division, Second Department, held that "under the facts of this case, although the defendant requested the assistance of counsel, he was not entitled to wait for an attorney before deciding to take the test since he indicated to the police that he could not get in touch with his attorney because it was too late at night." See also People v. Dejac, 187 Misc. 2d 287, 721 N.Y.S.2d 492 (Monroe Co. Sup. Ct. 2001); People v. Phraner, 151 Misc. 2d 961, 574 N.Y.S.2d 147 (Suffolk Co. Dist. Ct. 1991). See generally People v. Vinogradov, 294 A.D.2d 708, ___, 742 N.Y.S.2d 698, 700 (3d Dep't 2002); People v. DePonceau, 275 A.D.2d 994, 715 N.Y.S.2d 197 (4th Dep't 2000); People v. Kearney, 261 A.D.2d 638, 691 N.Y.S.2d 71 (2d Dep't 1999).

Where counsel has been contacted by phone and advises the motorist to refuse to submit to a chemical test, the motorist can

thereafter validly choose to ignore the attorney's advice and consent to the test, and/or waive the limited "right to counsel" without counsel present. People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 559 (Nassau Co. Dist. Ct. 1988). See also People v. Harrington, 111 Misc. 2d 648, 444 N.Y.S.2d 848 (Monroe Co. Ct. 1981). See generally People v. Phraner, 151 Misc. 2d 961, 574 N.Y.S.2d 147 (Suffolk Co. Dist. Ct. 1991).

In People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 495-96 (Monroe Co. Sup. Ct. 2001), the Court addressed the issue of the burden of proof at a hearing dealing with an alleged violation of the qualified right to counsel, and held that:

> [A]fter the People come forward at the hearing to show the legality of police conduct in the first instance, which is required by the statute, Vehicle & Traffic Law § 1194(2)(f) . . ., if defendant makes a claim that he was not "afforded an adequate opportunity to consult with counsel," or that the efforts of the police were not "reasonable and sufficient under the circumstances," it is the defendant's burden to establish such a claim at the hearing.

(Citations omitted).

It has been held that where the defendant consults with counsel, and then persistently refuses to submit to a properly requested chemical test on counsel's advice, such refusal (including the videotape thereof) is admissible at trial. See People v. McGovern, 179 Misc. 2d 159, ___, 683 N.Y.S.2d 822, 823-24 (Nassau Co. Dist. Ct. 1998).

### § 41:78 Right to counsel more limited at DMV refusal hearing

The limited "right to counsel" discussed in the previous section is even more limited in the context of a DMV refusal hearing. In this regard, in Matter of Cook v. Adduci, 205 A.D.2d 903, ___, 613 N.Y.S.2d 475, 476 (3d Dep't 1994), the Appellate Division, Third Department, stated that "[w]hile indeed, in a criminal proceeding, the failure to comply with a defendant's request for assistance of counsel may result in the suppression of evidence obtained, the same consequence does not apply in the context of an administrative license revocation proceeding." (Citations omitted). See also Matter of Finocchairo v. Kelly, 11 N.Y.2d 58, 226 N.Y.S.2d 403 (1962); Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 811-12 (4th Dep't 2008); Matter of Wilkinson v. Adduci, 176

A.D.2d 1233, ___, 576 N.Y.S.2d 728, 729 (4th Dep't 1991); Matter of Smith v. Passidomo, 120 A.D.2d 599, ___, 502 N.Y.S.2d 73, 74 (2d Dep't 1986).

By contrast, in Matter of Leopold v. Tofany, 68 Misc. 2d 3, __, 325 N.Y.S.2d 24, 27 (N.Y. Co. Sup. Ct.), aff'd, 38 A.D.2d 550, 327 N.Y.S.2d 999 (1st Dep't 1971), the Court held that:

> [W]here, as here, an attorney seeks to confer with his client, who is then in custody, and such conferring will not improperly delay the timely administering of the chemical examination, that right must be granted, or else a refusal to take such examination or the results of the examination may not be utilized against the alleged drunken driver, either in a criminal proceeding, or in the quasi-criminal proceeding to revoke the driver's license.

In any event, DMV's position on this issue is set forth in an internal memorandum to "All Safety ALJs" dated May 8, 1990:

> If a respondent is asked to take a chemical test, and responds by requesting the advice of an attorney, the police officer is not required, for Section 1194 purposes, to grant the request. However, if the officer does not inform the respondent that his request is denied and just records a refusal, there has not been a refusal. The respondent should be reasonably informed in some way (words, conduct, circumstances) that he is not going to be given a chance to consult with an attorney before his insistence on speaking to one can be considered a refusal.

A copy of this memorandum is set forth at Appendix 47.

### § 41:79 Chemical test refusals and the right of foreign nationals to consult with consular officials

"Article 36 of the Vienna Convention on Consular Relations . . . provides for notification of a foreign national's consulate upon the arrest of that foreign national." People v. Litarov, 188 Misc. 2d 234, ___, 727 N.Y.S.2d 293, 295 (N.Y. City Crim. Ct. 2001) (citation omitted). In Litarov, the Court held that the Vienna Convention "does not require that a refusal to take a Breathalyzer test should be suppressed because a defendant was denied access to a consular official." Id. at ___, 727 N.Y.S.2d at 295.

## § 41:80 Chemical test refusals and unconscious defendants

"If a person is unconscious or appears to be unconscious, he is deemed to have impliedly consented to a chemical test." People v. Feine, 227 A.D.2d 901, ___, 643 N.Y.S.2d 281, 282 (4th Dep't 1996). See also VTL § 1194(2)(a); People v. Massong, 105 A.D.2d 1154, ___, 482 N.Y.S.2d 601, 602 (4th Dep't 1984). As such, blood can properly be drawn from the person for purposes of chemical testing despite the fact that he or she is not afforded an opportunity to refuse the test. See, e.g., People v. Kates, 53 N.Y.2d 591, 444 N.Y.S.2d 446 (1981).

By contrast, a DWI suspect who feigns unconsciousness should be treated as a test refusal. See Massong, 105 A.D.2d at ___, 482 N.Y.S.2d at 602 ("Pretending to be unconscious in our view would be conduct evidencing a refusal to submit to a chemical test"). In such a case, blood cannot properly be drawn from the person for purposes of chemical testing without a Court Order. See, e.g., VTL § 1194(2)(b)(1); VTL § 1194(3); People v. Smith, 18 N.Y.3d 544, 549 n.2, 942 N.Y.S.2d 426, 429 n.2 (2012).

In Matter of Taney v. Melton, 89 A.D.2d 1000, 454 N.Y.S.2d 322 (2d Dep't 1982), the Appellate Division, Second Department, held that there was no refusal where (a) the petitioner, who was injured and in the hospital following an automobile accident, agreed to submit to a chemical test but thereafter fell asleep or became unconscious, and (b) there was no competent proof that petitioner was feigning unconsciousness.

The issue thus becomes whether a DWI suspect is actually unconsciousness, or rather is merely pretending to be. In this regard, Courts appear loathe to allow DWI defendants to benefit from feigning unconsciousness. See, e.g., Feine, 227 A.D.2d at ___, 643 N.Y.S.2d at 282 ("Feigning unconsciousness constitutes a refusal only when it is apparent that defendant is feigning unconsciousness for the purpose of refusing to take the test"); Massong, 105 A.D.2d at ___, 482 N.Y.S.2d at 602 ("Trooper Hibsch was not qualified to express a medical opinion as to whether the defendant was unconscious or faking; his opinion [that defendant was faking] was inapposite and because the defendant appeared unconscious there was no refusal to submit to the chemical test") (citation omitted); People v. Stuart, 216 A.D.2d 682, ___, 628 N.Y.S.2d 421, 422 (3d Dep't 1995).

In Kates, *supra*, the Court of Appeals held that "denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection." Id. at 596, 444 N.Y.S.2d at 449. In so holding, the Court reasoned:

> The distinction drawn between the conscious driver and the unconscious or incapacitated

> driver does not offend the equal protection clause. It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse, but to dispense with these requirements when the driver is unconscious or otherwise incapacitated to the point where he poses no threat. Indeed there is a rational basis for distinguishing between the driver who is capable of making a choice and the driver who is unable to do so. Thus, denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection.

Id. at 596, 444 N.Y.S.2d at 448-49.

**§ 41:81 Chemical test refusals and CPL § 60.50**

CPL § 60.50 provides that "[a] person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed." In the context of DWI cases, CPL § 60.50 can apply where there is a lack of corroboration of a DWI suspect's admission of operation. See Chapter 2, *supra*.

In Matter of Van Tassell v. New York State Comm'r of Motor Vehicles, 46 A.D.2d 984, ___, 362 N.Y.S.2d 281, 282 (3d Dep't 1974), the Appellate Division, Third Department, held that the corroboration requirement of CPL § 60.50 does not apply to DMV refusal hearings, as evidence necessary to sustain a criminal conviction is not required.

**§ 41:82 Chemical test refusals and CPL § 200.60**

Several crimes are raised from a "lower grade" to a "higher grade" if the defendant commits them while his or her driving privileges are revoked for refusing to submit to a chemical test. See, e.g., PL § 125.13(2)(b) (Vehicular Manslaughter in the 1st Degree); PL § 120.04(2)(b) (Vehicular Assault in the 1st Degree); VTL § 511(3)(a)(i); VTL § 511(2)(a)(ii) (AUO 1st). Since an underlying chemical test refusal revocation raises the grade of each of these offenses, proof of such revocation is an element of such offenses. See CPL § 200.60(1).

As a result, the People and the Court must utilize the procedure set forth in CPL § 200.60. See People v. Cooper, 78

N.Y.2d 476, 478, 577 N.Y.S.2d 202, 203 (1991) ("When a defendant's prior conviction raises the grade of an offense, and thus becomes an element of the higher grade offense, the Criminal Procedure Law -- reflecting a concern for potential prejudice and unfairness to the defendant in putting earlier convictions before the jury -- specifies a procedure for alleging and proving the prior convictions (CPL 200.60)"). This statute provides, in pertinent part, that:

> A previous conviction that "raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter" may not be referred to in the indictment (CPL 200.60[1]). Instead, it must be charged by special information filed at the same time as the indictment (CPL 200.60[2]). An arraignment must be held on the special information outside the jury's presence. If a defendant admits a previous conviction, "that element of the offense * * * is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense." (CPL 200.60[3][a]). If, however, the defendant denies the previous conviction or remains silent, the People may prove that element before the jury as part of their case (CPL 200.60[3][b]).

Cooper, 78 N.Y.2d at 481-82, 577 N.Y.S.2d at 205.

Construed literally, CPL § 200.60 only applies to a defendant's previous *convictions* -- *not* to "*conviction-related facts*" such as a chemical test refusal revocation. Faced with this "Catch-22" situation in Cooper, the Court of Appeals held that the spirit and purpose of CPL § 200.60 requires that the statute be applied not only to previous convictions, but also to relevant "conviction-related facts":

> In a situation such as the one before us -- where pleading and proving knowledge of a prior conviction necessarily reveals the conviction -- the protection afforded by CPL 200.60 can be effectuated only by reading the statute to require resort to the special information procedure for all of the conviction-related facts that constitute the enhancing element.

> Proper application of CPL 200.60 required that defendant be given an opportunity to admit -- outside the jury's presence -- the element that raised his crime in grade. That opportunity could have been afforded by a special information charging him with the prior conviction, the revocation of his license, and knowledge of the conviction and revocation. If defendant chose to admit those facts, no mention of them was necessary before the jury. If defendant denied all or any of those facts, the People could have proceeded with their proof, as the statute provides.

78 N.Y.2d at 482-83, 577 N.Y.S.2d at 205.

Although Cooper involved a charge of Vehicular Manslaughter in the 1st Degree, its rationale obviously applies to AUO 1st. See, e.g., People v. Flanagan, 247 A.D.2d 899, 668 N.Y.S.2d 528 (4th Dep't 1998); People v. Boyles, 210 A.D.2d 732, 621 N.Y.S.2d 118 (3d Dep't 1994); People v. Brockway, 202 A.D.2d 1015, 609 N.Y.S.2d 481 (4th Dep't 1994); People v. Sawyer, 188 A.D.2d 939, 592 N.Y.S.2d 92 (3d Dep't 1992).

In addition, a chemical test refusal revocation is a "conviction-related fact" for purposes of Cooper/CPL § 200.60. See People v. Alshoaibi, 273 A.D.2d 871, 711 N.Y.S.2d 646 (4th Dep't 2000); People v. Orlen, 170 Misc. 2d 737, 651 N.Y.S.2d 860 (Nassau Co. Ct. 1996).

The procedure set forth in CPL § 200.60 and Cooper arguably also applies to AUO 2nd. See generally People ex rel. Paganini v. Jablonsky, 79 N.Y.2d 586, 590, 584 N.Y.S.2d 415, 416 (1992) ("Appellant reasons that the elements of his [AUO 2nd] conviction included his prior refusal to submit to a chemical test and his prior [DWAI] conviction, both alcohol-related predicates. [W]e may well agree that [appellant's] Vehicle and Traffic Law § 511(2)(a)(ii) conviction had a factual and legal genesis in prior alcohol-related conduct").

### § 41:83 Chemical test refusals and CPL § 710.30 Notice

A refusal to submit to a chemical test is communicative or testimonial in nature, regardless of the form of the refusal (*e.g.*, oral, written, conduct). People v. Thomas, 46 N.Y.2d 100, 106-07, 412 N.Y.S.2d 845, 849 (1978). See also People v. Peeso, 266 A.D.2d 716, ___, 699 N.Y.S.2d 136, 138 (3d Dep't 1999). In addition, a refusal to submit to a chemical test is potentially suppressible on several grounds. For example, a test refusal, like a chemical test, can be suppressed:

(a) As the fruit of an illegal stop. See, e.g., Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010);

(b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);

(c) If it is obtained in violation of the right to counsel. See, e.g., People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or

(d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

Nonetheless, in Peeso, *supra*, the Appellate Division, Third Department, stated:

> We . . . reject the contention that the absence of notice pursuant to CPL 710.30 precluded the People's offer of evidence concerning defendant's test refusal (see, Vehicle and Traffic Law § 1194[2][f]). It is settled law that because there is no compulsion on a defendant to refuse to submit to the chemical test provided for in Vehicle and Traffic Law § 1194(2), the defendant "ha[s] no constitutional privilege or statutory right to refuse to take the test." Therefore, defendant's refusal, although constituting communicative or testimonial evidence, could not "[c]onsist[] of a record or potential testimony reciting or describing a statement of [] defendant involuntarily made, within the meaning of [CPL] 60.45" (CPL 710.20[3]) or thereby implicate the notice requirement of CPL 710.30(1)(a).

266 A.D.2d at ___, 699 N.Y.S.2d at 138 (citations omitted). Cf. People v. Burtula, 192 Misc. 2d 597, ___, 747 N.Y.S.2d 692, 694 (Nassau Co. Dist. Ct. 2002). Notably, since the Peeso Court

found that "the record demonstrates that the People provided adequate notice pursuant to CPL 710.30(1) of their intent to introduce the refusal at trial," 266 A.D.2d at ___, 699 N.Y.S.2d at 138, the above-quoted language is arguably *dicta*.

In any event, a defendant's refusal to submit to a chemical test is discoverable pursuant to CPL § 240.20(1)(a), which provides for disclosure of "[a]ny written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him."

In this regard, "[i]t is beyond dispute that a defendant's own statements to police are highly material and relevant to a criminal prosecution. It is for this reason that such statements are *always* discoverable, even when the People do not intend to offer them at trial." People v. Combest, 4 N.Y.3d 341, 347, 795 N.Y.S.2d 481, 485 (2005) (emphasis added). See also People v. Fields, 258 A.D.2d 809, ___, 687 N.Y.S.2d 184, 186 (3d Dep't 1999) ("CPL 240.20(1)(a) . . . is not limited to statements intended to be offered by the People 'at trial', i.e., statements offered as part of the People's direct case (see, CPL 240.10[4])"); People v. Crider, 301 A.D.2d 612, ___, 756 N.Y.S.2d 223, 225 (2d Dep't 2003) (pursuant to CPL § 240.20(1)(a), "the People shall provide the defendant with notice of *any* of his statements they are aware of, whether or not they intend to use them for *any* purpose, including but not limited to rebuttal") (emphases added); People v. Wyssling, 82 Misc. 2d 708, 372 N.Y.S.2d 142 (Suffolk Co. Ct. 1975); People v. Bennett, 75 Misc. 2d 1040, ___-___, 349 N.Y.S.2d 506, 519-20 (Erie Co. Sup. Ct. 1973). Thus, any argument by the People that they need only disclose statements to which CPL § 710.30 applies is without merit. See Combest, 4 N.Y.3d at 347, 795 N.Y.S.2d at 485; Fields, 258 A.D.2d at ___, 687 N.Y.S.2d at 185; People v. Hall, 181 A.D.2d 1008, 581 N.Y.S.2d 951 (4th Dep't 1992).

### § 41:84 Chemical test refusals and collateral estoppel

In People v. Walsh, 139 Misc. 2d 182, ___, 527 N.Y.S.2d 708, 709 (Monroe Co. Ct. 1988), the Court held that "the County Court, in criminal proceedings, is not subject to collateral estoppel by decisions resulting from Section 1194 hearings of the Department of Motor Vehicles." See also People v. Kearney, 196 Misc. 2d 335, 764 N.Y.S.2d 542 (Sullivan Co. Ct. 2003) (same); People v. Riola, 137 Misc. 2d 616, 522 N.Y.S.2d 419 (Nassau Co. Dist. Ct. 1987) (same); People v. Lalka, 113 Misc. 2d 474, 449 N.Y.S.2d 579 (Rochester City Ct. 1982) (same). See generally Matter of Duran v. Melton, 108 Misc. 2d 120, 437 N.Y.S.2d 49 (Monroe Co. Sup. Ct. 1981).

By contrast, DMV's position on the issue of collateral estoppel is as follows:

> In adjourned cases, a conviction may already exist on the alcohol charge underlying the refusal on which you are holding the hearing. If there has been a conviction or plea to [VTL §] 1192(2,3,4), then the issues of probable cause and lawful arrest are conclusively decided (collateral estoppel). If there has been a plea to [VTL §] 1192(1), it can be considered an admission against interest on these two issues, but is subject to attac[k] and explanation by the motorist. If there has been an 1192(1) conviction after trial, then all issues must be established without reference to the conviction.

See Memorandum from DMV Administrative Office Director Sidney W. Berke to All Safety Administrative Law Judges, dated June 5, 1986, set forth at Appendix 44. See also Appendix 47 (same).

Where a DWI arrest is found to be supported by probable cause both (a) at a DMV refusal hearing, and (b) following a probable cause hearing in Town Court, the doctrine of collateral estoppel precludes the motorist from relitigating the issue of probable cause in an action for false arrest, false imprisonment or malicious prosecution, and thus precludes such an action. Janendo v. Town of New Paltz Police Dep't, 211 A.D.2d 894, 621 N.Y.S.2d 175 (3d Dep't 1995). See also Holmes v. City of New Rochelle, 190 A.D.2d 713, 593 N.Y.S.2d 320 (2d Dep't 1993); Coffey v. Town of Wheatland, 135 A.D.2d 1125, 523 N.Y.S.2d 267 (4th Dep't 1987). Cf. Menio v. Akzo Salt Inc., 217 A.D.2d 334, ___ n.2, 634 N.Y.S.2d 802, 803 n.2 (3d Dep't 1995) ("To the extent that Janendo v. Town of New Paltz Police Dept. *(supra)* may be interpreted to enable collateral estoppel to be grounded solely upon a probable cause determination of a town justice, we decline to follow it").

### § 41:85 Chemical test refusals and equitable estoppel

In Matter of Ginty, 74 Misc. 2d 625, 345 N.Y.S.2d 856 (Niagara Co. Sup. Ct. 1973), following his arrest for DWI, the petitioner feigned a heart attack. During the "chaotic" situation which ensued, petitioner was requested to submit to a chemical test, but the arresting officer failed to administer sufficient refusal warnings to petitioner. Under these unique circumstances, the Court held that "the petitioner because of his own actions is estopped" from challenging the sufficiency of the refusal warnings. Id. at ___, 345 N.Y.S.2d at 858.

## § 41:86 Chemical test refusal sanctions as Double Jeopardy

The prosecution of a defendant for a violation of VTL § 1192 following a chemical test refusal revocation does not violate the Double Jeopardy Clause. Matter of Brennan v. Kmiotek, 233 A.D.2d 870, 649 N.Y.S.2d 611 (4th Dep't 1996). See also Matter of Barnes v. Tofany, 27 N.Y.2d 74, 77, 313 N.Y.S.2d 690, 693 (1970) ("We hold that the 'double punishment' feature of our Vehicle and Traffic statute -- one criminal and the other administrative -- is lawful"); People v. Frank, 166 Misc. 2d 277, 631 N.Y.S.2d 1014 (N.Y. City Crim. Ct. 1995). See generally People v. Demetsenare, 243 A.D.2d 777, ___, 663 N.Y.S.2d 299, 303 (3d Dep't 1997); People v. Roach, 226 A.D.2d 55, 649 N.Y.S.2d 607 (4th Dep't 1996); Matter of Smith v. County Court of Essex County, 224 A.D.2d 89, 649 N.Y.S.2d 507 (3d Dep't 1996).

Similarly, the Double Jeopardy Clause is not violated where a DMV license revocation proceeding is commenced despite the motorist's previous acquittal in a criminal case stemming from the same conduct. Matter of Giudice v. Adduci, 176 A.D.2d 1175, ___, 575 N.Y.S.2d 611, 612 (3d Dep't 1991).

## § 41:87 Admissibility of chemical test result obtained despite refusal

In the field of chemical testing and chemical test refusals, there is a clear (and critical) distinction between a DWI suspect's Constitutional rights and his or her statutory rights. Thus, for example, while a DWI suspect has no *Constitutional* right to refuse to submit to a chemical test, see, e.g., South Dakota v. Neville, 459 U.S. 553, 560 n.10, 103 S.Ct. 916, 921 n.10 (1983); Missouri v. McNeely, 133 S.Ct. 1552, 1566 (2013); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); People v. Shaw, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 930 (1988); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1981); People v. Thomas, 46 N.Y.2d 100, 106, 412 N.Y.S.2d 845, 848 (1978), he or she nonetheless has a well recognized *statutory* right to do so. See, e.g., Shaw, 72 N.Y.2d at 1034, 534 N.Y.S.2d at 930; People v. Daniel, 84 A.D.2d 916, ___, 446 N.Y.S.2d 658, 659 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Wolter, 83 A.D.2d 187, ___, 444 N.Y.S.2d 331, 333 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978).

In this regard, VTL § 1194(2)(b)(1) provides that, unless a Court Order has been granted pursuant to VTL § 1194(3), if a DWI suspect has refused to submit to a chemical test "*the test shall not be given* and a written report of such refusal shall be immediately made by the police officer before whom such refusal

was made." (Emphasis added). See also VTL § 1194(3)(b) ("Upon refusal by any person to submit to a chemical test or any portion thereof as described above, *the test shall not be given* unless a police officer or a district attorney . . . requests and obtains a court order to compel [the test]") (emphasis added).

In People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982), the Court of Appeals:

(a) Made clear that VTL § "1194 has pre-empted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." Id. at 109, 454 N.Y.S.2d at 297; and

(b) Held that "[a]bsent a manifestation of a defendant's consent thereto, blood samples taken without a court order other than in conformity with the provisions of subdivisions 1 and 2 of section 1194 of the Vehicle and Traffic Law are inadmissible in prosecutions for operating a motor vehicle while under the influence of alcohol under section 1192 of that law. Beyond that, blood samples taken without a defendant's consent are inadmissible in prosecutions under the Penal Law unless taken pursuant to an authorizing court order." Id. at 101, 454 N.Y.S.2d at 293.

See also People v. Smith, 18 N.Y.3d 544, 549 n.2, 942 N.Y.S.2d 426, 429 n.2 (2012) ("If the motorist declines to consent, the police may not administer the test unless authorized to do so by court order (see Vehicle and Traffic Law § 1194[3])"); People v. Kates, 53 N.Y.2d 591, 596, 444 N.Y.S.2d 446, 448 (1981) ("the Legislature . . . provide[d] that the police must request the driver's consent, advise him of the consequences of refusal *and honor his wishes if he decides to refuse*") (emphasis added); People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978) ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal *the test is not to be given* (§ 1194, subd. 2); the choice is the driver's") (emphasis added).

Clearly, according to VTL § 1194(2)(b)(1), VTL § 1194(3)(b), Moselle, Smith, Kates and Thomas, where a DWI suspect is requested to submit to a chemical test, declines, is read refusal warnings, and thereafter persists in his or her refusal, "*the test shall not be given*" (absent a Court Order pursuant to VTL § 1194(3)). See also Mackey v. Montrym, 443 U.S. 1, 5, 99 S.Ct. 2612, 2614 (1979) ("The statute leaves an officer no discretion once a breath-analysis test has been refused: 'If the person arrested refuses to submit to such test or analysis, . . . the

police officer before whom such refusal was made *shall immediately* prepare a written report of such refusal'"). Accordingly, a test result obtained under such circumstances should be inadmissible -- not because it violates the Constitution -- but rather because it violates the statutory scheme of VTL § 1194.

Nonetheless, in People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74-75 (3d Dep't 1983), the Appellate Division, Third Department, held:

> Defendant interprets section 1194 (subd. 2) of the Vehicle and Traffic Law to mandate that once a defendant refuses to submit to a chemical test after being fully apprised of the consequences of such refusal, all further requests and prompting by the police for defendant to reconsider and submit must immediately cease and the chemical test not be given. . . . Defendant's suggested literal interpretation of the subject statutory provision is misplaced and without merit. . . .
>
> Section 1194 of the Vehicle and Traffic Law does not, either expressly or by implication, foreclose the police from resuming discussion with a defendant and renewing their request that he submit to a chemical test.

Notably, the Stisi Court failed to cite Kates and/or Thomas, each of which appears to support the defendant's "suggested literal interpretation" of VTL § 1194(2).

Although People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988), appears at first glance to reach the same conclusion as the Stisi Court, in actuality it does not. In Cragg, "[d]efendant contend[ed] that the police violated Vehicle and Traffic Law § 1194(2) by administering a breathalyzer test despite defendant's initial refusal to submit to the test, and by informing him of certain consequences -- not specifically prescribed by the statute -- of such refusal." In rejecting defendant's claims, the Court of Appeals held:

> Contrary to defendant's assertion, the statute is not violated by an arresting officer informing a person as to the consequences of his choice to take or not take a breathalyzer test. Thus, it cannot be said, *in the circumstances of this case*, that by informing defendant that his refusal to submit to the test would result in his

> arraignment before a Magistrate and the posting of bail, the officer violated the provisions of the Vehicle and Traffic Law.

71 N.Y.2d at 927, 528 N.Y.S.2d at 807-08 (emphasis added).

However, the wording of the Cragg decision indicates that defendant's "initial refusal" to submit to the test preceded the refusal warnings -- requiring that defendant be informed of the consequences of a refusal and given a chance to change his mind. See Thomas, 46 N.Y.2d at 108, 412 N.Y.S.2d at 850 ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal the test is not to be given (§ 1194, subd. 2); the choice is the driver's"). Thus, the procedure followed in Cragg did not constitute an attempt to persuade the defendant to change his mind after a valid, persistent refusal had occurred. Rather, it is an example of the statute being implemented exactly as envisioned by the Legislature and the Court of Appeals. The position that Cragg was not intended to change settled law in this area is supported by the fact that Cragg (a) is a memorandum decision, (b) did not cite Stisi, and (c) did not cite Moselle, Kates and/or Thomas.

In People v. Ameigh, 95 A.D.2d 367, 467 N.Y.S.2d 718 (3d Dep't 1983), the defendant refused to submit to a police-requested chemical test, but his blood was nonetheless drawn and tested by hospital personnel for "diagnostic purposes." In ruling that the test result obtained in this manner was admissible, the Appellate Division, Third Department, reasoned:

> [W]e are not unmindful of the holding by the Court of Appeals in People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292, 439 N.E.2d 1235 that "[VTL §] 1194 has preempted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." . . .
>
> [However], the statutory framework simply does not address itself to evidence of blood-alcohol levels derived as a result of bona fide medical procedures in diagnosing or treating an injured driver. In that context, it is apparent to us that the provision in section 1194 (subd. 2) that the test shall not be given to a person expressly declining the officer's request does not render inadmissible the results of tests not taken at the direction or on behalf of the police.

> The legislative purpose underlying that provision was "to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test."

Id. at ___-___, 467 N.Y.S.2d at 718-19 (citation omitted).

### § 41:88 Admissibility of chemical test refusal evidence in actions arising under Penal Law

In People v. Loughlin, 154 A.D.2d 552, ___, 546 N.Y.S.2d 392, 393 (2d Dep't 1989), the Appellate Division, Second Department, held that "[t]he defendant's contention that evidence of his refusal to take a breathalyzer test should not have been admitted because he was charged with crimes arising under the Penal Law rather than under the Vehicle and Traffic Law . . . is without merit." See also People v. Stratis, 137 Misc. 2d 661, ___-___, 520 N.Y.S.2d 904, 910-11 (Kings Co. Sup. Ct. 1987) (VTL § 1194(4) (currently VTL § 1194(2)(f)) applies to Penal Law violations, and thus evidence of defendant's refusal to submit to chemical test inadmissible where refusal warnings were not read to defendant in "clear and unequivocal" language), aff'd on other grounds, 148 A.D.2d 557, 54 N.Y.S.2d 186 (2d Dep't 1989).

### § 41:89 Admissibility of chemical test refusal evidence in civil actions

In Bazza v. Banscher, 143 A.D.2d 715, ___, 533 N.Y.S.2d 285, 286 (2d Dep't 1988), the Appellate Division, Second Department, held that:

> The trial court . . . erred when it prevented the plaintiffs from introducing into evidence Banscher's refusal to submit to a breathalyzer test after the accident. The admission of evidence was not barred by Vehicle and Traffic Law § 1194(4) [currently VTL § 1194(2)(f)]. This provision does not preclude the admission of evidence of a refusal to submit to a blood-alcohol test in proceedings other than criminal prosecutions under Vehicle and Traffic Law § 1192. Instead, with respect to proceedings pursuant to § 1192 only, it establishes prerequisites for the admission of such evidence.

## § 41:90 Applicability of "two-hour rule" to chemical test refusals

The two-hour rule stems from VTL § 1194(2)(a), which provides, in pertinent part:

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood *provided that* such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
> > (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] *and within two hours* after such person has been placed under arrest for any such violation; or . . .
> >
> > (2) *within two hours* after a breath test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member.

VTL § 1194(2)(a)(1), (2) (emphases added). See Chapter 31, *supra*.

In People v. Brol, 81 A.D.2d 739, ___, 438 N.Y.S.2d 424, 424 (4th Dep't 1981), the Appellate Division, Fourth Department, held that if the defendant "was requested to take the [chemical] test after the two hours had expired, evidence of his refusal was incompetent and should not have been considered by the jury." See also People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 350 (Nassau Co. Dist. Ct. 1988).

By contrast, in People v. Ward, 176 Misc. 2d 398, ___, 673 N.Y.S.2d 297, 300 (Richmond Co. Sup. Ct. 1998), the Court held that "considering the reasoning in Brol, *supra* in conjunction with several subsequent decisions interpreting the scope of the two hour rule, it seems clear that today the rule has no

application in a determination of the admissibility of evidence that a defendant refused a chemical test." See also People v. Robinson, 82 A.D.3d 1269, ___, 920 N.Y.S.2d 162, 164 (2d Dep't 2011) ("Where, as here, the person is capable, but refuses to consent, evidence of that refusal, as governed by Vehicle and Traffic Law § 1194(2)(f), is admissible into evidence regardless of whether the refusal is made more than two hours after arrest"); People v. Rodriguez, 26 Misc. 3d 238, ___, 891 N.Y.S.2d 246, 248-49 (Bronx Co. Sup. Ct. 2009); People v. Coludro, 166 Misc. 2d 662, ___, 634 N.Y.S.2d 964, 967-68 (N.Y. City Crim. Ct. 1995); People v. Morales, 161 Misc. 2d 128, ___, 611 N.Y.S.2d 980, 984 (N.Y. City Crim. Ct. 1994).

In People v. Morris, 8 Misc. 3d 360, ___, 793 N.Y.S.2d 754, 757-58 (N.Y. City Crim. Ct. 2005), the Court expressly disagreed with the above-quoted language in Ward, and held that the two-hour rule is still applicable to chemical test refusals. See also id. at ___, 793 N.Y.S.2d at 758 ("the evidence of the refusal is suppressed based upon the tolling of the two-hour rule. Two-hours should mean two-hours, absent a knowing waiver and consent to take the test"). In addition, in People v. Rosa, 112 A.D.3d 551, ___, 977 N.Y.S.2d 250, 250-51 (1st Dep't 2013), the Appellate Division, First Department, stated that "[b]ecause more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court."

Regardless of the admissibility of such evidence at trial, the two-hour rule had always applied to DMV refusal hearings. In this regard, the standardized DMV Report of Refusal to Submit to Chemical Test form expressly stated that "[s]ection 1194 of the Vehicle and Traffic Law requires that the refusal must be within two hours of the arrest." This makes sense in that the "implied consent" provisions of VTL § 1194 only apply "*provided that*" the chemical test is administered within two hours of either the time of arrest for a violation of VTL § 1192 or the time of a positive breath screening test. See VTL § 1194(2)(a)(1), (2); § 31:2, *supra*. Since the civil sanctions for a chemical test refusal are imposed on a motorist as a penalty for revoking his or her implied consent, and are wholly unrelated to the issue of guilt or innocence, they should not be imposed when the requirements of VTL § 1194(2)(a) are not met.

Nonetheless, in 2012 DMV switched its position on this issue. In other words, DMV no longer applies the two-hour rule to chemical test refusal hearings. A copy of DMV Counsel's Office's letter in this regard is attached hereto as Appendix 68. Critically, however, in Rosa, *supra*, the Appellate Division, First Department, stated that "[b]ecause more than two hours had passed since defendant's arrest, the officer who administered the

breathalyzer test should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court." 112 A.D.3d at ___, 977 N.Y.S.2d at 250-51.

In People v. Harvin, 40 Misc. 3d 921, ___, 969 N.Y.S.2d 851, 856 (N.Y. City Crim. Ct. 2013), the Court summarized the evolution of the two-hour rule as applied to chemical test refusals, and concluded as follows:

> Jurisprudence like many things can be a continuous journey. The law is not fixed, and even the opinions of a judge can change over the years through discussions with colleagues and by hearing the arguments of advocates. Additionally, the courts that review our decisions, the "policy-making" courts, influence what the law is and what the law should be. Such an evolution has taken place in my decisions on the two-hour rule. While my personal belief may be that the two-hour rule is one of evidence, and that the Legislature designed it as such, clearly that is not a majority opinion, nor does it represent the current state of the law in New York. Likewise, it is clear that if our policy courts consider this rule to be no more than an implied consent rule, then a refusal after two hours should be admitted into evidence as long as it is knowing and persistent, and the People have met their burden as to that knowing and unequivocal refusal in this case. The Legislature, for its part, has had ample opportunity to clearly state a desire to return the two-hour rule to an evidentiary rule if it deemed the courts' positions to be incorrect.

(Citations omitted).

### § 41:91 Loss of videotape containing alleged chemical test refusal requires sanction

In People v. Marr, 177 A.D.2d 964, 577 N.Y.S.2d 1008 (4th Dep't 1991), the police erased a videotape which had contained discoverable evidence pertaining to, among other things, defendant's alleged unsuccessful attempts to submit to a breathalyzer test. Following a hearing, County Court "imposed a sanction precluding the People from introducing any evidence of defendant's alleged refusal to submit to the breathalyzer test." Id. at ___, 577 N.Y.S.2d at 1009.

On appeal, the Appellate Division, Fourth Department, held that "County Court properly exercised its discretion in fashioning an appropriate sanction. Although an adverse inference charge may also have been appropriate, in our view, the court did not abuse its discretion in precluding the prosecution from introducing evidence at trial of defendant's alleged refusal to submit to the breathalyzer test as its sole sanction for the prosecution's failure to preserve the videotape." Id. at ___, 577 N.Y.S.2d at 1009 (citations omitted). See also People v. Litarov, 188 Misc. 2d 234, ___, 727 N.Y.S.2d 293, 297 (N.Y. City Crim. Ct. 2001) (under circumstances presented, adverse inference charge appropriate sanction for People's loss of videotape of defendant's chemical test refusal).

### § 41:92 Policy of sentencing defendants convicted of DWAI to jail if they refused chemical test is illegal

In People v. McSpirit, 154 Misc. 2d 784, 595 N.Y.S.2d 660 (App. Term, 9th & 10th Jud. Dist. 1993), the defendant was sentenced to, *inter alia*, 5 days in jail upon her conviction of DWAI, in violation of VTL § 1192(1). In this regard, the Town Court apparently had "a policy of incarcerating those who refuse to take a breathalyzer test and are thereafter convicted of driving while impaired." Id. at ___, 595 N.Y.S.2d at 661.

On appeal, the Appellate Term modified defendant's sentence by deleting the term of incarceration, holding that "the policy as such is arbitrary, capricious and unauthorized by statute." Id. at ___, 595 N.Y.S.2d at 661.

### § 41:93 Report of refusal to submit to chemical test is discoverable pursuant to CPL § 240.20

Where a DWI defendant refuses to submit to a chemical test, or any portion thereof, to determine the alcoholic and/or drug content of his or her blood, "unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and *a written report of such refusal shall be immediately made by the police officer before whom such refusal was made*." VTL § 1194(2)(b)(1) (emphasis added). Such a report (a.k.a. a Report of Refusal to Submit to Chemical Test) constitutes a written report or document concerning a physical examination and/or a scientific test or experiment relating to the criminal action. As such, it is discoverable pursuant to CPL §§ 240.20(1)(c) and 240.20(1)(k) (and is not merely Rosario material).

A defendant's refusal to submit to a chemical test is also discoverable pursuant to CPL § 240.20(1)(a), which provides for the disclosure of "[a]ny written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law

enforcement activity or to a person then acting under his direction or in cooperation with him."

### § 41:94 Dentures and test refusals

There is research indicating that dentures can retain "mouth alcohol" for longer than the 15-20 minute continuous observation period which is required to insure that a breath test is not contaminated by mouth alcohol. See 10 NYCRR § 59.5(b). As a result, breath test operators are generally trained to inquire as to whether a DWI suspect wears dentures; and, if the suspect answers affirmatively, to (a) direct the suspect to remove the dentures, (b) direct the suspect to rinse his or her mouth out with water, and (c) conduct a new observation period, prior to the administration of the breath test.

However, a DWI suspect may feel particularly self-conscious in this regard. Thus, the situation can arise where the suspect consents to take a breath test but refuses to remove his or her dentures in connection therewith. Does such conduct constitute a test refusal?

DMV's position on this issue is that such conduct will constitute a chemical test refusal so long as the police "have advised the individual as to why the dentures must be removed and how such removal is necessary to the validity of the test." See Letter from former DMV First Assistant Counsel Joseph R. Donovan to Peter Gerstenzang, set forth at Appendix 45. In this regard, DMV strongly recommends that police departments incorporate denture removal procedures into their breath test rules and regulations. See id. See also Letter from former DMV First Assistant Counsel Joseph R. Donovan to Peter Gerstenzang, set forth at Appendix 46.

### § 41:95 Prosecutor's improper cross-examination and summation in refusal case results in reversal

In People v. Handwerker, 12 Misc. 3d 19, 816 N.Y.S.2d 824 (App. Term, 9th & 10th Jud. Dist. 2006), the defendant was convicted of DWAI following a jury trial. On appeal, the Appellate Term reversed, finding merit in defendant's claim "that he was denied a fair trial because, during cross-examination and summation, the prosecution improperly shifted the burden of proof to him by creating a presumption against him that he had to prove his innocence by taking a chemical test." Id. at ___, 816 N.Y.S.2d at 826. Specifically:

> During cross-examination, the prosecutor asked the defendant the following question: "[y]ou didn't say, I want to prove my innocence so give me the test,' right?" The

> court overruled defense counsel's objection and defendant indicated that he had not made such a request. During summation, the prosecutor remarked, "[w]ell, if he's innocent, then why doesn't he want to take the test to prove that?"
>
> It is well settled that the People have the unalterable burden of proving beyond a reasonable doubt every element of the crime charged. The prosecutor's inquiry during cross-examination and his remark during summation, in effect, suggested to the jury that it was defendant's burden to prove his innocence by submitting to a chemical test. . . . While refusal to take a chemical test is admissible at trial against a defendant as evidence of his consciousness of guilt, the prosecution sought to use defendant's refusal for purposes beyond that allowed by the law. We conclude that the cumulative effect of such misconduct by the prosecution substantially prejudiced defendant's right to a fair trial. Accordingly, the judgment convicting defendant of driving while ability impaired is reversed and a new trial is ordered as to said charge.

Id. at ___, 816 N.Y.S.2d at 826 (citations omitted).

In People v. Anderson, 89 A.D.3d 1161, ___, 932 N.Y.S.2d 561, 563 (3d Dep't 2011):

> No dispute exist[ed] that defendant was adequately warned as to the consequences of his refusal to submit to a chemical test, or that he repeatedly refused to take such a test. Defendant argue[d], nevertheless, that the People's statements and questioning of him at trial regarding his refusal to consent to a chemical blood test deprived him of a fair trial by impermissibly shifting the burden of proof to him. Specifically, during both cross-examination and summation, the People suggested that, by refusing to take the test, defendant forewent the opportunity to prove his innocence. Supreme Court sustained defendant's objections to these questions and comments, informing the jury that defendant did not bear any burden of proof and that it was entitled, but not required, to infer that defendant refused the

> test because he feared it would provide evidence of his guilt. *Under these circumstances*, we see no evidence that the burden of proof was improperly shifted to defendant or that he was deprived of a fair trial.

(Emphasis added).

### § 41:96 Improper presentation of refusal evidence to Grand Jury did not require dismissal of indictment

In People v. Jeffery, 70 A.D.3d 1512, ___, 894 N.Y.S.2d 797, 798 (4th Dep't 2010), "the People failed to comply with the requirements of Vehicle and Traffic Law § 1194(2)(f) and thus improperly presented evidence to the grand jury concerning defendant's refusal to submit to a chemical test." After concluding that the remaining evidence before the Grand Jury was legally insufficient, County Court dismissed the indictment. The Appellate Division, Fourth Department, reversed, concluding that:

> Although the court properly concluded that the evidence of defendant's refusal to submit to a chemical test was erroneously presented to the grand jury, we note that "'dismissal of an indictment under CPL 210.35(5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury.'" We agree with the People that there were no such instances here. Furthermore, we reject defendant's contention that the grand jury proceedings were impaired by the presentation of the inadmissible evidence. It is well settled that "not every . . . elicitation of inadmissible testimony . . . renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment." We also agree with the People that the remaining admissible evidence was legally sufficient to support the indictment.

Id. at ___, 894 N.Y.S.2d at 798 (citations omitted).

CHAPTER 14

# COMMERCIAL DRIVERS AND SPECIAL VEHICLES

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## § 14:1 In general

Prior to September 30, 2005, most of the DWI-related statutes pertinent to commercial drivers were only applicable if the defendant was operating a commercial motor vehicle at the time of the offense -- which was a relatively rare occurrence. However, critical changes to the laws took effect on September 30, 2005. As of that date, the critical issue is no longer whether the defendant was operating a commercial motor vehicle, but rather whether the defendant possesses a commercial driver's license ("CDL").

Under the new laws, VTL § 1192 convictions, chemical test refusals, and certain other offenses have a dramatic impact on a CDL *regardless of the type of motor vehicle that the CDL holder was operating in connection with the offense*. In addition, the traffic infraction of leaving the scene of a property damage accident in violation of VTL § 600(1) is now treated as seriously as VTL § 1192 offenses when committed by the holder of a CDL.

It is essential that defense attorneys representing CDL holders become familiar with the rules regarding "permanent" CDL revocation for repeat offenders. See §§ 14:11-14:13, *infra*. This issue is one of the most serious -- and least understood -- in the field of DWI law.

This chapter addresses important issues faced by CDL holders, as well as by those who operate commercial or so-called "special vehicles." It should be noted that there is some overlap between commercial and special vehicles. For example, certain vehicles that are denominated "special vehicles" in VTL § 1193(1)(d) (e.g., school buses and certain vehicles transporting hazardous materials) are commercial motor vehicles requiring a CDL.

## § 14:2 What is a "CDL"?

The term "commercial driver's license" or "CDL" is defined as:

> A class A or B driver's license or a class C driver's license which bears an H, P or X endorsement, which licenses contain the legend commercial driving license or CDL thereon and which is issued in accordance with the commercial motor vehicle safety act of 1986, public law 99-570, title XII, and this article which authorizes a person to operate a commercial motor vehicle.

VTL § 501-a(1). See also VTL § 501(2).

## § 14:3 What is a "commercial motor vehicle"?

The term "commercial motor vehicle" is defined in two places in the VTL -- and thus it can have different meanings in different contexts. For purposes of VTL Article 19 (*i.e.*, VTL §§ 501-09), VTL Article 20 (*i.e.*, VTL §§ 510-17) and VTL Article 31 (*i.e.*, VTL §§ 1192-99), the term "commercial motor vehicle" is defined as "[a] motor vehicle or combination of vehicles designed or used to transport passengers or property," and which:

1. Has a GVWR of more than 26,000 pounds;

2. Has a GCWR of more than 26,000 pounds, including any towed unit with a GVWR of more than 10,000 pounds;

3. Is designed or used to transport 15 or more passengers, in addition to the driver;

4. Is defined as a "bus" in VTL § 509-a(1); or

5. Is of any size -- other than a farm vehicle operated within 150 miles of the operator's farm -- used in the transportation of "hazardous materials."

VTL § 501-a(4)(a)(i)-(v). See also Barnes v. Board of Co-op Educ. Servs. of Nassau County, 172 Misc. 2d 402, ___, 656 N.Y.S.2d 839, 840 (Nassau Co. Sup. Ct. 1997).

For purposes of VTL Article 19-B (*i.e.*, VTL §§ 509-p-509-y), the term "commercial motor vehicle" is defined as a motor vehicle or combination of vehicles having a GCWR of more than 10,000 pounds used in commerce to transport property, including a tow truck with a GVWR of at least 8,600 pounds. VTL § 509-p(1).

Some of the terms used in VTL § 501-a are terms of art which are defined by the statute. For example:

1. The term "gross vehicle weight rating" or "GVWR" is defined as:

> The weight of a vehicle consisting of the unladen weight and the maximum carrying capacity recommended by the manufacturer of such vehicle. The GVWR of a combination of vehicles (commonly referred to as the "Gross Combination Weight Rating" or GCWR) is the GVWR of the power unit plus the GVWR of each vehicle in the combination.

VTL § 501-a(2). See also VTL § 509-p(2).

2. The term "hazardous materials" is defined as:

> Any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

VTL § 501-a(3).

3. The term "farm vehicle" is defined as:

> A vehicle having a GVWR of not more than [26,000] pounds which is controlled and operated by a farmer, is used to transport agricultural products, farm machinery, farm supplies or all of the aforementioned to or from the farm and is not used in the operations of a common or contract motor carrier and, such a vehicle having a GVWR of more than [26,000] pounds while being used within [150] miles of the person's farm.

VTL § 501-a(7).

### § 14:4 What is *not* a commercial motor vehicle?

The following vehicles are excluded from the definition of "commercial motor vehicle":

1. A personal use vehicle, a farm vehicle, or a combination of such vehicles;

2. Any motor vehicle or combination of motor vehicles operated by a "member of the armed forces" for military purposes;

3. A police or fire vehicle, or a vehicle during its use in an "emergency operation," as defined in VTL § 114-b, owned and identified as being owned by the state or a political subdivision thereof;

4. An "ambulance service" as defined in Public Health Law § 3001(2), or a "voluntary ambulance service" as defined in Public Health Law § 3001(3), used to provide "emergency medical service" as defined in Public Health Law § 3001; or

5. A vehicle or combination of vehicles which is designed and primarily used for purposes other than the transportation of persons or property and which is operated on a public highway only occasionally for the purpose of being transported to a construction or off-highway site at which its primary purpose is to be performed (except as may otherwise be specifically provided by DMV regulations).

VTL § 501-a(4)(b)(i)-(iv).

Some of the terms used in VTL § 501-a are terms of art which are defined by the statute. For example:

1. The term "personal use vehicle" is defined as:

> A vehicle constructed or altered to be used for recreational purposes which is exclusively used to transport family members and/or personal possessions of such family members for non-business recreational purposes by the operator, or a rental truck which is exclusively used to transport personal possessions of the person who has rented the truck for non-business purposes.

VTL § 501-a(8).

2. The term "farm vehicle" is defined as:

> A vehicle having a GVWR of not more than [26,000] pounds which is controlled and operated by a farmer, is used to transport agricultural products, farm machinery, farm supplies or all of the aforementioned to or from the farm and is not used in the operations of a common or contract motor

> carrier and, such a vehicle having a GVWR of more than [26,000] pounds while being used within [150] miles of the person's farm.

VTL § 501-a(7).

3. The term "member of the armed forces":

> [S]hall include active duty military personnel; members of the reserve components of the armed forces; members of the national guard on active duty, including personnel on full time active guard duty, personnel on part-time national guard training, and national guard military technicians (civilians who are required to wear military uniforms); and active duty United States coast guard personnel. The term shall not include United States reserve technicians. Notwithstanding the provisions of [VTL § 114-b], for the purposes of this paragraph, the term "emergency operation" shall include returning from emergency service.

VTL § 501-a(4)(b).

## § 14:5 A commercial motor vehicle can only be operated by a person possessing a full, unrestricted CDL

Effective September 30, 2005, DMV will no longer grant or recognize any type of limited, restricted or conditional driver's license or driving privileges in connection with the operation of commercial motor vehicles. Accordingly, a hardship privilege, a pre-conviction conditional license, a conditional license and/or a restricted use license can no longer be used to operate a commercial motor vehicle -- *even if the motorist is granted a certificate of relief from disabilities issued pursuant to Correction Law Article 23*. See VTL § 1193(2)(e)(7)(e); VTL § 1193(2)(e)(7)(d); VTL § 1196(7)(g); VTL § 530(5). See also 15 NYCRR § 134.9(c); 15 NYCRR § 134.18(a); 15 NYCRR § 135.9(b).

Prior to September 30, 2005, if a CDL holder obtained a certificate of relief from disabilities relieving him or her from the application of VTL § 1196(7)(g), DMV would have issued the holder a conditional license valid for the operation of a commercial motor vehicle. Similarly, if a CDL holder obtained a certificate of relief from disabilities relieving him or her from the application of VTL § 530(5), DMV would have issued the holder a restricted use license valid for the operation of a commercial motor vehicle.

## § 14:6 Length of CDL revocation for VTL § 1192 offenses committed in a non-commercial vehicle

A VTL § 1192 offense committed by a CDL holder is only considered to be a "first offense" if the holder has *never* previously been convicted of any of the following offenses:

1. Refusing to submit to a chemical test in violation of VTL § 1194 (although a chemical test refusal is not an "offense," and does not result in a "conviction," it is referred to as such herein for the sake of convenience); see also VTL § 109-c; § 14:41, *infra*;

2. Any violation of VTL § 1192;

3. Any violation of VTL § 600(1) or (2); or

4. Any felony involving the use of a motor vehicle.

VTL § 1193(2)(e)(3)(b). See also VTL § 1194(2)(d)(1)(c); VTL § 510-a(2)(c); VTL § 510(6)(d).

In other words, the way the statute reads, if a CDL holder has *ever* been convicted of any of the above offenses -- *in any type of vehicle* -- the holder is considered a "repeat offender" for CDL revocation purposes. Thus, the mere fact that a CDL holder (a) has no prior VTL § 1192 convictions, and/or (b) has never been convicted of a VTL § 1192 offense while operating a commercial motor vehicle, does not mean that the holder is a "first offender" for CDL revocation purposes. This is critical because the CDL revocation for a repeat offender is a "permanent" revocation. See §§ 14:11-14:13, *infra*.

That said, DMV counsel's office has advised the authors that DMV only counts the above-referenced "priors" towards permanent CDL revocation if such "prior" would have counted towards permanent CDL revocation prior to September 30, 2005.

Where a CDL holder is convicted as a first offender of violating any subdivision of VTL § 1192 (or an analogous out-of-state offense) in a non-commercial vehicle, his or her CDL will be revoked for at least 1 year. VTL § 1193(2)(b)(5)(i). However, the non-CDL portion of the person's driver's license will be suspended/revoked in the same manner that it would be if the person was a non-CDL holder. In this regard, see Chapter 46, *infra*.

Thus, DMV will generally allow the defendant to obtain a regular, non-commercial conditional license or regular driver's license (if he or she is otherwise eligible therefor). See § 14:10, *infra*.

## § 14:7 CDL holders and chemical test refusals

A chemical test refusal committed by a CDL holder is only considered to be a "first offense" if the holder has *never* previously been convicted of any of the following offenses:

1. Refusing to submit to a chemical test in violation of VTL § 1194;

2. Any violation of VTL § 1192;

3. Any violation of VTL § 600(1) or (2); or

4. Any felony involving the use of a motor vehicle.

VTL § 1194(2)(d)(1)(c).

In other words, the way the statute reads, if a CDL holder has *ever* been convicted of any of the above offenses -- *in any type of vehicle* -- the holder is considered a "repeat offender" for CDL revocation purposes. Thus, the mere fact that a CDL holder (a) has no prior chemical test refusal convictions, and/or (b) has never previously been convicted of a chemical test refusal while operating a commercial motor vehicle, does *not* mean that the holder is a "first offender" for CDL revocation purposes. This is critical because the CDL revocation for a repeat offender is a "permanent" revocation. See §§ 14:11-14:13, *infra*.

That said, DMV counsel's office has advised the authors that DMV only counts the above-referenced "priors" towards permanent CDL revocation if such "prior" would have counted towards permanent CDL revocation prior to September 30, 2005.

A CDL holder who refuses to submit to a chemical test in violation of VTL § 1194 as a first offender is subject to the following civil sanctions:

1. Mandatory revocation of the person's CDL for at least 18 months (at least 3 years if the person was operating a commercial motor vehicle transporting hazardous materials). VTL § 1194(2)(d)(1)(c); and

2. A civil penalty in the amount of $500 ($550 if the person was operating a commercial motor vehicle). VTL § 1194(2)(d)(2).

A CDL holder who is found to have refused to submit to a chemical test in violation of VTL § 1194 as a repeat offender is subject to the following civil sanctions:

1. "Permanent" disqualification from operating a commercial motor vehicle. VTL § 1194(2)(d)(1)(c); and

2. A civil penalty in the amount of $750. VTL § 1194(2)(d)(2).

If the person was operating a non-commercial vehicle in connection with the chemical test refusal, the non-CDL portion of the person's driver's license will be revoked in the same manner that it would be if he or she was a non-CDL holder. In this regard, see Chapter 41, *infra*.

Thus, DMV will generally allow the person to obtain a regular, non-commercial conditional license or regular driver's license (if he or she is otherwise eligible therefor). See § 14:10, *infra*.

## § 14:8 Periods of license revocation are *minimum* periods

Where a driver's license is revoked pursuant to VTL § 1193(2)(b), "no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner." VTL § 1193(2)(c).

In People v. Demperio, 86 N.Y.2d 549, 552, 634 N.Y.S.2d 672, 673 (1995), the Court of Appeals held that this statute provides a defendant with "reason to know that upon revocation of his license, a new license application [is] required."

## § 14:9 Successful DDP completion does *not* terminate CDL revocation

Ordinarily, upon successful completion of the Drinking Driver Program ("DDP"), "a participant may apply to the commissioner . . . for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course." VTL § 1196(5). In other words, successful DDP completion generally allows the defendant to apply for reinstatement of his or her full driving privileges.

VTL § 1193(2)(b)(9) expressly exempts CDL holders from this rule:

> Effect of rehabilitation program. No period of revocation arising out of [VTL § 1193(2)(b)(4), (5), (6) or (7)] may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

See also VTL § 1196(5); VTL § 1194(2)(d)(3); 15 NYCRR § 134.10(b).

On the other hand, where the conviction leading to the CDL revocation was committed in a non-commercial vehicle, successful DDP completion will generally allow the defendant to apply for reinstatement of regular, non-commercial driving privileges (unless the revocation was for a chemical test refusal, or the defendant was under 21 years of age at the time of the offense, or there is some other disqualification). In this regard, 15 NYCRR § 136.2(a) provides that:

> If the licensee holds a [CDL] and a conviction results in the revocation of both the commercial and non-commercial portion of his or her driver's license, the commercial portion of the driver's license shall be automatically restored after the minimum [1]-year revocation period is served, if the non-commercial portion of the license has been restored as the result of either completion of the [DDP] or approval for re-licensure pursuant to this Part.

See also § 14:10, *infra*.

### § 14:10 Where a CDL is suspended or revoked pursuant to VTL §§ 510-a, 1193 or 1194, DMV will generally allow the holder to obtain a regular, non-commercial driver's license (if he or she is otherwise eligible therefor)

Where a defendant's CDL is suspended or revoked pursuant to VTL §§ 510-a, 1193 or 1194, DMV will generally allow the defendant to obtain a regular, non-commercial conditional license or regular driver's license (if he or she is otherwise eligible therefor). In this regard, VTL § 510-a(5) provides that:

> Any revocation or suspension of a [CDL] issued pursuant to this section shall be applicable only to that portion of the holder's driver's license or privilege which permits the operation of commercial motor vehicles, and the commissioner shall immediately issue a license, other than a [CDL], to such person, provided that such person is otherwise eligible to receive such license and further provided that issuing a license to such person does not create a substantial traffic safety hazard.

See also VTL § 510-a(8)(b).

Similarly, VTL § 1193(2)(b)(11) provides that:

> Where revocation is mandatory pursuant to [VTL § 1193(2)(b)(5)] for a conviction of a violation of [VTL § 1192(5)], such revocation shall be issued only by the commissioner and shall be applicable only to that portion of the holder's driver's license or privilege which permits the operation of commercial motor vehicles, and the commissioner shall immediately issue a license, other than a [CDL], to such person provided that such person is otherwise eligible to receive such license and further provided that issuing a license to such person does not create a substantial traffic safety hazard.

With regard to CDL revocations under VTL §§ 1193 and 1194, the same rule generally applies. Thus, for example, a CDL holder convicted of a first offense DWAI or DWI committed in a non-commercial vehicle can obtain a class D conditional license (if he or she is otherwise eligible therefor). The authority for this procedure cannot be found either in the VTL or in DMV regulations (*i.e.*, Title 15 of the NYCRR). Rather, it is an internal DMV policy based on the logic of the above-quoted statutes and fundamental fairness.

It should be noted, however, that if the defendant is convicted of a violation of VTL § 1192 -- other than a violation of VTL § 1192(5) (and perhaps VTL § 1192(1)) -- *while operating a commercial motor vehicle*, DMV will *not* grant the defendant a class D conditional license during the revocation period. The rationale for this policy comes from 15 NYCRR § 134.7(a)(8), which prohibits the issuance of a conditional license where the offense was committed in a "special vehicle."

## § 14:11 "Permanent" CDL revocation -- Generally

For non-CDL holders, the general rule is that DWI-related offenses have, at most, a 10-year window within which they affect:

(a) The level of a new offense;

(b) The length of a driver's license revocation; and/or

(c) The defendant's eligibility for a conditional license.

See, e.g., VTL § 1193(1)(a); VTL § 1193(1)(c); VTL § 1193(2)(b)(3); 15 NYCRR § 134.7(a)(11). Cf. VTL § 1193(2)(c).

This rule does *not* apply to CDL holders. DWI-related (and certain other) offenses committed by CDL holders:

(a) Stay on the holder's DMV record "forever." See § 14:14, *infra*;

(b) Result in a 10-year "permanent" CDL revocation if the holder is convicted of a second offense. See § 14:12, *infra*; and

(c) Result in a permanent, lifetime CDL revocation for a third offense. See § 14:13, *infra*;

*even if none of the offenses were committed in a commercial motor vehicle*.

The relevant offenses that can lead to a "permanent" CDL revocation are:

1. Refusing to submit to a chemical test in violation of VTL § 1194;

2. Any violation of VTL § 1192;

3. Any violation of VTL § 600(1) or (2);

4. Any felony involving the use of a motor vehicle;

5. Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle; and/or

6. Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter or criminally negligent homicide.

**§ 14:12 10-year "permanent" CDL revocation**

The way the relevant statutes read, upon a second conviction of any of the offenses listed in the previous section (not arising out of the same incident) *at any point in a CDL holder's lifetime*, the holder faces "permanent" CDL revocation -- regardless of whether the first conviction was obtained prior to the September 30, 2005 changes to the laws affecting CDL holders, and regardless of whether the first conviction was obtained prior to the time that the defendant obtained a CDL. However, DMV counsel's office has advised the authors that DMV only counts a "prior" towards permanent CDL revocation if such "prior" would

have counted towards permanent CDL revocation prior to September 30, 2005.

Notably, the term "permanent" does not necessarily mean *permanent* for second offenders. Rather, it means a minimum of 10 years. In this regard, four separate statutes address the issue of a 10-year "permanent" CDL revocation for second offenders:

1. VTL § 1193(2)(e)(3)(b);

2. VTL § 1194(2)(d)(1)(c);

3. VTL § 510-a(2)(c); and

4. VTL § 510(6)(d).

1. VTL § 1193(2)(e)(3)(b)

VTL § 1193(2)(e)(3)(b) deals with the reinstatement of a CDL where the holder's second offense is a VTL § 1192 conviction. This section provides that DMV can waive a "permanent" CDL revocation where:

1. At least 10 years have elapsed from such sentence;

2. During such 10-year period, the person has not been convicted of any of the following offenses:

   (a) Refusing to submit to a chemical test in violation of VTL § 1194;

   (b) Any violation of VTL § 1192;

   (c) Any violation of VTL § 600(1) or (2); or

   (d) Any felony involving the use of a motor vehicle;

3. The person provides acceptable documentation to DMV that he or she is not in need of alcohol or drug treatment, or has satisfactorily completed a prescribed course of such treatment; and

4. After such documentation is accepted, the person is granted a certificate of relief from disabilities pursuant to Correction Law § 701 by the Court in which such person was last penalized.

## 2. VTL § 1194(2)(d)(1)(c)

VTL § 1194(2)(d)(1)(c) deals with the reinstatement of a CDL where the holder's second offense is a chemical test refusal. This section provides that DMV can waive a "permanent" CDL revocation where:

1. At least 10 years have elapsed from the commencement of the revocation;

2. During such 10-year period, the person has not been convicted of any of the following offenses:

   (a) Refusing to submit to a chemical test in violation of VTL § 1194;

   (b) Any violation of VTL § 1192;

   (c) Any violation of VTL § 600(1) or (2); or

   (d) Any felony involving the use of a motor vehicle;

3. The person provides acceptable documentation to DMV that he or she is not in need of alcohol or drug treatment, or has satisfactorily completed a prescribed course of such treatment; and

4. After such documentation is accepted, the person is granted a certificate of relief from disabilities pursuant to Correction Law § 701 by the Court in which such person was last penalized.

## 3. VTL § 510-a(2)(c)

VTL § 510-a provides additional offenses that can lead to a "permanent" CDL revocation in addition to the offenses listed in VTL § 1193(2)(e)(3)(b) and VTL § 1194(2)(d)(1)(c). Specifically, conviction of the following offenses can lead to a "permanent" CDL revocation under VTL § 510-a (whether committed in New York or out-of-state):

1. A felony involving the use of a motor vehicle;

2. A felony involving the manufacturing, distributing or dispensing of a "drug," as defined in VTL § 114-a, or possession of any such drug with intent to manufacture, distribute or dispense such drug in which a motor vehicle was used;

3. A violation of VTL § 600(1) or (2);

4. Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle; and/or

5. Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter or criminally negligent homicide.

VTL § 510-a(2)(c) deals with the reinstatement of a CDL where the holder's second offense is for a violation listed in paragraphs "1", "4" or "5" above. This section provides that DMV can waive a "permanent" CDL revocation where:

1. At least 10 years have elapsed from such sentence;

2. During such 10-year period, the person has not been convicted of any of the following offenses:

   (a) Refusing to submit to a chemical test in violation of VTL § 1194;

   (b) Any violation of VTL § 1192;

   (c) Any violation of VTL § 600(1) or (2);

   (d) Any felony involving the use of a motor vehicle;

   (e) Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle; or

   (f) Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter or criminally negligent homicide;

3. If any of the grounds upon which the permanent CDL revocation is based involved a chemical test refusal or a VTL § 1192 conviction, that the person provides acceptable documentation to DMV that he or she has voluntarily enrolled in and successfully completed an appropriate rehabilitation program; and

4. After such documentation, if required, is accepted, the person is granted a certificate of relief from disabilities pursuant to Correction Law § 701 by the Court in which such person was last penalized.

4. VTL § 510(6)(d)

VTL § 510(6)(d) deals with the reinstatement of a CDL where the holder's second offense is a conviction of violating VTL § 600(2), VTL § 392 or a local law or ordinance making it unlawful to leave the scene of an accident without reporting. This section provides that DMV can waive a "permanent" CDL revocation where:

1. At least 10 years have elapsed from such sentence;

2. During such 10-year period, the person has not been convicted of any of the following offenses:

   (a) Refusing to submit to a chemical test in violation of VTL § 1194;

   (b) Any violation of VTL § 1192;

   (c) Any violation of VTL § 600(1) or (2); or

   (d) Any felony involving the use of a motor vehicle;

3. If any of the grounds upon which the permanent CDL revocation is based involved a chemical test refusal or a VTL § 1192 conviction, that the person provides acceptable documentation to DMV that he or she has voluntarily enrolled in and successfully completed an appropriate rehabilitation program; and

4. After such documentation, if required, is accepted, the person is granted a certificate of relief from disabilities pursuant to Correction Law § 701 by the Court in which such person was last penalized.

Prior to September 30, 2005, "permanent" CDL revocations were relatively rare -- as both of the offenses in question were required to have been committed while operating a commercial motor vehicle. However, the law no longer distinguishes between convictions obtained while operating a commercial motor vehicle and those obtained while operating a passenger car, a pickup truck, an SUV, a motorcycle, an ATV, or even a riding lawnmower. In other words, the critical issue is no longer whether the defendant was operating a commercial motor vehicle, but rather whether the defendant possesses a CDL.

Notably, however, DMV counsel's office has advised the authors that DMV only counts a "prior" towards permanent CDL revocation if such "prior" would have counted towards permanent CDL revocation prior to September 30, 2005. On the other hand, eligible prior convictions accrued before the new laws took effect will count if a new offense is committed.

### § 14:13 Truly permanent CDL revocation

A CDL holder who is convicted of 3 of the following offenses (not arising out of the same incident) -- *at any point during the CDL holder's lifetime* -- will receive a truly permanent, lifetime CDL revocation:

1. Refusing to submit to a chemical test in violation of VTL § 1194;

2. Any violation of VTL § 1192;

3. Any violation of VTL § 600(1) or (2);

4. Any felony involving the use of a motor vehicle;

5. Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle; and/or

6. Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter or criminally negligent homicide.

See VTL § 510(6)(e); VTL § 510-a(2)(d); VTL § 1193(2)(e)(3)(c); VTL § 1194(2)(d)(1)(d).

Prior to September 30, 2005, this was an extremely rare occurrence -- as all 3 of the offenses in question were required to have been committed while operating a commercial motor vehicle. There could be little dispute that a CDL holder who has been convicted 3 separate times of operating a commercial motor vehicle in violation of VTL § 1192 should be prohibited from ever operating a commercial motor vehicle again. However, the law no longer distinguishes between convictions obtained while operating a commercial motor vehicle and those obtained while operating a passenger car, a pickup truck, an SUV, a motorcycle, an ATV, or even a riding lawnmower. In other words, the critical issue is no longer whether the defendant was operating a commercial motor vehicle, but rather whether the defendant possesses a CDL.

Notably, however, DMV counsel's office has advised the authors that DMV only counts a "prior" towards permanent CDL revocation if such "prior" would have counted towards permanent CDL revocation prior to September 30, 2005. On the other hand, eligible prior convictions accrued before the new laws took effect will count if a new offense is committed.

In addition, conviction of (a) a felony involving the manufacturing, distributing or dispensing of a "drug," as defined in VTL § 114-a, or (b) the possession of any such drug with intent to manufacture, distribute or dispense such drug, in which a motor vehicle was used, will also result in a truly permanent, lifetime CDL revocation -- even for a first offense. VTL § 510-a(2)(e).

### § 14:14 DMV will retain records that can lead to permanent CDL revocation for 55 years

VTL § 201 addresses the issue of how long DMV is required to retain various records. VTL § 201(1)(i)(ii)(A) mandates that records of convictions and of license suspensions/revocations that can lead to permanent CDL revocation, see §§ 14:11-14:13, *supra*, must be retained for 55 years.

Specifically, VTL § 201(1)(i)(ii)(A)(1) provides that DMV cannot destroy, for 55 years, any "conviction certificates and closed suspension and revocation orders" obtained by a CDL holder -- regardless of the type of motor vehicle operated by the CDL holder at the time of the offense -- where the conviction, suspension or revocation relates to:

1. Refusing to submit to a chemical test in violation of VTL § 1194;

2. Any violation of VTL § 1192(2), (3), (4), (5) or (6);

3. Any violation of VTL § 600(1) or (2);

4. Any felony involving the use of a motor vehicle;

5. Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is suspended or revoked; or

6. Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter and criminally negligent homicide as set forth in Penal Law Article 125.

Where the conviction, suspension or revocation relates to "violating an out of service order as provided for in the rules and regulations of [DOT] while operating a commercial motor vehicle," the retention period is 15 years. VTL § 201(1)(i)(ii)(A)(2).

Where the conviction, suspension or revocation relates to any conviction "arising out of the use of a motor vehicle in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance," the retention period is forever. VTL § 201(1)(i)(ii)(B).

### § 14:15 Non-DWI-related grounds for suspension/revocation of a CDL -- Generally

The sections that follow address the suspension/revocation of a CDL for various reasons other than for violations of VTL §§ 1192 and 1194.

### § 14:16 "Serious traffic violations" applicable to CDLs

Certain VTL offenses committed while operating a commercial motor vehicle are classified as "serious traffic violations." See VTL § 510-a(4). Conviction of 2 or more "serious traffic violations," in separate incidents, during any 3-year period (whether in New York or elsewhere), will result in a CDL suspension. VTL § 510-a(3)(a), (b). See also § 14:18, *infra*.

Pursuant to VTL § 510-a(4), the following offenses constitute "serious traffic violations" if committed in a commercial motor vehicle:

1. Excessive speeding (which is defined as 15 or more MPH over the speed limit);

2. Reckless driving;

3. Improper or erratic lane change;

4. Following too closely;

5. Any moving violation committed in connection with a fatal accident;

6. Operation of a commercial motor vehicle without first obtaining a CDL;

7. Operation of a commercial motor vehicle by a person who possesses a valid CDL but does not have it in his or her actual possession; and

8. Operation of a commercial motor vehicle without the proper class of CDL, and/or without the proper endorsement for either the specific vehicle being operated or the passengers/cargo being transported.

VTL § 510-a(4)(a)(i)-(viii).

### § 14:17 Dismissal of certain "serious traffic violations"

With regard to "serious traffic violations" "6", "7" and "8" in the previous section -- which deal with defendants who operate commercial motor vehicles (a) without possessing a CDL, (b) without having their CDL in their possession, and/or (c) with the wrong class of CDL -- VTL § 510-a(4-a) provides that:

> The court shall dismiss any charge of operating a commercial motor vehicle without a [CDL] in the driver's possession if, between the date the driver is charged with such violation and the appearance date for such violation, the driver supplies the court with proof that he or she held a valid [CDL] on the date of such violation. Such driver must also supply such proof to the law enforcement authority that issued the citation, prior to such driver's appearance in court.

### § 14:18 Non-DWI-related grounds for *suspension* of a CDL

VTL § 510-a(3) provides for the suspension of a CDL as a result of various convictions. The suspension periods are as follows:

1. 60 days -- where the defendant is convicted of 2 "serious traffic violations," as defined in VTL § 510-a(4), committed within a 3-year period, in separate incidents (whether in New York or elsewhere);

2. 120 days -- where the defendant is convicted of 3 "serious traffic violations," as defined in VTL § 510-a(4), committed within a 3-year period, in separate incidents (whether in New York or elsewhere). Such suspension takes effect consecutive to any other suspension in effect pursuant to VTL § 510-a(3);

3. 60 days -- where the defendant is convicted of a violation of VTL § 1180(g), and either:

(a) the speed upon which the conviction was based was more than 20 MPH over the speed limit; or

(b) the speed upon which the conviction was based was more than 10 MPH over the speed limit, and the vehicle was either:

(i) in violation of any rule or regulation involving an out-of-service defect relating to its brakes, steering, and/or couplings; or

(ii) transporting flammable gas, radioactive materials or explosives;

4. 180 days -- where the defendant is found to have operated a commercial motor vehicle designed or used to transport property, as defined in VTL § 501-a(4)(a)(i) & (ii), in violation of an out-of-service order (whether in New York or elsewhere);

5. 2 years -- where, during any 10-year period, the defendant is found to have committed 2 such violations, not arising out of the same incident (whether in New York or elsewhere);

6. 3 years -- where, during any 10-year period, the defendant is found to have committed 3 or more such violations, not arising out of the same incident (whether in New York or elsewhere);

7. 180 days -- where the defendant is found to have operated a commercial motor vehicle designed or used to transport passengers or property, as defined in VTL § 501-a(4)(a)(iii) & (iv), in violation of an out-of-service order, while transporting hazardous materials or passengers (whether in New York or elsewhere);

8. 3 years -- where, during any 10-year period, the defendant is found to have committed 2 or more such violations, not arising out of the same incident (whether in New York or elsewhere);

9. 60 days -- where the defendant is convicted of a violation of VTL § 1171 or VTL § 1176 (or an analogous out-of-state offense);

10. 120 days -- where, during any 3-year period, the defendant is convicted of a 2nd such violation (or an analogous out-of-state offense); and

11. 1 year -- where, during any 3-year period, the defendant is convicted of a 3rd such violation (or an analogous out-of-state offense).

VTL § 510-a(3)(a)-(e).

### § 14:19 Non-DWI-related grounds for *revocation* of a CDL

A CDL will be revoked by DMV whenever the holder is convicted in New York or elsewhere of:

(a) A felony involving the use of a motor vehicle;

(b) A felony involving the manufacturing, distributing or dispensing of a "drug," as defined in VTL § 114-a, or possession of any such drug with intent to manufacture, distribute or dispense such drug in which a motor vehicle was used;

(c) A violation of VTL § 600(1) or (2);

(d) Operating a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's CDL is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle; or

(e) Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of vehicular manslaughter or criminally negligent homicide.

VTL § 510-a(1). See also VTL § 510(2)(a)(iii).

Where a CDL is revoked pursuant to paragraph (a), (c), (d) or (e) above *as a first offense*, the mandatory CDL revocation is for a period of at least 1 year (at least 3 years if the person was operating a commercial motor vehicle transporting hazardous materials). VTL § 510-a(2)(a), (b). See also VTL § 510(6)(b), (c).

If the defendant is a "repeat offender," the revocation is "permanent." Id. See also §§ 14:11-14:13, *infra*.

In addition, where a CDL is revoked pursuant to paragraph (b) above, even as a first offense, "such revocation shall be permanent and may not be waived by the commissioner under any circumstances." VTL § 510-a(2)(e).

## § 14:20 What happens if a VTL § 510-a offense is committed by a person who does not possess a CDL?

VTL § 510-a deals with the suspension/revocation of a CDL. What happens if a person who does not possess a CDL commits an offense that would require the suspension or revocation of the person's CDL if he or she had one?

The answer is set forth in VTL § 510-a(6), which provides as follows:

> Application of section to persons not holding a [CDL]. Whenever a person who is not the holder of a [CDL] issued by the commissioner is convicted of a violation arising out of the operation of a commercial motor vehicle which would require the mandatory revocation or suspension of a [CDL] pursuant to this section or [VTL § 1193(2)(b)(5)(i) or (ii), VTL § 1193(2)(e)(3)(b), or VTL § 1194(2)(d)(1)(c)], the privilege of such person to operate a commercial motor vehicle and/or to obtain a [CDL] issued by the commissioner will be suspended or revoked for the same periods of time and subject to the same conditions provided in this section, or [VTL § 1193(2)(b)(5)(i) or (ii), VTL § 1193(2)(e)(3)(b), or VTL § 1194(2)(d)(1)(c)], which would be applicable to the holder of a commercial driver's license.

## § 14:21 VTL § 510-a does not preclude other permissible CDL suspensions/revocations from being imposed

VTL § 510-a(7) provides that:

> Other revocation or suspension action not prohibited. The provisions of [VTL § 510-a] shall not be construed to prevent any person who has the authority to suspend or revoke a license to drive or privilege of operating pursuant to [VTL § 510] from exercising any such authority based upon a conviction for which suspension or revocation of a [CDL] by the commissioner is mandated.

## § 14:22 VTL § 1192 offenses committed in commercial motor vehicles -- Generally

For obvious reasons, the government does not want people who operate commercial motor vehicles to do so with even low BACs --

even if the operator would not be considered impaired or intoxicated in the traditional sense. In this regard, VTL § 1192 contains two subdivisions -- *i.e.*, VTL §§ 1192(5) and 1192(6) -- which lower the "legal limit" for drivers operating commercial motor vehicles.

VTL § 1192(5) makes it a traffic infraction to operate a commercial motor vehicle with a BAC of between .04% and .06% -- regardless of whether the driver is actually impaired. VTL § 1192(6) lowers the threshold for *per se* DWI from .08% to .07% where a commercial motor vehicle is involved. These subdivisions are discussed in the sections that follow.

It should be noted that VTL §§ 1192(5) and 1192(6) merely add to the number of offenses applicable to commercial drivers -- they do not preempt them. Thus, the operator of a commercial motor vehicle can also be charged with violating VTL §§ 1192(1), (2), (2-a), (3), (4) and/or (4-a) in an appropriate case.

### § 14:23 VTL § 1192(5) -- Commercial motor vehicles: Per se -- level I

VTL § 1192(5) prohibits the operation of a commercial motor vehicle with a BAC between .04% and .06%. Specifically, VTL § 1192(5) provides:

> Commercial motor vehicles: per se -- level I. Notwithstanding the provisions of [VTL § 1195], no person shall operate a commercial motor vehicle while such person has .04 of one per centum or more but not more than .06 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194].

### § 14:24 VTL § 1192(5) does not preclude a charge of DWAI or VTL § 1192-a where appropriate

VTL § 1192(5) is not the exclusive means of prosecuting a person who operates a commercial motor vehicle with a low BAC. Such drivers can also, where appropriate, be charged with DWAI in violation of VTL § 1192(1), or, if the person's BAC is between .02% and .03% (and he or she is under 21 years of age), with a violation of the Zero Tolerance law in violation of VTL § 1192-a. In this regard, VTL § 1192(5) provides that:

> [N]othing contained in this subdivision shall prohibit the imposition of a charge of a violation of [VTL § 1192(1)], or of [VTL §

> 1192-a] where a person under the age of [21] operates a commercial motor vehicle where a chemical analysis of such person's blood, breath, urine, or saliva, made pursuant to the provisions of [VTL § 1194], indicates that such operator has .02 of one per centum or more but less than .04 of one per centum by weight of alcohol in such operator's blood.

Thus, while the Zero Tolerance law applies to BACs up to .07%, see VTL § 1192-a, it cannot be charged in lieu of VTL § 1192(1) or (5) where the defendant operates a commercial motor vehicle with a BAC of .04% or more. See also VTL § 1192-a ("[e]xcept as otherwise provided in [VTL § 1192(5)], this section shall not apply to a person who operates a commercial motor vehicle").

Note that a violation of VTL § 1192(1) committed in a commercial motor vehicle is a higher level offense than a violation of VTL § 1192(5). In this regard, a violation of VTL § 1192(1) committed in a commercial motor vehicle is a misdemeanor, whereas a violation of VTL § 1192(5) is a traffic infraction. VTL § 1193(1)(d)(2). In addition, a violation of VTL § 1192(1) committed in a commercial motor vehicle can be a felony, and/or can be used as a predicate for a felony; whereas a violation of VTL § 1192(5) cannot. See VTL § 1193(1)(d)(4).

### § 14:25 VTL § 1192(6) -- Commercial motor vehicles: Per se -- level II

VTL § 1192(6) prohibits the operation of a commercial motor vehicle with a BAC of .07%. Specifically, VTL § 1192(6) provides:

> Notwithstanding the provisions of [VTL § 1195], no person shall operate a commercial motor vehicle while such person has more than .06 of one per centum but less than .08 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194].

Notably, since the Department of Health Rules and Regulations mandate that BACs be reported only to the second decimal place, see § 37:2, *infra*, VTL § 1192(6) is only applicable to a BAC of *exactly* .07% (as .07 is the only 2-decimal-place number greater than .06 and less than .08).

### § 14:26 VTL § 1192(6) does not preclude a charge of DWAI where appropriate

VTL § 1192(6) is not the exclusive means of prosecuting a person who operates a commercial motor vehicle with a BAC of .07%. Such drivers can also, where appropriate, be charged with DWAI in violation of VTL § 1192(1). In this regard, VTL § 1192(6) provides that "nothing contained in this subdivision shall prohibit the imposition of a charge of a violation of [VTL § 1192(1)]."

### § 14:27 VTL §§ 1192(5) and 1192(6) only apply to operators of commercial motor vehicles

"No person other than an operator of a commercial motor vehicle may be charged with or convicted of a violation of [VTL § 1192(5) or (6)]." VTL § 1192(11). See also VTL § 1192(10)(a)(i).

### § 14:28 Plea bargain limitation applicable to commercial drivers

VTL § 1192(10) sets forth various plea bargain limitations applicable to VTL § 1192 cases. With respect to commercial drivers, VTL § 1192(10)(b) provides that:

> In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1) or (6)] while operating a commercial motor vehicle, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of [VTL § 1192] and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney upon reviewing the available evidence determines that the charge of a violation of [VTL § 1192] is not warranted, he may consent, and the court may allow, a disposition by plea of guilty to another charge [in] satisfaction of such charge.

### § 14:29 Applicability of certificate of relief from disabilities to commercial drivers

Prior to September 30, 2005, VTL § 1196(7)(g) provided that "[a]ny conditional license or privilege issued to a person convicted of a violation of any subdivision of [VTL § 1192] shall

not be valid for the operation of any commercial motor vehicle." However, if a commercial driver obtained a certificate of relief from disabilities relieving him or her from the application of VTL § 1196(7)(g), DMV would issue the driver a conditional license valid for the operation of a commercial motor vehicle.

Effective September 30, 2005, VTL § 1196(7)(g) now provides that the prohibition against using a conditional license for the operation of a commercial motor vehicle applies "[n]otwithstanding anything to the contrary contained in a certificate of relief from disabilities issued pursuant to [Correction Law Article 23]."

A similar amendment was made to VTL § 530(5), which now prohibits DMV from issuing a restricted use license valid for the operation of a commercial motor vehicle notwithstanding anything to the contrary contained in a certificate of relief from disabilities.

### § 14:30 Penalties for first VTL § 1192 offense committed in a commercial motor vehicle

For CDL purposes, a VTL § 1192 offense is only considered a first offense if the defendant has *never* previously been convicted of:

(a) Refusing to submit to a chemical test in violation of VTL § 1194;

(b) Any violation of VTL § 1192;

(c) Any violation of VTL § 600(1) or (2); or

(d) Any felony involving the use of a motor vehicle.

VTL § 1193(2)(e)(3)(b). See also § 14:6, § 14:12, *supra*.

Violating VTL § 1192(5) is a traffic infraction punishable as provided in VTL § 1193(1)(a). VTL § 1193(1)(d)(2). In other words, the criminal penalties for a violation of VTL § 1192(5) are the same as those for DWAI in violation of VTL § 1192(1). See §§ 46:2-46:4, *infra*.

By contrast, the licensing consequences for a violation of VTL § 1192(5) are *not* the same as those for DWAI in violation of VTL § 1192(1). Rather, the defendant's CDL will be revoked for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii). Note that:

> Where revocation is mandatory pursuant to [VTL § 1193(2)(b)(5)] for a conviction of a violation of [VTL § 1192(5)], such revocation shall be issued only by the commissioner and shall be applicable only to that portion of the holder's driver's license or privilege which permits the operation of commercial motor vehicles, and the commissioner shall immediately issue a license, other than a [CDL], to such person provided that such person is otherwise eligible to receive such license and further provided that issuing a license to such person does not create a substantial traffic safety hazard.

VTL § 1193(2)(b)(11).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Violating VTL § 1192(1), (2), (3), (4), (4-a) or (6) while operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7) (e.g., vehicles such as snow plows, road sweepers, road building machines, earth movers, etc.), is a misdemeanor. VTL § 1193(1)(d)(2). Note that DWAI in violation of VTL § 1192(1) is a misdemeanor under VTL § 1193(1)(d)(2).

A defendant who is convicted of VTL § 1192(6) as a first offense is subject to the following consequences:

1. A fine of between $500 and $1,500, up to 180 days in jail, or both. VTL § 1193(1)(d)(2);

2. A period of probation of 3 years. PL § 65.00(3)(d);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii); and

4. Discretionary revocation of his or her registration for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

A defendant who is convicted of VTL § 1192(1), (2), (3), (4) or (4-a) as a first offense is subject to the following consequences:

1. A fine of between $500 and $1,500, up to 1 year in jail, or both. VTL § 1193(1)(d)(2); PL § 55.10(2)(b); PL § 70.15(1);

2. A period of probation of 3 years. PL § 65.00(3)(d);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii); and

4. Discretionary revocation of his or her registration for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Committing Aggravated DWI in violation of VTL § 1192(2-a) while operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7), is a class E felony. VTL § 1193(1)(d)(2). A defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(2); PL § 70.00(2)(e);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii); and

4. Discretionary revocation of his or her registration for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192(2-a) conviction. See Chapter 46, *infra*.

### § 14:31 Penalties for first VTL § 1192 offense committed in a vehicle with a GVWR greater than 18,000 pounds transporting hazardous materials

For CDL purposes, a VTL § 1192 offense is only considered a first offense if the defendant has *never* previously been convicted of:

(a) Refusing to submit to a chemical test in violation of VTL § 1194;

(b) Any violation of VTL § 1192;

(c) Any violation of VTL § 600(1) or (2); or

(d) Any felony involving the use of a motor vehicle.

VTL § 1193(2)(e)(3)(b). See also § 14:6, § 14:12, *supra*.

Committing DWAI in violation of VTL § 1192(1) while operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives is a misdemeanor. VTL § 1193(1)(d)(3). A defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $500 and $1,500, up to 1 year in jail, or both. VTL § 1193(1)(d)(3); PL § 55.10(2)(b); PL § 70.15(1);

2. A period of probation of 3 years. PL § 65.00(3)(d);

3. Mandatory revocation of his or her driver's license for at least 3 years. VTL § 1193(2)(b)(5)(ii); and

4. Discretionary revocation of his or her registration for at least 3 years. VTL § 1193(2)(b)(5)(ii).

In addition, the defendant will be "permanently" disqualified from operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives. VTL § 1193(2)(e)(3)(a). However, DMV can waive such "permanent" disqualification where:

1. At least 5 years have elapsed from such sentence;

2. During such 5-year period, the person has not violated any of the provisions of VTL § 1192 or any alcohol- or drug-related traffic offense in New York or elsewhere;

3. The person provides acceptable documentation to DMV that he or she is not in need of alcohol or drug treatment, or has satisfactorily completed a prescribed course of such treatment; and

4. After such documentation is accepted, the person is granted a certificate of relief from disabilities pursuant to Correction Law § 701 by the Court in which such person was last penalized.

VTL § 1193(2)(e)(3)(a)(i)-(iii).

Furthermore, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Violating VTL § 1192(2), (3), (4) or (4-a) while operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives is a class E felony. VTL § 1193(1)(d)(5). A defendant who is convicted of any of these offenses as a first offense is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(5); PL § 70.00(2)(e); PL § 80.00(1)(a);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 3 years. VTL § 1193(2)(b)(5)(ii); and

4. Discretionary revocation of his or her registration for at least 3 years. VTL § 1193(2)(b)(5)(ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Note that "a conviction for such violation shall not be considered a predicate felony pursuant to [Penal Law § 70.06], or a previous felony conviction pursuant to [Penal Law § 70.10]." VTL § 1193(1)(d)(5).

Committing Aggravated DWI in violation of VTL § 1192(2-a) while operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives is a class D felony. VTL § 1193(1)(d)(5). A

defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $2,000 and $10,000, up to 7 years in state prison, or both. VTL § 1193(1)(d)(5); PL § 70.00(2)(d);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 3 years. VTL § 1193(2)(b)(5)(ii); and

4. Discretionary revocation of his or her registration for at least 3 years. VTL § 1193(2)(b)(5)(ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192(2-a) conviction. See Chapter 46, *infra*.

Note that "a conviction for such violation shall not be considered a predicate felony pursuant to [Penal Law § 70.06], or a previous felony conviction pursuant to [Penal Law § 70.10]." VTL § 1193(1)(d)(5).

### § 14:32 Commercial motor vehicles -- Repeat offense

Violating VTL § 1192(6) after having been convicted within the preceding 5 years of violating VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (6) is a misdemeanor which subjects the defendant to the following consequences:

1. A fine of between $500 and $1,500, up to 1 year in jail, or both. VTL § 1193(1)(d)(2); PL § 55.10(2)(b); PL § 70.15(1);

2. A period of probation of 3 years. PL § 65.00(3)(d);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a commercial motor vehicle transporting hazardous materials). VTL § 1193(2)(b)(5)(i), (ii); and

4. "Permanent" disqualification from operating a commercial motor vehicle. See §§ 14:11-14:13, *supra*.

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

A defendant who violates VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7), after having been convicted within the preceding 10 years of violating VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation;

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

(d) Operating a school bus carrying at least 1 student passenger;

(e) Operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7); or

(f) Operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives;

can be charged with a class E felony, and is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(4)(i); PL § 70.00(2)(e);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a school bus or a commercial motor vehicle transporting hazardous materials). VTL §§ 1193(2)(b)(4-a)(B), 1193(2)(b)(5); and

4. "Permanent" disqualification from operating a commercial motor vehicle. VTL § 1193(1)(d)(4)(i); VTL § 1193(2)(e)(3). See §§ 14:11-14:13, *supra*.

The defendant can also be charged with any other applicable felony for any acts arising out of the same incident. VTL § 1193(1)(d)(7).

A defendant who violates VTL § 1192(6) after having been convicted of 2 or more violations of VTL § 1192(1), (2), (2-a),

(3), (4), (4-a) or (6) within the preceding 5 years is subject to the same consequences. VTL § 1193(1)(d)(4)(i).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

A defendant who violates VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7), after having been convicted twice within the preceding 10 years of violating VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation;

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

(d) Operating a school bus carrying at least 1 student passenger;

(e) Operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7); or

(f) Operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives;

can be charged with a class D felony, and is subject to the following consequences:

1. A fine of between $2,000 and $10,000, up to 7 years in state prison, or both. VTL § 1193(1)(d)(4)(ii); PL § 70.00(2)(d);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year (at least 3 years if the violation was committed while operating a school bus or a commercial motor vehicle transporting hazardous materials). VTL §§ 1193(2)(b)(4-a)(B), 1193(2)(b)(5); and

4. "Permanent" disqualification from operating a commercial motor vehicle. VTL § 1193(1)(d)(4)(ii); VTL § 1193(2)(e)(3). See §§ 14:11-14:13, *supra*.

The defendant can also be charged with any other applicable felony for any acts arising out of the same incident. VTL § 1193(1)(d)(7).

A defendant who violates VTL § 1192(6) after having been convicted of 3 or more violations of VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (6) within the preceding 5 years is subject to the same consequences. VTL § 1193(1)(d)(4)(ii).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Note that a violation of VTL § 1192(5) is excluded from the list of offenses that can serve as a predicate for a felony charge under VTL § 1193(1)(d)(4). See also VTL § 1193(1)(c).

## § 14:33 Miscellaneous issues related to commercial motor vehicles and CDLs -- Generally

The sections that follow address various miscellaneous issues related to commercial motor vehicles and CDLs.

## § 14:34 Unlicensed operation of a commercial motor vehicle

VTL § 509(7) provides that "[n]o person shall operate a commercial motor vehicle without being in possession of the appropriate license for the motor vehicle being operated." In addition, VTL § 509(1-a) provides that "[w]henever a license is required to operate a commercial motor vehicle, no person shall operate a commercial motor vehicle without the proper endorsements for the specific vehicle being operated or for the passengers or type of cargo being transported."

A violation of VTL § 509(7) is a traffic infraction punishable by a fine of not more than $75. VTL § 509(11). A violation of VTL § 509(1-a) is a traffic infraction punishable by a fine of between $75 and $300, up to 15 days in jail, or both. Id.

## § 14:35 AUO in vehicle with a GVWR greater than 18,000 pounds

A person is guilty of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree ("AUO 3rd"), "when such person operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state or privilege of

obtaining a license to operate such motor vehicle issued by the commissioner is suspended, revoked or otherwise withdrawn by the commissioner." VTL § 511(1)(a).

If the defendant is convicted of AUO 3rd with respect to the operation of a motor vehicle with a GVWR of more than 18,000 pounds, the sentence of the Court must be: a fine of between $500 and $1,500, up to 30 days in jail, or both. VTL § 511(1)(c).

### § 14:36 Vehicular assault/vehicular manslaughter provisions applicable to certain commercial motor vehicles

Vehicular Assault 2nd generally requires that the defendant drive while intoxicated or while impaired by drugs in connection with the offense. See PL § 120.03. See also § 12:5, *supra*. However, PL § 120.03(2) provides that the offense is also committed where the defendant:

> [O]perates a motor vehicle with a [GVWR] of more than [18,000] pounds which contains flammable gas, radioactive materials or explosives in violation of [VTL § 1192(1)], and such flammable gas, radioactive materials or explosives is the cause of such serious physical injury, and as a result of such impairment by the use of alcohol, operates such motor vehicle in a manner that causes such serious physical injury to such other person.

Similarly, Vehicular Manslaughter 2nd generally requires that the defendant drive while intoxicated or while impaired by drugs in connection with the offense. See PL § 125.12. See also § 12:9, *supra*. However, PL § 125.12(2) provides that the offense is also committed where the defendant:

> [O]perates a motor vehicle with a [GVWR] of more than [18,000] pounds which contains flammable gas, radioactive materials or explosives in violation of [VTL § 1192(1)], and such flammable gas, radioactive materials or explosives is the cause of such death, and as a result of such impairment by the use of alcohol, operates such motor vehicle in a manner that causes the death of such other person.

## § 14:37 Operating large commercial motor vehicle on wet road while speeding and impaired by alcohol constitutes criminal negligence

In People v. Kricfalusi, 291 A.D.2d 907, ___, 738 N.Y.S.2d 270, 271 (4th Dep't 2002), the defendant appealed his conviction of Assault 3rd. The Appellate Division, Fourth Department, held that the "proof that defendant was operating a large commercial vehicle on a wet road in excess of the posted speed limit while his ability to operate the vehicle was impaired by alcohol [was] sufficient to establish that defendant acted with criminal negligence."

## § 14:38 Where element of offense requires operation of a commercial motor vehicle, failure to allege that vehicle in question was a commercial motor vehicle renders accusatory instrument facially insufficient

In People v. Hoffman Floor Covering Corp., 179 Misc. 2d 656, ___, 686 N.Y.S.2d 651, 652 (N.Y. City Crim. Ct. 1999), the Court held that:

> It is well settled that a valid and sufficient accusatory instrument is a non-waivable jurisdictional prerequisite to criminal prosecution. Here the universal summons alleges only that defendant's driver was operating a "vehicle" without the requisite tax stamp. By its terms, Title 11, Chapter 8 of the New York City Administrative Code imposes a tax on commercial vehicles and motor vehicles for the transportation of passengers other than medallion taxicabs. By failing to allege that the subject vehicle was of a type specified by the ordinance, the universal summons omitted an essential element of the violation and was therefore facially insufficient.

(Citation omitted).

## § 14:39 Where CDL is a job requirement, failure to maintain a valid CDL precludes collection of unemployment insurance benefits

In In re Geer, 255 A.D.2d 676, ___, 679 N.Y.S.2d 457, 457 (3d Dep't 1998), the Appellate Division, Third Department, held that:

> Claimant was terminated from his employment as a special motor equipment operator when

> the employer learned that the commercial driver's license that claimant was required to maintain as a condition of his employment had expired several years earlier. The Unemployment Insurance Appeal Board ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause. We affirm.
>
> The record reveals that claimant failed to take appropriate measures to renew his commercial driver's license so as to comply with the employer's legitimate licensing requirement. Since claimant voluntarily engaged in conduct which rendered him ineligible for continued work and left the employer with no choice but to terminate his employment, we find substantial evidence to support the Board's conclusion that claimant provoked his discharge and thereby voluntarily left his employment without good cause.

See also In re Decker, 809 N.Y.S.2d 476, 27 A.D.3d 821 (3d Dep't 2006) (same result where CDL was suspended for failure to pay traffic fines); In re Killorin, 232 A.D.2d 696, 648 N.Y.S.2d 182 (3d Dep't 1996) (same result where CDL was revoked for DWI); In re Kinnicutt, 226 A.D.2d 870, 640 N.Y.S.2d 663 (3d Dep't 1996) (same).

### § 14:40 Restrictions on use of radar/laser detector in certain vehicles

VTL § 1180 addresses speeding violations. VTL § 1180(g)(i) provides that:

> No person who uses a radar or laser detector in a vehicle with a [GVWR] of more than [18,000] pounds, or a commercial motor vehicle with a [GVWR] of more than [10,000] pounds, shall drive at a speed in excess of [55 MPH] or, if a maximum speed limit other than [55 MPH] . . . has been established, at a speed in excess of such speed limit.

With regard to the issue of establishing that the defendant was "using" such radar/laser detector, VTL § 1180(g)(i) provides that:

> The presence in any such vehicle of either:

> (1) a radar or laser detector connected to a power source and in an operable condition; or (2) a concealed radar or laser detector where a part of such detector is securely affixed to some part of the vehicle outside of the cab, in a manner which renders the detector not readily observable, is presumptive evidence of its use by any person operating such vehicle.

However, either of these presumptions "shall be rebutted by any credible and reliable evidence which tends to show that such radar or laser detector was not in use." Id.

Finally, VTL § 1180(g)(ii) provides that "[t]he provisions of this section shall not be construed as authorizing the seizure or forfeiture of a radar or laser detector, unless otherwise provided by law."

### § 14:41 The term "conviction" has a special definition as pertains to CDL holders

For most purposes, the term "conviction" is defined in CPL § 1.20(13), which defines a conviction as "the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument." VTL § 109-c provides an additional definition of the term "conviction" pertinent to CDL holders:

> Any conviction as defined in [CPL § 1.20(13)]; provided, however, where a conviction or administrative finding in this state or another state results in a mandatory sanction against a [CDL], as set forth in [VTL §§ 510, 510-a, 1192 and 1194], conviction shall also mean an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

## § 14:42 Duty of CDL holder to notify employer and/or DMV of convictions, suspensions, revocations, etc.

VTL § 514-a imposes an affirmative obligation on CDL holders to notify their employers and/or to notify DMV of convictions for any moving violation, and of any CDL suspension, revocation, cancellation and/or disqualification that they accrue. For CDL holders who drive for a New York employer, VTL § 514-a(1) provides that:

> Each person who operates a commercial motor vehicle for a New York state employer who is convicted of violating within or outside of this state, *in any type of motor vehicle*, a state or local law relating to motor vehicle traffic control (other than a parking violation), shall notify his/her current employer of such conviction.

(Emphasis added).

In addition, VTL § 514-a(2) provides that:

> Each person who operates a commercial motor vehicle for a New York state employer who has a driver's license suspended, revoked, or canceled by the commissioner or by the appropriate authorities of any other state, District of Columbia or Canadian province, or who loses the right to operate a commercial motor vehicle in any state or jurisdiction for any period, or who is disqualified from operating a commercial motor vehicle for any period, shall notify his/her current employer of such suspension, revocation, cancellation, lost privilege, or disqualification.

For CDL holders who drive for an out-of-state employer, or who are self-employed, VTL § 514-a(1) provides that:

> Any person who holds a [CDL] issued by the commissioner who does not operate a commercial motor vehicle for a New York state employer or who operates a commercial motor vehicle while self-employed who is convicted in any other state, the District of Columbia or a Canadian province of violating any law relating to motor vehicle traffic control (other than a parking violation) while operating a commercial motor vehicle shall notify the commissioner of such conviction.

The notification required by VTL § 514-a(1) "must be made within [30] days after the date that the person has been convicted except that if a person is a bus driver as defined in [VTL § 509-a], such notification must be made within [5] days after the date the person has been convicted as required by [VTL § 509-i]." Id. The required content of the notification is as follows:

> The above notification must be made in writing and contain the following information:
>
> (a) driver's full name;
>
> (b) driver's license number;
>
> (c) date of conviction;
>
> (d) the specific criminal or other offense(s), serious traffic violation(s) of state or local law relating to motor vehicle traffic control, for which the person was convicted and any suspension, revocation, cancellation of any driving privileges or disqualification from operating a commercial motor vehicle which resulted from such conviction(s);
>
> (e) indication whether the violation was in a commercial motor vehicle;
>
> (f) location of offense;
>
> (g) court or tribunal in which the conviction occurred; and
>
> (h) driver's signature.

Id.

When DMV receives information relating to a conviction, suspension, revocation, cancellation or disqualification pertaining to a CDL holder, "the commissioner shall take action as may be required and may take action as may be permitted by [the VTL] based upon such conviction or notice." VTL § 514-b.

### § 14:43 Cheating on CDL exam can lead to suspension of driver's license by DMV independent of any criminal conviction flowing from the offense

In Matter of Brady v. Department of Motor Vehicles, 98 N.Y.2d 625, 626, 748 N.Y.S.2d 889, 889 (2002):

> The Department of Motor Vehicles (DMV) charged petitioner with violating Vehicle and Traffic Law § 392, which provides that "[a]ny person * * * who shall deceive * * * in connection with any examination * * * shall be guilty of a misdemeanor." Following a hearing, an Administrative Law Judge (ALJ) found that petitioner committed such deception in connection with the written portion of a Commercial Driver's License test when, contrary to DMV's test procedures and explicit directions, he left the testing area with the test materials, giving rise to a risk of their illegal use. The ALJ found this constituted "cheating" and "attempt[ing] to gain an unfair advantage," and suspended petitioner's driver's license for 60 days.

Although the Court of Appeals affirmed on procedural grounds, it stated that:

> With some exceptions, drivers' licenses may be suspended or revoked for any violation of the Vehicle and Traffic Law, and "a court conviction shall not be necessary to sustain a revocation or suspension." Indeed, petitioner was not convicted of violating section 392 or of any other crime. Rather, in an administrative proceeding, the ALJ found that petitioner had engaged in deception in connection with the Commercial Driver's License test, violating Vehicle and Traffic Law § 392 and thus establishing the predicate for the administrative act of suspending his license.

Id. at 626, 748 N.Y.S.2d at 890 (citation omitted).

### § 14:44 DOT regulation authorizing random searches of commercial vehicles found to be unconstitutional

In People v. Reyes, 154 Misc. 2d 476, 596 N.Y.S.2d 304 (N.Y. City Crim. Ct. 1993), the Court held that a Department of Transportation regulation authorizing random searches of commercial vehicles without particularized suspicion or advance judicial oversight was unconstitutional.

Similarly, in People v. Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753 (Nassau Co. Dist. Ct. 1988), the Court held that the suspicionless stop of a commercial vehicle transporting hazardous materials for a "routine check" was unconstitutional.

### § 14:45 Special vehicles -- Generally

The sections that follow deal with issues facing drivers of so-called "special vehicles."

### § 14:46 What is a "special vehicle"?

The term "special vehicle" refers to a vehicle typically used to carry passengers for hire such as a bus, a school bus, a taxicab, a livery, etc. It also applies to a tow truck and to a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle. Some of these terms are defined in the VTL:

1. "Bus" is defined as "[e]very motor vehicle having a seating capacity of [15] or more passengers in addition to the driver and used for the transportation of persons." VTL § 104. See also VTL § 509-a(1);

2. "School bus" is defined as "[e]very motor vehicle owned by a public or governmental agency or private school and operated for the transportation of pupils, children of pupils, teachers and other persons acting in a supervisory capacity, to or from school or school activities or privately owned and operated for compensation for the transportation of pupils, children of pupils, teachers and other persons acting in a supervisory capacity to or from school or school activities." VTL § 142;

3. "Taxicab" is defined as "[e]very motor vehicle, other than a bus, used in the business of transporting passengers for compensation, and operated in such business under a license or permit issued by a local authority. However, it shall not include vehicles which are rented or leased without a driver." VTL § 148-a;

4. "Livery" is defined as "[e]very motor vehicle, other than a taxicab or a bus, used in the business of transporting passengers for compensation. However, it shall not include vehicles which are rented or leased without a driver." VTL § 121-e; and

5. "Tow truck" is defined as "[a] motor vehicle that tows or carries a disabled, illegally parked or abandoned

motor vehicle or a motor vehicle involved in an accident." VTL § 148-b.

Some "special vehicles" listed in VTL § 1193 are commercial motor vehicles requiring a CDL. Taxicabs and livery vehicles can be operated with a class E driver's license -- which is *not* a CDL. However, a school bus is a commercial motor vehicle requiring a CDL, as is a tow truck with a GVWR of at least 8,600 pounds. Accordingly, there is a degree of overlap in the VTL between commercial and special vehicles -- particularly in light of the September 30, 2005 changes to the laws affecting CDL holders.

### § 14:47 Buses other than school buses -- License sanctions

VTL § 509-c provides for various disqualifications from operating buses other than school buses. As the list is lengthy, this section focuses on DWI-related disqualifications. It should be noted that since a bus is a commercial motor vehicle requiring a CDL, see VTL § 501-(a)(4); VTL § 509-a(1), the September 30, 2005 changes to the laws affecting CDL holders, see §§ 14:1, 14:5, 14:11-14:13, 14:29, *supra*, likely render various provisions of VTL § 509-c redundant and/or obsolete.

VTL § 509-c(2)(g) provides for a bus disqualification "for the period that such person's license is revoked or suspended for violating [VTL § 1192 (or an analogous out-of-state offense)]. Such disqualification shall be for not less than [6] months."

A person is subject to a 5-year disqualification from operating a bus (commencing from the date of his or her last conviction) where the person has been convicted of:

1. A violation of any subdivision of VTL § 1192 (or an analogous out-of-state offense) committed while the person was operating a bus;

2. A violation of any subdivision of VTL § 1192 (or an analogous out-of-state offense) twice within a 10-year period;

3. Leaving the scene of an accident which resulted in personal injury or death in violation of VTL § 600(2) (or an analogous out-of-state offense);

4. A violation of PL § 120.04, 120.04-a, 125.13 or 125.14; or

5. AUO 1st in violation of VTL § 511(3).

VTL § 509-c(2)(b), (2)(c).

A person is subject to a 1-year disqualification from operating a bus:

> [I]f that person accumulates [9] or more points on his or her driving record for acts occurring during an [18] month period, provided, however, that the disqualification shall terminate if the person has reduced the points to less than [9] through the successful completion of a motor vehicle accident prevention course.

VTL § 509-c(2)(d).

### § 14:48 Penalties for first VTL § 1192 offense committed in a school bus carrying at least 1 student passenger

At the outset, it must be noted that a school bus is a commercial motor vehicle requiring a CDL, see VTL § 501-(a)(4); VTL § 509-a(1), and that, for CDL purposes, a VTL § 1192 offense is only considered a first offense if the defendant has *never* previously been convicted of:

(a) Refusing to submit to a chemical test in violation of VTL § 1194;

(b) Any violation of VTL § 1192;

(c) Any violation of VTL § 600(1) or (2); or

(d) Any felony involving the use of a motor vehicle.

VTL § 1193(2)(e)(3)(b). See also § 14:6, § 14:12, *supra*.

Committing DWAI in violation of VTL § 1192(1) while operating a school bus carrying at least 1 student passenger is a misdemeanor. VTL § 1193(1)(d)(1-a). A defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $500 and $1,500, up to 1 year in jail, or both. VTL § 1193(1)(d)(1-a); PL § 55.10(2)(b); PL § 70.15(1);

2. A period of probation of 3 years. PL § 65.00(3)(d); and

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4-a)(A). See also § 14:47, *infra*.

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Violating VTL § 1192(2), (3), (4) or (4-a) while operating a school bus carrying at least 1 student passenger is a class E felony. VTL § 1193(1)(d)(4-a). A defendant who is convicted of any of these offenses as a first offense is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(4-a); PL § 70.00(2)(e);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i); and

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4-a)(A). See also § 14:47, *infra*.

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

Committing Aggravated DWI in violation of VTL § 1192(2-a) while operating a school bus carrying at least 1 student passenger is a class D felony. VTL § 1193(1)(d)(4-a). A defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $2,000 and $10,000, up to 7 years in state prison, or both. VTL § 1193(1)(d)(4-a); PL § 70.00(2)(d);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i); and

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4-a)(A). See also § 14:47, *infra*.

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192(2-a) conviction. See Chapter 46, *infra*.

### § 14:49 School buses -- Additional license sanctions

VTL § 1193(2)(b)(4-a) addresses the licensing consequences of VTL § 1192 offenses committed while operating a school bus. It should be noted, however, that since a school bus is a

commercial motor vehicle requiring a CDL, see VTL § 501-(a)(4); VTL § 509-a(1), the September 30, 2005 changes to the laws affecting CDL holders, see §§ 14:1, 14:5, 14:11-14:13, 14:29, *supra*, likely render VTL § 1193(2)(b)(4-a) redundant and/or obsolete.

VTL § 509-cc also provides for various disqualifications from operating a school bus. As the list is lengthy, this section focuses on DWI-related disqualifications.

VTL § 509-cc(2)(h) provides for a school bus disqualification "for the period that such person's license is revoked or suspended for violating [VTL § 1192 (or an analogous out-of-state offense)]. Such disqualification shall be for not less than [6] months."

A person is subject to a "permanent" disqualification from operating a school bus where the person has been convicted of, *inter alia*, PL §§ 125.10, 125.12, 125.15, an analogous out-of-state offense, or an attempt to commit any such offense. See VTL §§ 509-cc(2)(a), (2)(b), (4)(a), (4)(b). However, DMV can waive such "permanent" disqualification where:

1. At least 5 years have elapsed since the person was discharged or released from a sentence of imprisonment imposed for a conviction of such offense;

2. The person has been granted a certificate of relief from disabilities pursuant to Correction Law § 701;

3. Where the certificate of relief is issued by a Court for a conviction which occurred in New York, it must be issued by the court having jurisdiction over the conviction; and

4. Such certificate must specifically indicate that the Court granting it "has considered the bearing, if any, the criminal offense or offenses for which the person was convicted will have on the applicant's fitness or ability to operate a bus transporting school children."

VTL §§ 509-cc(2)(a), (2)(b). See also People v. Martin, 196 Misc. 2d 583, 764 N.Y.S.2d 546 (Yates Co. Ct. 2003). VTL § 509-cc(2)(b) authorizes earlier reinstatement, in DMV's discretion, where the conviction is for an offense listed in VTL § 509-cc(4)(b).

A person is subject to a 5-year disqualification from operating a school bus (commencing from the date of his or her last conviction) where the person has been convicted of:

1. PL §§ 120.03, 120.04, 120.04-a, 120.05, 120.10, 120.25, 125.13, 125.14, an analogous out-of-state offense, or an attempt to commit any such offense, within the preceding 5 years;

2. A violation of any subdivision of VTL § 1192 (or an analogous out-of-state offense) committed while the person was operating a bus;

3. A violation of any subdivision of VTL § 1192 (or an analogous out-of-state offense) twice within a 10-year period;

4. Leaving the scene of an accident which resulted in personal injury or death in violation of VTL § 600(2) (or an analogous out-of-state offense);

5. A violation of PL § 120.04, 120.04-a, 125.13 or 125.14; or

6. AUO 1st in violation of VTL § 511(3).

VTL § 509-cc(2)(c), (2)(d).

If the conviction is for a violation listed in paragraph "1" above:

> Such disqualification shall be waived provided that the applicant has been granted a certificate of relief from disabilities as provided for in [Correction Law § 701]. When the certificate is issued by a court for a conviction which occurred in this state, it shall only be issued by the court having jurisdiction over such conviction. Such certificate shall specifically indicate that the authority granting such certificate has considered the bearing, if any, the criminal offense or offenses for which the person was convicted will have on the applicant's fitness or ability to operate a bus transporting school children, prior to granting such a certificate.

VTL § 509-cc(2)(c)(i).

A person is subject to a 1-year disqualification from operating a school bus:

> [I]f that person accumulates [9] or more points on his or her driving record for acts occurring during an [18] month period,

provided, however, that the disqualification shall terminate if the person has reduced the points to less than [9] through the successful completion of a motor vehicle accident prevention course.

VTL § 509-cc(2)(e).

### § 14:50 DMV will not revoke the registration of a school bus driven in violation of VTL § 1192

"Notwithstanding the provisions of the opening paragraph of [VTL § 1193(2)(b)], the commissioner shall not revoke the registration of a school bus driven in violation of [VTL § 1192]." VTL § 1193(2)(b)(4-a)(C).

### § 14:51 Bus drivers cannot possess or consume alcohol or drugs while on duty or consume alcohol or drugs within 6 hours beforehand

VTL § 509-l provides as follows:

1. No person shall:

(a) consume a drug, controlled substance or an intoxicating liquor, regardless of its alcoholic content, or be under the influence of an intoxicating liquor or drug, within [6] hours before going on duty or operating, or having physical control of a bus, or

(b) consume a drug, controlled substance or an intoxicating liquor, regardless of its alcoholic content while on duty, or operating, or in physical control of a bus, or

(c) possess a drug, controlled substance or an intoxicating liquor, regardless of its alcoholic content while on duty, operating or in physical control of a bus. However, this paragraph does not apply to possession of a drug, controlled substance or an intoxicating liquor which is transported as part of a shipment or personal effects of a passenger or to alcoholic beverages which are in sealed containers.

2. No motor carrier shall require or permit a driver to:

(a) violate any provision of [VTL § 509-l(1)]; or

(b) be on duty or operate a bus if, by such person's general appearance or by such person's conduct or by other substantiating evidence, such person appears to have consumed a drug, controlled substance or an intoxicating liquor within the preceding [6] hours.

See also Northland Transp. Inc. v. Jackson, 271 A.D.2d 846, 706 N.Y.S.2d 501 (3d Dep't 2000).

## § 14:52 Penalties for first VTL § 1192 offense committed in certain special vehicles

Violating VTL § 1192(1), (2), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

is a misdemeanor. VTL § 1193(1)(d)(1). Note that DWAI in violation of VTL § 1192(1) is a misdemeanor under VTL § 1193(1)(d)(1). A defendant who is convicted of any of these offenses as a first offense is subject to the following consequences:

1. A fine of between $500 and $1,500, up to 1 year in jail, or both. VTL § 1193(1)(d)(1); PL § 55.10(2)(b); PL § 70.15(1);

2. A period of probation of 3 years. PL § 65.00(3)(d);

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4); and

4. Discretionary revocation of his or her registration for at least 1 year. VTL § 1193(2)(b)(4).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*. Note that unless the conviction is for VTL § 1192(1), the defendant is *not* eligible for a conditional license. See 15 NYCRR § 134.7(a)(8).

Committing Aggravated DWI in violation of VTL § 1192(2-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

is a class E felony. VTL § 1193(1)(d)(1). A defendant who is convicted of this offense as a first offense is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(1); PL § 70.00(2)(e);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4); and

4. Discretionary revocation of his or her registration for at least 1 year. VTL § 1193(2)(b)(4).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192(2-a) conviction. See Chapter 46, *infra*. Note that the defendant is *not* eligible for a conditional license. See 15 NYCRR § 134.7(a)(8).

**§ 14:53 Special vehicles -- Repeat offense**

A defendant who violates VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

after having been convicted within the preceding 10 years of violating VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation;

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

(d) Operating a school bus carrying at least 1 student passenger;

(e) Operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7); or

(f) Operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives;

can be charged with a class E felony, and is subject to the following consequences:

1. A fine of between $1,000 and $5,000, up to 4 years in state prison, or both. VTL § 1193(1)(d)(4)(i); PL § 70.00(2)(e);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4);

4. Discretionary revocation of his or her registration for at least 1 year. VTL § 1193(2)(b)(4); and

5. "Permanent" disqualification from operating a commercial motor vehicle (even if the defendant does not have a CDL). VTL § 1193(1)(d)(4)(i); VTL § 1193(2)(e)(3). See §§ 14:11-14:13, *supra*.

The defendant can also be charged with any other applicable felony for any acts arising out of the same incident. VTL § 1193(1)(d)(7).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

A defendant who violates VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

after having been convicted twice within the preceding 10 years of violating VTL § 1192(1), (2), (2-a), (3), (4) or (4-a) while:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation;

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

(d) Operating a school bus carrying at least 1 student passenger;

(e) Operating a commercial motor vehicle, or any motor vehicle registered or registerable under Schedule F of VTL § 401(7); or

(f) Operating a motor vehicle with a GVWR of more than 18,000 pounds which contains flammable gas, radioactive materials or explosives;

can be charged with a class D felony, and is subject to the following consequences:

1. A fine of between $2,000 and $10,000, up to 7 years in state prison, or both. VTL § 1193(1)(d)(4)(ii); PL § 70.00(2)(d);

2. A period of probation of 5 years. PL § 65.00(3)(a)(i);

3. Mandatory revocation of his or her driver's license for at least 1 year. VTL § 1193(2)(b)(4);

4. Discretionary revocation of his or her registration for at least 1 year. VTL § 1193(2)(b)(4); and

5. "Permanent" disqualification from operating a commercial motor vehicle (even if the defendant does not have a CDL). VTL § 1193(1)(d)(4)(ii); VTL § 1193(2)(e)(3). See §§ 14:11-14:13, *supra*.

The defendant can also be charged with any other applicable felony for any acts arising out of the same incident. VTL § 1193(1)(d)(7).

In addition, the defendant will be subject to all of the other usual consequences of a VTL § 1192 conviction. See Chapter 46, *infra*.

### § 14:54 Commercial/special vehicles penalties apply regardless of contrary provisions in other laws

The sentences required to be imposed by VTL § 1193(1)(d)(1), (1-a), (2), (3), (4), (4-a) or (5) "shall be imposed notwithstanding any contrary provision of [the VTL] or the penal law." VTL § 1193(1)(d)(6).

### § 14:55 Commercial/special vehicles statute does not preclude other relevant felonies from being charged if appropriate

VTL § 1193(1)(d)(7) provides that nothing contained in VTL § 1193(1)(d) "shall prohibit the imposition of a charge of any other felony set forth in this or any other provision of law for any acts arising out of the same incident."

### § 14:56 Applicability of pre-conviction conditional license to taxicabs

A pre-conviction conditional license "shall not be valid for the operation of a commercial motor vehicle or a taxicab." 15 NYCRR § 134.18(a).

### § 14:57 Applicability of regular, post-conviction conditional license to taxicabs

VTL § 1196(7)(g) provides that:

> Notwithstanding anything to the contrary contained in a certificate of relief from disabilities issued pursuant to [Correction Law Article 23], any conditional license or privilege issued to a person convicted of a violation of any subdivision of [VTL § 1192] shall not be valid for the operation of any commercial motor vehicle. *In addition, no such conditional license or privilege shall*

*be valid for the operation of a taxicab as defined in this chapter*.

(Emphasis added). See also 15 NYCRR § 134.9(c).

Critically, when VTL § 1196(7)(g) was amended effective September 30, 2005, the language in the first sentence thereof (which prohibits DMV from issuing a conditional license valid for the operation of a commercial motor vehicle notwithstanding anything to the contrary contained in a certificate of relief from disabilities) was *not* incorporated into the second sentence (which pertains to taxicabs).

As a result, if a taxicab driver obtains a certificate of relief from disabilities relieving him or her from the application of VTL § 1196(7)(g), DMV will still issue the driver a conditional license valid for the operation of a taxicab (if he or she is otherwise eligible therefor).

In this regard, this procedure will not override 15 NYCRR § 134.7(a)(8), which precludes the issuance of a conditional license where the underlying VTL § 1192 conviction leading to the revocation of the defendant's driver's license was committed while the defendant was:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

unless the conviction was for DWAI in violation of VTL § 1192(1). See 15 NYCRR § 134.7(a)(8). See also VTL § 1196(7)(a).

## § 14:58 Applicability of conditional license to other special vehicles

As is noted in the previous section, the driver of a special vehicle is ineligible for a conditional license where the underlying VTL § 1192 conviction leading to the revocation of his or her driver's license was committed while such person was:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle;

unless the conviction was for DWAI in violation of VTL § 1192(1). See 15 NYCRR § 134.7(a)(8). See also VTL § 1196(7)(a).

In addition, a conditional license cannot be used to operate either a bus or a school bus where the holder is disqualified from operating such bus pursuant to VTL § 509-c or VTL § 509-cc. See 15 NYCRR §§ 6.27(b), 6.28(b). See also VTL § 1196(7)(g); 15 NYCRR § 134.9(c).

Although VTL § 1196(7)(g) and 15 NYCRR § 134.9(c) do not reference any special vehicles other than taxicabs, a certificate of relief from disabilities may be required to obtain a conditional license valid for the operation of certain special vehicles.

### § 14:59 Successful DDP completion does *not* terminate certain "special vehicle" license revocations

Ordinarily, upon successful completion of the Drinking Driver Program ("DDP"), "a participant may apply to the commissioner . . . for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course." VTL § 1196(5). In other words, successful DDP completion generally allows the defendant to apply for reinstatement of his or her full driving privileges.

VTL § 1193(2)(b)(9) expressly exempts certain "special vehicle" drivers from this rule:

> Effect of rehabilitation program. No period of revocation arising out of [VTL § 1193(2)(b)(4), (5), (6) or (7)] may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

See also VTL § 1196(5); VTL § 1194(2)(d)(3); 15 NYCRR § 134.10(b).

Specifically, successful DDP completion will *not* terminate a license revocation where the underlying offense was committed while the defendant was:

(a) Operating a taxicab carrying a passenger for compensation;

(b) Operating a livery carrying a passenger for compensation; or

(c) Operating a truck with a GVWR of more than 18,000 pounds but not more than 26,000 pounds which is *not* a commercial motor vehicle.

See VTL § 1193(2)(b)(4); VTL § 1193(1)(d)(1).

### § 14:60 Applicability of restricted use license to special vehicles

VTL Article 21-A "provides for the issuance of a restricted use license to a person whose driver's license has been suspended or revoked pursuant to section 318 or 510 of the Vehicle and Traffic Law." 15 NYCRR § 135.1(a). VTL § 530(5) addresses the use of a restricted use license to operate special vehicles:

> A restricted use license or privilege shall be valid for the operation of any motor vehicle, *except a commercial motor vehicle or a vehicle for hire as a taxicab, livery, coach, limousine, van or wheelchair accessible van or tow truck as defined in this chapter* subject to the conditions set forth herein, which the holder would otherwise be entitled to operate had his drivers license or privilege not been suspended or revoked. Notwithstanding anything to the contrary in a certificate of relief from disabilities issued pursuant to [Correction Law Article 23], a restricted use license shall not be valid for the operation of a commercial motor vehicle.

(Emphasis added). See also 15 NYCRR § 135.9(b) ("[a]ny restricted license . . . shall be limited to the operation of vehicles which are not commercial motor vehicles as defined in [VTL § 501-a] or which are not for-hire vehicles as set forth in [VTL § 530]").

In addition, a restricted use license cannot be used to operate either a bus or a school bus where the holder is disqualified from operating such bus pursuant to VTL § 509-c or VTL § 509-cc. See 15 NYCRR §§ 6.27(b), 6.28(b). See also VTL § 530(5); 15 NYCRR § 135.9(b).

Critically, when VTL § 530(5) was amended effective September 30, 2005, the language in the second sentence thereof (which prohibits DMV from issuing a restricted use license valid for the operation of a commercial motor vehicle notwithstanding

anything to the contrary contained in a certificate of relief from disabilities) was *not* incorporated into the first sentence (which pertains to vehicles for hire as a taxicab, livery, coach, limousine, van, wheelchair accessible van or tow truck).

As a result, if the driver of one of these vehicles obtains a certificate of relief from disabilities relieving him or her from the application of VTL § 530(5), DMV will still issue the driver a restricted use license valid for the operation of such vehicle (if he or she is otherwise eligible therefor, and if such vehicle can lawfully be operated without a CDL).

### § 14:61 Unlicensed operation of certain special vehicles

VTL § 509(2) provides that "[w]henever a license is required to operate a motor vehicle, no person shall operate a motor vehicle unless he is the holder of a class of license which is valid for the operation of such vehicle."

A violation of VTL § 509(2) involving the operation for hire of any vehicle as a taxicab, "livery" as defined in VTL § 121-e, coach, limousine, van, wheelchair accessible van or tow truck without the appropriate license therefor is a traffic infraction punishable by a fine of between $225 and $450. VTL § 509(12).

A second such offense within 5 years is a traffic infraction punishable by a fine of between $375 and $750. Id.

A third or subsequent such offense within 10 years is a traffic infraction punishable by a fine of between $750 and $1,500. Id.

CHAPTER 15

# UNDERAGE OFFENDERS

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## § 15:1 In general

In the context of New York DWI law, an "underage offender" is a person under 21 years of age. By contrast, a "youthful offender" is a person at least 16 years of age and under 19 years of age. See CPL § 720.10(1). As a general rule, the laws pertaining to, and the consequences of, alcohol- and drug-related driving offenses are identical for motorists over and under 21, with two major exceptions: (1) certain statutes such as VTL § 1192-a and VTL § 1194-a (*i.e.*, the "Zero Tolerance" laws) only apply to underage offenders, and (2) license suspension/revocation periods are generally longer for underage offenders. This chapter focuses on situations in which underage offenders are treated differently than offenders over the age of 21.

## § 15:2 Whether person is "under 21" is determined by person's age on date of offense

In determining whether a person is under 21 years of age for purposes of the underage offender laws, the person's age is determined based upon his or her age on the date of the commission of the offense -- *not* his or her age on the date of conviction. Thus, it is possible for a person well over the age of 21 to be punished as an underage offender (if the offense was committed when the person was under 21).

## § 15:3 Junior learner's permits and driver's licenses

A class D license is a regular, non-commercial driver's license. VTL § 501(2)(a)(iv). A class DJ license is a "junior" driver's license. VTL § 501(2)(a)(vi). A class M license is a motorcycle driver's license. VTL § 501(2)(a)(vii). A class MJ

license is a "junior" motorcycle driver's license. VTL § 501(2)(a)(viii).

A person between 16 and 18 years of age can apply for a junior learner's permit/driver's license. VTL § 502(2)(d); VTL § 502(3). VTL § 501(5) places various restrictions on the use of class DJ and class MJ learner's permits. VTL § 501(3) places various restrictions on the use of class DJ and class MJ driver's licenses. VTL § 501-b places various additional restrictions on the use of class DJ and class MJ permits/licenses.

The holder of a class DJ or class MJ learner's permit is not eligible to obtain a class DJ or class MJ driver's license unless, *inter alia*, at least 6 months have elapsed since the issuance of such permit (excluding any time period during which the permit was suspended or revoked). VTL § 501-b(1)(d). See also VTL § 503-a(2). However, if the holder of a class DJ or class MJ learner's permit passes a road test pursuant to VTL § 502(4)(b) less than 6 months after acquiring such permit, he or she will be issued a "limited class DJ or MJ license." VTL § 503-a(1). VTL § 503-a places certain restrictions on the use of limited class DJ or MJ licenses. Use of a limited class DJ or MJ license for a purpose other than those authorized by VTL § 503-a(1) is a traffic infraction. VTL § 503-a(6).

"A limited class DJ or MJ license issued pursuant to [VTL § 503-a] shall automatically become a class DJ or MJ license after such limited class DJ or MJ license, singly or in combination with the class DJ or MJ learner's permit, has been valid for [6] months." VTL § 503-a(2). However, "[a]ny time period during which such license or learner's permit has been suspended or revoked shall not be counted in determining such period of validity." Id. See also VTL § 501-b(1)(d).

A class DJ or class MJ driver's license can be converted to a class D or class M driver's license if the holder is at least 17 years of age and has, *inter alia*, successfully completed an approved high school or college driver education course. VTL § 502(2)(c). See also 15 NYCRR § 2.5. At age 18, a valid class DJ or class MJ driver's license automatically converts to a class D or class M driver's license. VTL § 501(2)(a)(vi); VTL § 501(2)(a)(viii).

### § 15:4 Suspension/revocation of junior learner's permits and driver's licenses

VTL § 510-c provides for the suspension or revocation of junior learner's permits and driver's licenses for certain violations. A class DJ or class MJ learner's permit will be suspended for 60 days:

> (i) upon a conviction or finding of a serious traffic violation as defined in [VTL § 510-c(4)], committed while the holder had a class DJ or class MJ learner's permit; or
>
> (ii) upon the *second* conviction or finding of such holder of a violation of any other provision of [the VTL] or any other law, ordinance, order, rule or regulation relating to traffic [*i.e.*, any *moving* violation], committed while such holder had such learner's permit.

VTL § 510-c(1)(a) (emphasis added).

A class DJ or class MJ learner's permit will be *revoked* for 60 days "upon the conviction or finding of the holder of a violation or violations, committed within [6] months after the restoration of a class DJ or class MJ learner's permit suspended pursuant to [VTL § 510-c(1)(a)], which convictions or findings would result in the suspension of such permit pursuant to [VTL § 510-c(1)(a)]." VTL § 510-c(1)(b).

A class DJ or class MJ driver's license or limited class DJ or class MJ license will be suspended for 60 days:

> (i) upon a conviction or finding of a serious traffic violation as defined in [VTL § 510-c(4)], committed while the holder had such license; or
>
> (ii) upon the *second* conviction or finding of the holder of a violation of any other provision of [the VTL] or any other law, ordinance, order, rule or regulation relating to traffic [*i.e.*, any *moving* violation], committed while such holder had such license.

VTL § 510-c(2)(a) (emphasis added).

A class DJ or class MJ driver's license or a limited class DJ or class MJ license will be revoked for 60 days "upon the conviction or finding of the holder of a violation or violations, committed within [6] months either after the restoration of such driver's license suspended pursuant to [VTL § 510-c(2)(a)] or after the restoration of a learner's permit suspended or revoked pursuant to [VTL § 510-c(1)], which convictions or findings would result in the suspension of such license pursuant to [VTL § 510-c(2)(a)]." VTL § 510-c(2)(b).

A driver's license that has been restored following a suspension of a class DJ or class MJ driver's license or a limited

class DJ or class MJ license pursuant to VTL § 510-c(2) will be revoked for 60 days "upon the conviction or finding, within [6] months of such restoration, of any violation or violations which would result in the suspension of a class DJ or class MJ driver's license or a limited class DJ or class MJ license pursuant to [VTL § 510-c(2)(a)]." VTL § 510-c(3).

For purposes of VTL § 510-c, the term "serious traffic violation" means operating a motor vehicle in violation of any of the following provisions of the VTL:

1. VTL Articles 25 and 26 (*i.e.*, VTL §§ 1120-1131 and 1140-1146-A);

2. VTL § 600(1) (leaving the scene of an incident without reporting);

3. VTL § 601 (leaving the scene of injury to certain animals without reporting);

4. VTL § 1111 (traffic-control signals);

5. VTL § 1170 (obedience to signal indicating approach of train);

6. VTL § 1172 (stop signs and yield signs);

7. VTL § 1174 (passing school bus);

8. VTL § 1180(a), (b), (c), (d) and (f) (speeding) -- provided that the violation involved 10 or more MPH over the speed limit;

9. VTL § 1182 (speed contests/races);

10. VTL § 1229-c(3-a) (safety seats and seat belts) -- for violations involving the use of safety seats or seat belts by a child under the age of 16; and

11. VTL § 1212 (reckless driving).

## § 15:5 Probationary driver's licenses

With limited exceptions, "[a]ny driver's license, other than a class DJ and class MJ license or limited class DJ and MJ license, shall be considered probationary until the expiration of [6] months following the date of issuance thereof, and thereafter as provided in [VTL § 510-b]." VTL § 501(4).

## § 15:6 Suspension/revocation of probationary driver's licenses

VTL § 510-b provides for the suspension or revocation of probationary driver's licenses for certain violations committed during the probationary period. A probationary license will be suspended for 60 days "upon the first conviction of the licensee of a violation, committed during the probationary period," of:

1. VTL § 1129 (following too closely);

2. VTL § 1180 (speeding) or any ordinance or regulation limiting the speed of motor vehicles and motorcycles;

3. VTL § 1182 (speed contests/races);

4. VTL § 1192(1) (DWAI); or

5. VTL § 1212 (reckless driving).

VTL § 510-b(1)(i).

A probationary license will also be suspended for 60 days "upon the *second* conviction of the licensee of a violation, committed during the aforesaid probationary period, of any other provision of [the VTL] or of any other law, ordinance, order, rule or regulation relating to traffic [*i.e.*, any *moving* violation]." VTL § 510-b(1)(ii) (emphasis added).

Where a probationary license "is restored or issued to a person who has had his last valid license suspended or revoked pursuant to" VTL § 510-b, such license will be probationary for an additional 6 months following the date of restoration or issuance thereof. VTL § 510-b(3).

If, within 6 months of the restoration of a probationary license, the probationary licensee is convicted of any offense which "would result in the suspension of a probationary license pursuant to [VTL § 510-b(1)]," such probationary license will be revoked. VTL § 510-b(2).

Finally, VTL § 510-b(4) provides that:

> The provisions of [VTL § 510(1), (5), (6) and (7)] shall apply to any suspension or revocation under [VTL § 510-b]. However, the provisions of [VTL § 510-b] shall not operate to prevent a mandatory revocation or suspension for a greater period of time under [VTL § 510(2)] or [VTL § 1193]; nor shall the provisions of [VTL § 510-b] prevent revocation or suspension under [VTL § 510(2) and (3)]

> based upon [2] or more violations, including the same violation which was the basis for suspension or revocation under [VTL § 510-b].

## § 15:7 VTL §§ 1192-a and 1194-a -- The Zero Tolerance laws

VTL § 1192-a provides, in pertinent part:

> **Operating a motor vehicle after having consumed alcohol; under the age of [21]; per se**
>
> No person under the age of [21] shall operate a motor vehicle after having consumed alcohol as defined in this section. For purposes of this section, a person under the age of [21] is deemed to have consumed alcohol only if such person has .02 of one per centum or more but not more than .07 of one per centum by weight of alcohol in the person's blood [*i.e.*, between .02% and .07%], as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194].

VTL § 1194-a sets forth the procedures applicable to a violation of VTL § 1192-a, as well as the procedures applicable to a Zero Tolerance law chemical test refusal.

VTL § 1192-a was created to send a message to underage drivers that if they merely drink and drive they will lose their driver's licenses *regardless of whether they are actually impaired to any extent* (*i.e.*, New York has "zero tolerance" for underage drinking and driving). In this regard, since the intent of the Zero Tolerance laws was to deter underage drinking and driving without inordinately punishing the underage drinking driver, and since a person who drives in violation of VTL § 1192-a may not be at all impaired by the consumption of alcohol, the statute makes clear that it is civil, not criminal, in nature. See VTL § 1192-a ("Notwithstanding any provision of law to the contrary, a finding that a person under the age of [21] operated a motor vehicle after having consumed alcohol in violation of this section is not a judgment of conviction for a crime or any other offense"). See also VTL § 1194-a(2) (a person found guilty of a Zero Tolerance law violation is not subject to a fine, but rather to a "civil penalty").

## § 15:8 Alleged violation of Zero Tolerance laws adjudicated at DMV -- not in Court

Consistent with the fact that a Zero Tolerance law violation is civil, not criminal, in nature, see previous section, the adjudication of an alleged violation of the Zero Tolerance laws takes place at DMV, *not* in a local criminal Court. See VTL § 1192-a ("Any person who operates a motor vehicle in violation of this section, and who is not charged with a violation of any subdivision of [VTL § 1192] arising out of the same incident shall be referred to [DMV] for action in accordance with the provisions of [VTL § 1194-a]").

## § 15:9 Person cannot be charged with Zero Tolerance law violation if charged with violating VTL § 1192

VTL § 1192-a expressly provides that "[a]ny person who operates a motor vehicle in violation of this section, *and who is not charged with a violation of any subdivision of [VTL § 1192] arising out of the same incident* shall be referred to [DMV] for action in accordance with the provisions of [VTL § 1194-a]." (Emphasis added). See also VTL § 1194-a(1)(a); VTL § 1194-a(1)(b). Thus, a person cannot be charged with violating VTL § 1192-a if he or she is charged with a violation of VTL § 1192 arising out of the same incident.

Similarly, a person cannot be charged with violating VTL § 1192-a in a criminal Court. Rather, such "charge" must be filed with DMV. In this regard, in People v. Pesantes, 10 Misc. 3d 676, ___-___, 809 N.Y.S.2d 859, 860-61 (N.Y. City Crim. Ct. 2005), the Court held that:

> While defendant correctly argues that the information fails to establish the necessary elements of Vehicle and Traffic Law § 1192-a, the charge is also subject to dismissal for a more fundamental reason, i.e., Vehicle and Traffic Law § 1192-a is a non-criminal offense which is adjudicated exclusively before a Department of Motor Vehicles hearing officer. * * *
>
> While the New York City Criminal Court generally has jurisdiction to hear, try and determine misdemeanors and all offenses of a grade less than misdemeanor, the Legislature has explicitly limited the adjudication of Vehicle and Traffic Law § 1192-a offenses to the Department of Motor Vehicles. Accordingly, this Court is without jurisdiction to hear, try and determine this charge.

## § 15:10 Person can be *convicted* of Zero Tolerance law violation if charged with violating VTL § 1192

Although a person cannot be *charged* with violating VTL § 1192-a if he or she is charged with a violation of VTL § 1192 arising out of the same incident, see previous section, a person can be *convicted* of violating VTL § 1192-a even if he or she is charged with a violation of VTL § 1192(1). See VTL § 1192(10)(a)(iii), (c). See also § 15:11, *infra*; People v. Pesantes, 10 Misc. 3d 676, ___, 809 N.Y.S.2d 859, 861 (N.Y. City Crim. Ct. 2005).

In addition, VTL § 1192(10)(a)(i) provides that if a person is charged with violating VTL § 1192(2), (3), (4) or (4-a) and "the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge." Since, in such a case, a plea outside of VTL § 1192 is authorized, a plea to a violation of VTL § 1192-a is permissible (as long as the defendant was under 21 years of age on the date of the offense) even if the original charge consisted of a violation of VTL § 1192(2), (3), (4) and/or (4-a).

Indeed, an argument can be made that VTL § 1192-a is a lesser included offense of VTL §§ 1192(1) and (3). In this regard, CPL § 1.20(37) defines "lesser included offense" as follows:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

CPL § 300.50 provides, in pertinent part, that:

> 1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would

> support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.
>
> 2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.

See also CPL § 360.50(1), (2); Chapter 9, *supra*.

### § 15:11 Plea bargain limitations applicable to underage offenders

VTL § 1192(10) sets forth certain plea bargain limitations applicable to VTL § 1192 cases. With respect to underage offenders, VTL § 1192(10)(a)(iii) provides, in pertinent part, that:

> In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] and the operator was under the age of [21] at the time of such violation, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of [VTL § 1192(1)]; provided, however, such charge may instead be satisfied as provided in [VTL § 1192(10)(c)].

VTL § 1192(10)(a)(iii) further provides that:

> [I]f the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192(1)] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

VTL § 1192(10)(b) sets forth plea bargain limitations where the defendant was charged with VTL § 1192(1) or (6) while operating a commercial motor vehicle.

VTL § 1192(10)(c) provides that:

> (c) Except as provided in [VTL § 1192(10)(b)], in any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] by a person who was under the age of [21] at the time of commission of the offense, the court, with the consent of both parties, may allow the satisfaction of such charge by the defendant's agreement to be subject to action by [DMV] pursuant to [VTL § 1194-a]. In any such case, the defendant shall waive the right to a hearing under [VTL § 1194-a] and such waiver shall have the same force and effect as a finding of a violation of [VTL § 1192-a] entered after a hearing conducted pursuant to [VTL § 1194-a]. The defendant shall execute such waiver in open court, and, if represented by counsel, in the presence of his attorney, on a form to be provided by [DMV], which shall be forwarded by the court to [DMV] within [96] hours.

VTL § 1192(10)(c) further provides that:

> To be valid, such form shall, at a minimum, contain clear and conspicuous language advising the defendant that a duly executed waiver: (i) has the same force and effect as a guilty finding following a hearing pursuant to [VTL § 1194-a]; (ii) shall subject the defendant to the imposition of sanctions pursuant to [VTL § 1194-a]; and (iii) may subject the defendant to increased sanctions upon a subsequent violation of [VTL § 1192] or [VTL § 1192-a].

"Upon receipt of a duly executed waiver pursuant to this paragraph, [DMV] shall take such administrative action and impose such sanctions as may be required by [VTL § 1194-a]." Id.

### § 15:12 Sealing of records in Zero Tolerance law case

VTL § 201(1)(k) provides, in pertinent part, that the Commissioner may destroy:

> [A]ny records, including any reproductions or electronically created images of such records and including any records received by the commissioner from a court pursuant to [VTL § 1192(10)(c)] or [Navigation Law § 49-b], relating to a finding of a violation of [VTL §

> 1192-a] or a waiver of the right to a hearing under [VTL § 1194-a] or a finding of a refusal following a hearing conducted pursuant to [VTL § 1194-a(3)] or a finding of a violation of [Navigation Law § 49-b] or a waiver of the right to a hearing or a finding of refusal following a hearing conducted pursuant to [Navigation Law § 49-b], after remaining on file for [3] years after such finding or entry of such waiver or refusal or until the person that is found to have violated such section reaches the age of [21], whichever is the greater period of time.

At such time:

> [T]he entirety of the proceedings concerning the violation or alleged violation of [VTL § 1192-a] or [Navigation Law § 49-b], from the initial stop and detention of the operator to the entering of a finding and imposition of sanctions pursuant to any subdivision of [VTL § 1194-a] or of [Navigation Law § 49-b] shall be deemed a nullity, and the operator shall be restored, in contemplation of law, to the status he occupied before the initial stop and prosecution.

Id. It is critical to note that, *upon the expiration of the retention period set forth in VTL § 201(1)(k), all records in a Zero Tolerance law case "shall be deemed destroyed as a matter of law for all purposes" whether or not such records are actually destroyed*. VTL § 201(5) (emphasis added).

In addition, CPL § 160.55(5) provides, in pertinent part, that:

> (b) Where a person under the age of [21] is referred by the police to [DMV] for action pursuant to [VTL § 1192-a or VTL § 1194-a], or [Navigation Law § 49-b] and a finding in favor of the motorist or operator is rendered, the commissioner of [DMV] shall, as soon as practicable, but not later than [3] years from the date of commission of the offense or when such person reaches the age of [21], whichever is the greater period of time, notify the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies that such finding in favor of the motorist or operator was rendered. Upon receipt of such notification,

> the commissioner of [DCJS] and the heads of such police departments and other law enforcement agencies shall take the actions required by [CPL § 160.50(1)(a), (b) and (c)].
>
> (c) Where a person under the age of [21] is referred by the police to [DMV] for action pursuant to [VTL § 1192-a or VTL § 1194-a], or [Navigation Law § 49-b], and no notification is received by the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies pursuant to [CPL § 160.55(5)(b)], such commissioner of [DCJS] and such heads of police departments and other law enforcement agencies shall, after [3] years from the date of commission of the offense or when the person reaches the age of [21], whichever is the greater period of time, take the actions required by [CPL § 160.50(1)(a), (b) and (c)].

CPL § 160.55(5)(b), (c).

### § 15:13 Sealing of records where VTL § 1192 charge reduced to violation of VTL § 1192-a

Where a VTL § 1192 charge is reduced to a violation of VTL § 1192-a, CPL § 160.55(5)(a) provides:

> When a criminal action or proceeding is terminated against a person by the entry of a waiver of a hearing pursuant to [VTL § 1192(10)(c)] or [Navigation Law § 49-b], the record of the criminal action shall be sealed in accordance with [CPL § 160.55(5)]. Upon the entry of such waiver, the court or the clerk of the court shall immediately notify the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies that a waiver has been entered and that the record of the action shall be sealed when the person reaches the age of [21] or [3] years from the date of commission of the offense, whichever is the greater period of time. At the expiration of such period, the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies shall take the actions required by [CPL § 160.50(1)(a), (b) and (c)].

## § 15:14 Zero Tolerance law generally inapplicable to operator of commercial motor vehicle

VTL § 1192-a expressly provides that "[e]xcept as otherwise provided in [VTL § 1192(5)], this section shall not apply to a person who operates a commercial motor vehicle." VTL § 1192(5) provides that:

> Commercial motor vehicles: per se -- level I. Notwithstanding the provisions of [VTL § 1195], no person shall operate a commercial motor vehicle while such person has .04 of one per centum or more but not more than .06 of one per centum by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194].

VTL § 1192(5) further provides that:

> [N]othing contained in this subdivision shall prohibit the imposition of a charge of a violation of [VTL § 1192(1)], or of [VTL § 1192-a] where a person under the age of [21] operates a commercial motor vehicle where a chemical analysis of such person's blood, breath, urine, or saliva, made pursuant to the provisions of [VTL § 1194], indicates that such operator has .02 of one per centum or more but less than .04 of one per centum by weight of alcohol in such operator's blood.

In other words, an underage offender who operates a commercial motor vehicle with a BAC of .02% or .03% -- which is below the threshold required to be charged with violating VTL § 1192(5) -- can nonetheless be charged with violating VTL § 1192-a or VTL § 1192(1).

## § 15:15 Underage offenders -- First offense

Where a person under the age of 21 is found guilty of a violation of VTL § 1192-a, his or her driver's license will be *suspended*, and his or her registration may be suspended, for a period of 6 months. VTL § 1193(2)(a)(2). He or she will also be liable for a civil penalty in the amount of $125. VTL § 1194-a(2). See also § 15:50, *infra*. The person will most likely be eligible for the Drinking Driver Program and a conditional license. See Chapter 50, *infra*.

Where a defendant under the age of 21 is convicted of, or adjudicated a youthful offender for, a violation of any subdivision of VTL § 1192, his or her driver's license will be *revoked*, and his or her registration may be revoked, for a period of at least 1 year. VTL § 1193(2)(b)(6). He or she will otherwise be subject to the same consequences as a person 21 years of age or older. See Chapter 46, *infra*.

In this situation, the defendant will most likely be eligible for the Drinking Driver Program and a conditional license. However, successful completion of the Drinking Driver Program will *not* result in full restoration of the defendant's driving privileges prior to the expiration of the minimum revocation period. VTL § 1193(2)(b)(9). See also § 15:25, *infra*; Chapter 50, *infra*.

**§ 15:16 Underage offenders -- Second offense**

Where a person under the age of 21 is either (a) found guilty of a violation of VTL § 1192-a, or (b) convicted of, or adjudicated a youthful offender for, a violation of any subdivision of VTL § 1192, and the person has previously been either (a) found guilty of a violation of VTL § 1192-a, or (b) convicted of, or adjudicated a youthful offender for, a violation of any subdivision of VTL § 1192 *not arising out of the same incident*, his or her driver's license will be revoked, and his or her registration may be revoked, for a period of at least 1 year or until the person reaches the age of 21, *whichever is longer*. VTL § 1193(2)(b)(7). In addition, the person will *not* be eligible for either the Drinking Driver Program or a conditional license. See Chapter 50, *infra*.

If the second conviction is for a violation of VTL § 1192-a, the person will also be liable for a civil penalty in the amount of $125. VTL § 1194-a(2). See also § 15:50, *infra*. If the second conviction is for a violation of VTL § 1192, the person will otherwise be subject to the same consequences as a person 21 years of age or older. See Chapter 46, *infra*.

**§ 15:17 Underage offenders -- Chemical test refusal revocation**

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year. VTL § 1194(2)(d)(1)(b).

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), and who "has a prior finding, conviction or youthful offender adjudication resulting from a violation of [VTL § 1192] or [VTL § 1192-a], *not arising from the same incident*,"

will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year or until the person reaches the age of 21, *whichever is longer*. VTL § 1194(2)(d)(1)(b) (emphasis added). See also Chapter 41, *infra*.

### § 15:18 Effect of prior Zero Tolerance law adjudication

For purposes of determining the length of a license suspension or revocation to be imposed for a subsequent offense/refusal committed after a person has been found guilty of a violation of VTL § 1192-a, the effect of the prior Zero Tolerance law adjudication is the same as a conviction of DWAI in violation of VTL § 1192(1), *provided that the subsequent offense is committed during the retention period set forth in VTL § 201(1)(k)*. VTL § 1192(8-a). VTL § 201(1)(k) provides, in pertinent part, that the Commissioner may destroy:

> [A]ny records, including any reproductions or electronically created images of such records and including any records received by the commissioner from a court pursuant to [VTL § 1192(10)(c)] or [Navigation Law § 49-b], relating to a finding of a violation of [VTL § 1192-a] or a waiver of the right to a hearing under [VTL § 1194-a] or a finding of a refusal following a hearing conducted pursuant to [VTL § 1194-a(3)] or a finding of a violation of [Navigation Law § 49-b] or a waiver of the right to a hearing or a finding of refusal following a hearing conducted pursuant to [Navigation Law § 49-b], after remaining on file for [3] years after such finding or entry of such waiver or refusal or until the person that is found to have violated such section reaches the age of [21], whichever is the greater period of time.

In other words, if a subsequent offense/refusal is committed after the retention period set forth in VTL § 201(1)(k) has expired, a prior violation of VTL § 1192-a will have no effect on the length of the suspension/revocation for the new offense/refusal.

### § 15:19 Effect of prior Zero Tolerance law chemical test refusal adjudication

VTL § 1194(2)(d)(1)(a) provides, in pertinent part, that:

> [A] prior finding that a person under the age of [21] has refused to submit to a chemical test pursuant to [VTL § 1194-a(3)] shall have

> the same effect as a prior finding of a refusal pursuant to [VTL § 1194(2)(d)] solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of this article, provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in [VTL § 201(1)(k)].

The pertinent portion of VTL § 201(1)(k) is set forth in the previous section.

In other words, if a subsequent offense/refusal is committed after the retention period set forth in VTL § 201(1)(k) has expired, a prior Zero Tolerance law chemical test refusal will have no effect on the length of the suspension/revocation for the new offense/refusal.

### § 15:20 Out-of-state convictions

Prior to November 1, 2006, VTL § 1192(8) provided that, for purposes of determining the consequences of a violation of VTL § 1192, a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs was deemed to be a prior conviction of DWAI in violation of VTL § 1192(1). Effective November 1, 2006, VTL § 1192(8) provides as follows:

> Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)]; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of [VTL § 1192]. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of [VTL § 1192] which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of [VTL § 1192(1)] for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)].

Thus, a prior out-of-state DWI conviction can now potentially be used as a predicate conviction for a felony DWI charge.

Critically, however, the enabling portion of this change to VTL § 1192(8) expressly provides that it only applies to out-of-state convictions that occurred on or after November 1, 2006. See also People v. Ballman, 15 N.Y.3d 68, 70, 904 N.Y.S.2d 361, 362 (2010) ("This appeal raises the issue whether Vehicle and Traffic Law § 1192(8) allows an out-of-state conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a charge of driving while intoxicated from a misdemeanor to a felony. We hold that it does not").

In addition, where a New York licensee under the age of 21 is convicted of operating a motor vehicle while under the influence of alcohol in another State, his or her driver's license will be revoked, and his or her registration may be revoked, for at least:

(a) 1 year, if the licensee is a "first offender." VTL § 1193(2)(b)(6); VTL § 1193(2)(b)(8); or

(b) 1 year or until age 21, *whichever is longer*, if the licensee is a "repeat offender." VTL § 1193(2)(b)(7); VTL § 1193(2)(b)(8).

## § 15:21 Court must notify parent or guardian of certain minors of VTL charges

VTL § 1193(2)(e)(7)(f) provides that the Court must promptly notify the parent or guardian of a person under the age of 18 (if the minor lives with such parent or guardian) where the minor was charged with a violation of VTL § 1192(1), (2) and/or (3):

> Notice of charges to parent or guardian. Notwithstanding the provisions of [VTL § 1807(2)], upon the first scheduled appearance of any person under [18] years of age who resides within the household of his or her parent or guardian upon a charge of a violation of [VTL § 1192(1), (2) and/or (3)], the local criminal court before which such first appearance is scheduled shall forthwith transmit written notice of such appearance or failure to make such appearance to the parent or guardian of such minor person.

In a situation where the minor pleads guilty by mail or at arraignment, VTL § 1193(2)(e)(7)(f) provides that "transmittal of notice of his or her conviction as provided in [VTL § 514] shall be sufficient and the notice required by this paragraph need not be given."

VTL § 1193(2)(e)(7)(f) further provides "that the failure of a local criminal court to transmit the notice required by this paragraph shall in no manner affect the validity of a conviction subsequently obtained."

VTL § 1193(2)(e)(7)(f) is somewhat redundant, as VTL § 1807(2) provides identical rules for virtually all moving violations:

> Upon the arraignment of any person under [18] years of age who resides within the household of his parent or guardian upon a charge of a violation of the [VTL] or other law or ordinance relating to the operation of motor vehicles or motor cycles, except a violation relating to parking, stopping or standing, the local criminal court which arraigns him shall forthwith transmit written notice of such arraignment to the parent or guardian of such minor person.

VTL § 1807(2).

In a situation where the minor pleads guilty by mail or at arraignment, VTL § 1807(2) provides that "transmittal of notice of his conviction as provided in [VTL § 514] shall be sufficient and the notice of arraignment hereunder need not be given."

VTL § 1807(2) further provides "that the failure of a local criminal court to transmit such notice of arraignment shall in no manner affect the validity of a conviction subsequently obtained."

### § 15:22 Underage offenders and the Drinking Driver Program

A conditional license allows a person to drive, among other places, to, from and during work, and to and from school, during the time period that the person's driving privileges are suspended or revoked as a result of an alcohol-related traffic offense. See VTL § 1196(7); 15 NYCRR § 134.9(b). See also Chapter 50, *infra*. To be eligible for a conditional license, a person must, among other things, participate in the so-called Drinking Driver Program ("DDP").

However, eligibility for the DDP requires an alcohol- or drug-related conviction or a Zero Tolerance adjudication. In this regard, VTL § 1196(4) provides, in pertinent part, that:

> *Participation in the [DDP] shall be limited to those persons convicted of alcohol or drug-related traffic offenses or persons who have been adjudicated youthful offenders for*

> *alcohol or drug-related traffic offenses, or persons found to have been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a]*, who choose to participate and who satisfy the criteria and meet the requirements for participation as established by [VTL § 1196] and the regulations promulgated thereunder.

(Emphasis added). See also 15 NYCRR § 134.2.

In addition, eligibility for the DDP is limited to individuals who, *inter alia*, have neither (a) participated in the DDP within the preceding 5 years, nor (b) been convicted of a violation of any subdivision of VTL § 1192 within the preceding 5 years. See VTL § 1196(4); 15 NYCRR § 134.2; Chapter 50, *infra*. Thus, it will be extremely rare for an underage offender to be eligible for the DDP more than once.

First offense underage offenders, whether convicted of, or adjudicated a youthful offender for, a violation of any subdivision of VTL § 1192, or found guilty of a violation of VTL § 1192-a, will generally be eligible for both the DDP and a conditional license (or, if convicted of DWAI Drugs, for a restricted use license). See Chapter 50, *infra*.

### § 15:23 Chemical test refusals and the DDP

As the previous section demonstrates, eligibility for the DDP requires an alcohol- or drug-related conviction or a VTL § 1192-a adjudication. Thus, a person who refuses to submit to a chemical test and whose driving privileges are revoked by DMV as a result thereof (and who is otherwise eligible for a conditional license), will not be able to obtain a conditional license unless and until the person obtains a VTL § 1192 conviction or a VTL § 1192-a adjudication. As a result, many people who lose their chemical test refusal hearings (and who need to drive to earn a living or to obtain an education) are virtually forced to accept a DWAI or DWI plea in criminal Court in order to obtain a conditional license. This seemingly unfair restriction on conditional license eligibility has been found to be Constitutional. See Matter of Miller v. Tofany, 88 Misc. 2d 247, ___-___, 387 N.Y.S.2d 342, 345-46 (Broome Co. Sup. Ct. 1975).

### § 15:24 Zero Tolerance law chemical test refusals and the DDP

As § 15:22 demonstrates, eligibility for the DDP requires an alcohol- or drug-related driving conviction or a VTL § 1192-a adjudication. In the usual chemical test refusal case, the defendant is charged with both a chemical test refusal as well as a violation of VTL § 1192(1) or (3). As a result, if the defendant

loses his or her DMV chemical test refusal hearing, he or she can obtain a conditional license (if otherwise eligible) by pleading guilty to DWAI or DWI in criminal Court.

By contrast, an underage offender charged with a Zero Tolerance law chemical test refusal will not, by definition, be charged with a violation of either VTL § 1192 or VTL § 1192-a in conjunction therewith, since:

(a) A person cannot be charged with a Zero Tolerance law violation and a violation of any subdivision of VTL § 1192 arising out of the same incident; and

(b) A person cannot be charged with a Zero Tolerance law chemical test refusal and a violation of VTL § 1192-a arising out of the same incident (as VTL § 1192-a requires a chemical test result).

Thus, an underage offender who is found guilty of a Zero Tolerance law chemical test refusal will be ineligible for a conditional license.

Such a situation will likely be extremely rare, however, as drivers who refuse to submit to chemical tests are almost always charged with common law DWI in violation of VTL § 1192(3). In other words, if an underage offender (who would have qualified for a charge of VTL § 1192-a if he or she took the chemical test) refuses to submit to a chemical test, he or she will generally, *at a minimum*, be charged with a violation of VTL § 1192(1) in criminal Court -- not merely with a Zero Tolerance law chemical test refusal.

### § 15:25 Successful DDP completion does not permit early termination of VTL § 1192 revocation for underage offenders

Ordinarily, upon successful completion of the DDP, "a participant may apply to the commissioner . . . for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course." VTL § 1196(5). In other words, successful DDP completion generally allows the defendant to apply for reinstatement of his or her full driving privileges.

However, VTL § 1193(2)(b)(9) expressly exempts underage offenders revoked for a violation of VTL § 1192 from this rule:

> Effect of rehabilitation program. No period of revocation arising out of [VTL § 1193(2)(b)(4), (5), (6) or (7)] may be set aside by the commissioner for the reason that

> such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

In addition, VTL § 1194(2)(d)(3) expressly exempts *any* offender revoked for a chemical test refusal from this rule:

> Effect of rehabilitation program. No period of revocation arising out of [VTL § 1194] may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

See also VTL § 1196(5); 15 NYCRR § 134.10(b); 15 NYCRR § 136.3(a).

Nonetheless, DMV will allow the person to continue to use his or her conditional license pending the expiration of the revocation period (provided that the person does not violate any of the conditions of the conditional license). See generally VTL § 1196(7)(e), (f); 15 NYCRR § 134.9(d)(1). In addition:

> [I]f any such person's conditional license is revoked and such person has completed a rehabilitation program as provided for in [15 NYCRR § 134.10], time served shall be credited toward the remaining portion of the revocation period, calculated from the effective date of the order of revocation which resulted in the issuance of the conditional license, to the date of the violation which resulted in the revocation of the conditional license.

15 NYCRR § 134.9(d)(2).

### § 15:26 Successful DDP completion *does* permit early termination of VTL § 1192-a suspension

As the previous section demonstrates, the relevant statutes prohibit an underage offender whose driver's license is revoked for a violation of VTL § 1192 from reaping the benefit of early license reinstatement provided by VTL § 1196(5). The same rule was apparently intended to apply to underage offenders whose driver's licenses are suspended for 6 months for a violation of VTL § 1192-a. However, when the Zero Tolerance laws were enacted no provision analogous to VTL § 1193(2)(b)(9) was included, and no amendment was made to VTL § 1196(5).

As a result, successful completion of the DDP *does* allow an underage offender suspended for a violation of VTL § 1192-a to apply for early reinstatement of his or her full driving privileges

(which would have the effect of shortening the suspension/ conditional license time from 6 months to approximately 2 months).

### § 15:27 Suspension pending prosecution -- Special rules applicable to underage offenders

In addition to the usual suspension pending prosecution laws, see Chapter 45, *infra*, VTL § 1193(2)(e)(7)(a-1) applies to drivers under 18 years of age who do not yet possess a full class D or class M driver's license. A class D license is a regular, non-commercial driver's license. A class M license is a motorcycle driver's license. VTL § 1193(2)(e)(7)(a-1) provides:

> A court shall suspend a class DJ or MJ learner's permit or a class DJ or MJ driver's license, pending prosecution, of any person who has been charged with a violation of [VTL § 1192(1), (2) and/or (3)].

The "J" designation pertains to a junior learner's permit or junior driver's license. A person between 16 and 18 years of age can apply for a junior permit/license. A class DJ or MJ driver's license can be converted to a class D or M driver's license if the holder is at least 17 years of age and has, among other things, successfully completed an approved high school or college driver education course. See 15 NYCRR § 2.5. At age 18, a valid class DJ or MJ driver's license automatically converts to a class D or M driver's license.

Notably, unlike the prompt suspension law for class D or M driver's license holders, VTL § 1193(2)(e)(7)(a-1) applies not only where the defendant is charged with VTL § 1192(2) and/or (3), but also where he or she is charged with VTL § 1192(1) (*i.e.*, DWAI). In addition, unlike the prompt suspension law for class D or M driver's license holders, no chemical test result is required. Thus, VTL § 1193(2)(e)(7)(a-1) can be applied to chemical test refusal cases, and to cases where the chemical test results are not yet available.

VTL § 1193(2)(e)(7)(b) provides that "the suspension occurring under [VTL § 1193(2)(e)(7)(a-1)] shall occur immediately after the holder's first appearance before the court on the charge which shall, whenever possible, be the next regularly scheduled session of the court after the arrest or at the conclusion of all proceedings required for the arraignment."

In terms of due process, in order to impose a suspension under VTL § 1193(2)(e)(7)(1-a), the Court must make two findings. First, the Court "must find that the accusatory instrument conforms to the requirements of [CPL §] 100.40." VTL § 1193(2)(e)(7)(b). CPL § 100.40 sets forth the facial sufficiency requirements for local

criminal court accusatory instruments. Second, the Court must find that "there exists reasonable cause to believe either that":

> (a) the holder operated a motor vehicle while such holder had .08 of one percent or more by weight of alcohol in his or her blood as was shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194]; or
>
> (b) *the person was the holder of a class DJ or MJ learner's permit or a class DJ or MJ driver's license and operated a motor vehicle while such holder was in violation of [VTL § 1192(1), (2) and/or (3)]*.

VTL § 1193(2)(e)(7)(b) (emphasis added).

If such *tentative* findings are made, the statute provides that "the holder shall be entitled to an opportunity to make a statement regarding these two issues and to present evidence tending to rebut the court's findings." VTL § 1193(2)(e)(7)(b). In addition, the additional procedural due process requirements set forth in the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), apply. See § 45:3, *infra*.

### § 15:28 Suspension pending prosecution is *not* applicable to Zero Tolerance laws

VTL § 1194-a(1)(b) provides that "[u]nless otherwise provided by law, the license or permit to drive or any non-resident operating privilege of such person shall *not* be suspended or revoked prior to the scheduled date for [a Zero Tolerance law] hearing." (Emphasis added).

Similarly, in a Zero Tolerance law chemical test refusal case there is no pre-hearing license suspension. See § 15:55, *infra*.

### § 15:29 Zero Tolerance laws -- Generally

For purposes of the sections that follow, the phrase "Zero Tolerance law" refers to VTL § 1192-a, the phrase "Zero Tolerance laws" refers to VTL §§ 1192-a and 1194-a, and the phrase "Zero Tolerance refusal" refers to a Zero Tolerance law chemical test refusal.

### § 15:30 Zero Tolerance laws -- Who can lawfully be requested to submit to a chemical test?

Where a police officer has reasonable grounds to believe that a person under the age of 21 has been operating a motor vehicle in

violation of VTL § 1192, VTL § 1194(2)(a)(1) and (2) sets forth the circumstances pursuant to which such person can properly be requested to submit to a chemical test.

Where a police officer does *not* have reasonable grounds to believe that a person under the age of 21 has been operating a motor vehicle in violation of VTL § 1192, but nonetheless has reasonable grounds to believe that the person has been operating a motor vehicle after having consumed alcohol in violation of VTL § 1192-a (*i.e.*, where a police officer has reasonable grounds to believe that a minor has been drinking, but is neither impaired nor intoxicated), VTL § 1194(2)(a) provides, in pertinent part:

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
> (1) . . . having reasonable grounds to believe such person to have been operating in violation of [VTL § 1192-a] and within [2] hours after the stop of such person for any such violation,
> * * *
>
> (3) for the purposes of [VTL § 1194(2)(a)], "reasonable grounds" to believe that a person has been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a] shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of such subdivision. Such circumstances may include any visible or behavioral indication of alcohol consumption by the operator, the existence of an open container containing or having contained an alcoholic beverage in or around the vehicle driven by the operator, or any other evidence surrounding the circumstances of the incident which indicates that the operator has been

> operating a motor vehicle after having consumed alcohol at the time of the incident.

VTL § 1194(2)(a)(1), (3).

In such a situation, the motorist cannot be arrested, but "may be temporarily detained by the police solely for the purpose of requesting or administering [a] chemical test." VTL § 1194(2)(a)(4). See also § 15:31, *infra*.

### § 15:31 Minor suspected of violating Zero Tolerance law cannot be arrested

Where a police officer does not have reasonable grounds to believe that a person under the age of 21 has been operating a motor vehicle in violation of VTL § 1192, but nonetheless has reasonable grounds to believe that the person has been operating a motor vehicle after having consumed alcohol in violation of VTL § 1192-a (*i.e.*, where a police officer has reasonable grounds to believe that a minor has been drinking, but is neither impaired nor intoxicated), VTL § 1194(2)(a)(4) provides that:

> [N]otwithstanding any other provision of law to the contrary, no person under the age of [21] shall be arrested for an alleged violation of [VTL § 1192-a]. However, a person under the age of [21] for whom a chemical test is authorized pursuant to [VTL § 1194(2)(a)] may be temporarily detained by the police solely for the purpose of requesting or administering such chemical test whenever arrest without a warrant for a petty offense would be authorized in accordance with the provisions of [CPL § 140.10] or [VTL § 1194(1)(a)].

### § 15:32 Zero Tolerance law -- Procedure where chemical test result is obtained

Where a chemical test result between .02% and .07% is obtained and the underage offender will be charged with violating VTL § 1192-a (and will *not* be charged with violating any subdivision of VTL § 1192 arising out of the same incident):

> [T]he police officer who administered the test shall forward a report of the results of such test to [DMV] within [24] hours of the time when such results are available in a manner prescribed by the commissioner, and the operator shall be given a hearing notice as

> provided in [VTL § 1194-a(1-a)], to appear before a hearing officer in the county where the chemical test was administered, or in an adjoining county under such circumstances as prescribed by the commissioner, on a date to be established in accordance with a schedule promulgated by the commissioner.

VTL § 1194-a(1)(a). Note that in such a case the underage offender will *not* be brought or sent to Court. Rather, everything will be handled at DMV.

### § 15:33 Zero Tolerance law -- Chemical test result report -- Verification

Where a chemical test result between .02% and .07% is obtained and the underage offender will be charged with violating VTL § 1192-a, "the police officer who administered the test shall forward a report of the results of such test to [DMV] within [24] hours of the time when such results are available." VTL § 1194-a(1)(a). "The report of the police officer shall be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to [PL § 210.45] and such form notice together with the subscription of the deponent shall constitute verification of the report." Id.

### § 15:34 Zero Tolerance law hearings -- Generally

VTL § 1194-a(1)(b) provides for a Due Process hearing prior to the imposition of sanctions for a violation of VTL § 1192-a:

> Every person under the age of [21] who is alleged to have operated a motor vehicle after having consumed alcohol as set forth in [VTL § 1192-a], and who is not charged with violating any subdivision of [VTL § 1192] arising out of the same incident, is entitled to a hearing before a hearing officer in accordance with the provisions of [VTL § 1194-a].

### § 15:35 Zero Tolerance law hearing -- Waiver of right to hearing

VTL § 1194-a(1)(c) provides that:

> Any person may waive the right to a hearing under [VTL § 1194-a(1)], in a form and manner prescribed by the commissioner, and may enter an admission of guilt, in person or by mail, to the charge of operating a motor vehicle in violation of [VTL § 1192-a]. Such admission

> of guilt shall have the same force and effect as a finding of guilt entered following a hearing conducted pursuant to [VTL § 1194-a(1)].

See also 15 NYCRR § 127.7(f)(7).

### § 15:36 Zero Tolerance law hearing -- Hearing notice

VTL § 1194-a(1-a) sets forth the requirements for a Zero Tolerance law hearing notice:

> Hearing notice. The hearing notice issued to an operator pursuant to [VTL § 1194-a(1)] shall be in a form as prescribed by the commissioner. In addition to containing information concerning the time, date and location of the hearing, and such other information as the commissioner deems appropriate, such hearing notice shall also contain the following information: the date, time and place of the offense charged; the procedures for requesting an adjournment of a scheduled hearing as provided in [VTL § 1194-a], the operator's right to a hearing conducted pursuant to [VTL § 1194-a] and the right to waive such hearing and plead guilty, either in person or by mail, to the offense charged.

### § 15:37 Zero Tolerance law hearing -- Time of hearing

A Zero Tolerance law hearing:

> [S]hall occur within [30] days of, but not less than [48] hours from, the date that the chemical test was administered, provided, however, where the commissioner determines, based upon the availability of hearing officers and the anticipated volume of hearings at a particular location, that the scheduling of such hearing within [30] days would impair the timely scheduling or conducting of other hearings pursuant to this chapter, such hearing shall be scheduled at the next hearing date for such particular location.

VTL § 1194-a(1)(a).

## § 15:38 Zero Tolerance law hearing -- Pre-hearing discovery

In sharp contrast with the rules of discovery applicable to a VTL § 1192 prosecution, in a Zero Tolerance law case the motorist must be provided with the discovery set forth in CPL § 240.20(1)(c) and (k), *without a demand therefor*, at the time that the motorist is provided with the hearing notice:

> When providing the operator with [the] hearing notice, the police officer shall also give to the operator, and shall, prior to the commencement of the hearing, provide to [DMV], copies of the following reports, documents and materials: any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or instrument, which tests or examinations were made by or at the request or direction of a public servant engaged in law enforcement activity.

VTL § 1194-a(1)(a).

## § 15:39 Zero Tolerance law hearing -- Failure of motorist to appear at hearing

VTL § 1194-a(1)(c) provides that:

> Unless an adjournment of the hearing date has been granted, upon the operator's failure to appear for a scheduled hearing, the commissioner shall suspend the license or permit to drive or non-resident operating privilege until the operator petitions the commissioner and a rescheduled hearing is conducted, provided, however, the commissioner shall restore such person's license or permit to drive or non-resident operating privilege if such rescheduled hearing is adjourned at the request of a person other than the operator.

See also 15 NYCRR § 127.7(f)(6).

Critically, "[i]f the respondent fails to appear at a hearing, the hearing shall be rescheduled and no testimony shall be taken in

the respondent's absence." 15 NYCRR § 127.7(f)(8). Cf. 15 NYCRR § 127.9(b). *In other words, if the motorist fails to appear for (or to waive) a Zero Tolerance law hearing, the motorist's driving privileges will be suspended indefinitely until he or she petitions DMV and a rescheduled hearing is conducted (or a hearing waiver is received by DMV).*

### § 15:40 Zero Tolerance law hearing -- Failure of police officer to appear at hearing

If the arresting officer fails to appear at a DMV chemical test refusal hearing on the first scheduled hearing date, the hearing will be adjourned. 15 NYCRR § 127.9(c). By contrast, "[i]f a police officer does not appear for a [Zero Tolerance law] hearing, the hearing officer shall have the authority to dismiss the charge." VTL § 1194-a(1)(c). See also 15 NYCRR § 127.7(f)(7).

### § 15:41 Zero Tolerance law hearing -- Requests for adjournments

VTL § 1194-a(1)(c) provides that:

> Requests for adjournments shall be made and determined in accordance with regulations promulgated by the commissioner. If such a request by the operator for an adjournment is granted, the commissioner shall notify the operator of the rescheduled hearing, which shall be scheduled for the next hearing date. If a second or subsequent request by the operator for an adjournment is granted, the operator's license or permit to drive or non-resident operating privilege may be suspended pending the hearing at the time such adjournment is granted; provided, however, that the records of [DMV] or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard; and provided further, that such hearing shall be scheduled for the next hearing date.

The relevant DMV regulations are found at 15 NYCRR § 127.7(f)(1)-(5):

> *Adjournments of hearings held under [VTL § 1194-a].* (1) Adjournments of hearings may only be granted by the hearing officer responsible for the particular hearing, by a supervisor of such hearing officer or by the Safety Hearing Bureau.

(2) It is [DMV's] general policy to grant a request for adjournment for good cause if such request is received at least [7] days prior to the scheduled date of hearing and if no prior requests for adjournment have been made. Notwithstanding this policy, requests for adjournments made more than [7] days prior to hearing may be denied by the hearing officer, or supervisor of the hearing office[r] or by the Safety Hearing Bureau. Grounds for such a denial include, but are not limited to, such a request being a second or subsequent request for adjournment, or where there is reason to believe such request is merely an attempt to delay the holding of a hearing, or where an adjournment will significantly affect the availability of other witnesses scheduled to testify.

(3) Any motorist or designated representative requesting an adjournment should obtain the name and title of the person granting such request. This information will be required in the event of any dispute as to whether an adjournment was in fact granted. Any request which is not specifically granted shall be deemed denied.

(4) Requests for adjournments within [7] days of a scheduled hearing must be made directly to the hearing officer. Such requests will generally not be granted, unless the initial hearing was scheduled less than [7] days from the date on which respondent was first notified of the hearing by the police officer.

(5) A temporary suspension of a license, permit or privilege may be imposed at the time a second or subsequent adjournment requested by the respondent is granted provided that the records of [DMV] or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard.

### § 15:42 Zero Tolerance law hearing -- Rights of motorist

VTL § 1194-a(1)(b)(ii) affords the motorist the following rights at a Zero Tolerance law hearing:

(a) The right to be present at the hearing;

(b) The right to be represented by attorney, or in the hearing officer's discretion, by any other person the operator chooses;

(c) The right to receive and review discovery materials as provided in VTL § 1194-a(1);

(d) The right not to testify;

(e) The right to present evidence and witnesses in his own behalf;

(f) The right to cross-examine adverse witnesses; and

(g) The right to appeal from an adverse determination in accordance with VTL Article 3-A.

See generally State Administrative Procedure Act ("SAPA").

While the motorist may be permitted to be represented by a non-attorney, "[a]ny person representing the operator must conform to the standards of conduct required of attorneys appearing before state courts, and failure to conform to these standards will be grounds for declining to permit his continued appearance in the hearing." VTL § 1194-a(1)(b)(ii)

**§ 15:43 Zero Tolerance law hearing -- Hearing procedures**

VTL § 1194-a(1)(b)(iii) provides that Zero Tolerance law hearings are to be conducted in accordance with both (a) VTL § 1194-a(1), and (b) the provisions applicable to the adjudication of traffic infractions pursuant to the following provisions of 15 NYCRR Part 124:

1. 15 NYCRR § 124.1(b) regarding the opening statement;

2. 15 NYCRR § 124.2(b) regarding the rights to representation and to remain silent; and

3. 15 NYCRR § 124.4(a)-(e) regarding the conduct of the hearing, procedure and recusal.

"[H]owever, . . . nothing contained in [VTL § 1194-a(1)(b)(iii)] shall be deemed to preclude a hearing officer from changing the order of a hearing conducted pursuant to [VTL § 1194-a(1)] as justice may require and for good cause shown." Id.

See also 15 NYCRR § 127.5(e).

15 NYCRR § 124.1(b) provides that *the ALJ* must make an "opening statement" informing motorists (a) of the rights set forth in § 15:42, *supra*, and (b) of hearing and adjournment procedures, including (i) the order in which the hearing will be conducted, and (ii) that the police officer bears the burden of proving the motorist's guilt by clear and convincing evidence.

15 NYCRR § 124.2(b) reiterates the rights to representation and to remain silent set forth in § 15:42, *supra*. It also provides that "*[n]o negative inference will be drawn from the exercise of the motorist's right not to testify*." (Emphasis added).

15 NYCRR § 124.4 provides that:

> (a) The administrative law judge will call the police officer, the motorist, and the attorney or other representative, if any, to the dais. After the charge is read, the police officer will testify. The burden of proving the charge rests with the police officer, who has the obligation to present evidence which is sufficient to establish each material element of the charge by clear and convincing evidence. Other testimony in support of the charge may then be given.
>
> (b) *The administrative law judge may question the police officer for the purpose of clarifying evidence already presented; leading questions addressed to material elements of the charge which have been omitted from the police officer's testimony may not be asked*.
>
> (c) After the people's case has been presented, the motorist may then testify on his or her own behalf and call witnesses. Any person who testifies may be examined by the administrative law judge and cross-examined by the adverse party. All testimony shall be given under oath or affirmation. The administrative law judge may exclude any witness, except the motorist or police officer, during the testimony of another person. Documentary evidence may be introduced by any party.
>
> (d) When the administrative law judge has received all of the evidence, the police officer and motorist or his or her representative may make a closing statement. The administrative law judge will then consider all the evidence in the record and

> announce whether or not the charge has been sustained by clear and convincing evidence.
>
> (e) The motorist may request recusal of a presiding administrative law judge. The request and the reason for it must be stated to the presiding administrative law judge at the commencement of the hearing or as soon after the beginning as the motorist receives information which forms the basis for such request. An administrative law judge's denial of a request for recusal is appealable provided a hearing determination is subsequently made which is appealable by the requestor to the Traffic Violations Appeals Board pursuant to [VTL Article 2-A].

(Emphasis added).

### § 15:44 Zero Tolerance law hearing -- Rules of evidence

VTL § 1194-a(1)(b)(iv) provides that the rules governing the receipt of evidence in a court of law shall not apply in a Zero Tolerance law hearing except as follows:

(1) On the merits of the charge, and whether or not a party objects, the hearing officer shall exclude from consideration the following:

  (a) A privileged communication;

  (b) Evidence which, for constitutional reasons, would not be admissible in a court of law;

  (c) Evidence of prior misconduct, incompetency or illness (except where such evidence would be admissible in a court of law); and

  (d) Evidence which is irrelevant or immaterial; and

(2) No negative inference shall be drawn from the operator's exercising the right not to testify.

See also 15 NYCRR § 124.5 (same).

### § 15:45 Zero Tolerance law hearing -- Issues to be determined at hearing

VTL § 1194-a(1)(b)(i) provides that a Zero Tolerance law hearing shall be limited to the following issues:

(1) Did such person operate the motor vehicle;

(2) Was a valid request to submit to a chemical test made by the police officer in accordance with the provisions of VTL § 1194;

(3) Was such person less than 21 years of age at the time of operation of the motor vehicle;

(4) Was the chemical test properly administered in accordance with the provisions of VTL § 1194;

(5) Did the test find that such person had driven after having consumed alcohol as defined in VTL § 1192-a; and

(6) Did the police officer make a lawful stop of such person.

### § 15:46 Zero Tolerance law hearing -- Burden of proof

At a Zero Tolerance law hearing, "[t]he burden of proof shall be on the police officer to prove each of the[] issues [set forth in the previous section] by clear and convincing evidence." VTL § 1194-a(1)(b)(i).

### § 15:47 Zero Tolerance law hearing -- DMV action where evidence establishes all 6 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds all of the issues set forth in [VTL § 1194-a(1)] in the affirmative, the hearing officer shall suspend or revoke the license or permit to drive or non-resident operating privilege of such person in accordance with the time periods set forth in [VTL § 1193(2)]." VTL § 1194-a(1)(b)(v). See also §§ 15:15 & 15:16, *supra*.

### § 15:48 Zero Tolerance law hearing -- DMV action where evidence fails to establish all 6 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds any of said issues in the negative, the hearing officer must find that the operator did not drive after having consumed alcohol." VTL § 1194-a(1)(b)(v).

### § 15:49 Zero Tolerance law hearing -- Right to appeal adverse decision

"A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to the provisions of [VTL § 1194-a] may appeal the finding of the hearing officer in accordance with the provisions of [VTL Article 3-A (*i.e.*, VTL §§ 260-63)]." VTL § 1194-a(1)(b)(vi). See also § 41:67, *infra*.

## § 15:50 Zero Tolerance laws -- Civil penalty

A person who is found guilty of either (a) a violation of the Zero Tolerance law, or (b) a Zero Tolerance law chemical test refusal, is not only subject to the suspension or revocation of his or her driver's license, permit to drive, or non-resident operating privilege -- the person "shall also be liable for a civil penalty in the amount of [$125]." VTL § 1194-a(2).

In addition, where the person's license or operating privilege has been *suspended* for a violation of VTL § 1192-a, the person must also pay a suspension termination fee of $100 before his or her driving privileges will be reinstated. VTL § 503(2)(j).

Similarly, where the person's license has been *revoked* for a violation of VTL § 1192-a, the person must also pay a re-application fee of $100 (unless the person has been issued a conditional or restricted use license). VTL § 503(2)(h). If the person has an out-of state license, the re-application fee is $25. VTL § 503(2)(i).

## § 15:51 Zero Tolerance refusals -- Procedure upon detention -- Zero Tolerance Report of Refusal

Where a person has been lawfully detained for a suspected violation of VTL § 1192-a, VTL § 1194(2)(b)(1) provides, in pertinent part:

> Report of Refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; or *(C) with regard to a person under the age of [21], there are reasonable grounds to believe that such person has been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a];* and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege [a] shall be immediately suspended and subsequently revoked, or, [b] *for operators under the age of [21] for whom there are reasonable grounds to believe that such operator has been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a], shall be revoked* for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of

> the charge for which such person is arrested *or detained*, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

(Emphases added).

### § 15:52 Zero Tolerance Report of Refusal -- Verification

A Zero Tolerance Report of Refusal "may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to [PL § 210.45] and such form notice together with the subscription of the deponent shall constitute a verification of the report." VTL § 1194(2)(b)(1).

### § 15:53 Zero Tolerance Report of Refusal -- Contents

The officer's Zero Tolerance Report of Refusal must "set forth reasonable grounds to believe [1] . . . such detained person under the age of [21] had been driving in violation of . . . [VTL § 1192-a], [2] that said person had refused to submit to such chemical test, and [3] that no chemical test was administered pursuant to the requirements of [VTL § 1194(3)]." VTL § 1194(2)(b)(2).

### § 15:54 Zero Tolerance Report of Refusal -- To whom is it submitted?

> [I]n the case of a person under the age of [21], for whom a test was authorized pursuant to the provisions of [VTL § 1194(2)(a)(2) or (3)], and who has not been placed under arrest for a violation of any of the provisions of [VTL § 1192], [the officer's Zero Tolerance Report of Refusal] shall be forwarded to the commissioner within [48] hours in a manner to be prescribed by the commissioner, and all subsequent proceedings with regard to refusal to submit to such chemical test by such person shall be as set forth in [VTL § 1194-a(3)].

VTL § 1194(2)(b)(2).

## § 15:55 Zero Tolerance refusals -- There is no pre-hearing license suspension

At arraignment in a "regular" DWI chemical test refusal case, the Court is required to temporarily suspend the defendant's driving privileges pending the outcome of a DMV refusal hearing. See VTL § 1194(2)(b)(3) ("For persons placed under arrest for a violation of any subdivision of [VTL § 1192], the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court without notice pending the determination of a hearing as provided in [VTL § 1194(2)(c)]"). See also 15 NYCRR § 139.3(a).

By contrast, in a Zero Tolerance refusal case there is no pre-hearing license suspension (nor is there an arrest and/or an arraignment).

## § 15:56 Zero Tolerance refusal hearings -- Generally

VTL § 1194-a(3)(a) provides for a Due Process hearing prior to the imposition of sanctions for a Zero Tolerance law chemical test refusal:

> Any person under the age of [21] who is suspected of operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a], and who is not charged with violating any subdivision of [VTL § 1192] arising out of the same incident, and who has been requested to submit to a chemical test pursuant to [VTL § 1194(2)(a)] and after having been informed that his license or permit to drive and any non-resident operating privilege shall be revoked for refusal to submit to such chemical test or any portion thereof, whether or not there is a finding of driving after having consumed alcohol, and such person refuses to submit to such chemical test or any portion thereof, shall be entitled to a hearing in accordance with a schedule promulgated by the commissioner.

## § 15:57 Zero Tolerance refusal hearing -- Waiver of right to hearing

VTL § 1194-a(3)(b) provides that "[a]ny person may waive the right to a hearing under this subdivision." See also 15 NYCRR § 127.7(f)(7).

## § 15:58 Zero Tolerance refusals -- Police officer must provide motorist with waiver form and notice of refusal hearing date

VTL § 1194(2)(b)(4) provides that:

> The . . . police officer, in the case of a person under the age of [21] alleged to be driving after having consumed alcohol, shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner. If a hearing, as provided for in . . . [VTL § 1194-a(3)], is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, as of the date of receipt of such waiver in accordance with the provisions of [VTL § 1194(2)(d)].

## § 15:59 Zero Tolerance refusal hearing -- Time of hearing

A Zero Tolerance law chemical test refusal hearing:

> [S]hall occur within [30] days of, but not less than [48] hours from, the date of such refusal, provided, however, where the commissioner determines, based upon the availability of hearing officers and the anticipated volume of hearings at a particular location, that the scheduling of such hearing within [30] days would impair the timely scheduling or conducting of other hearings pursuant to this chapter, such hearing shall be scheduled at the next hearing date for such particular location.

## § 15:60 Zero Tolerance refusal hearing -- Failure of motorist to appear at hearing

VTL § 1194-a(3)(b) provides that:

> Unless an adjournment of the hearing date has been granted, upon the operator's failure to appear for a scheduled hearing, the commissioner shall suspend the license or permit to drive or non-resident operating privilege until the operator petitions the commissioner and a rescheduled hearing is conducted, provided, however, the commissioner shall restore such person's license or permit

> to drive or non-resident operating privilege if such rescheduled hearing is adjourned at the request of a person other than the operator.

See also 15 NYCRR § 127.7(f)(6).

Critically, "[i]f the respondent fails to appear at a hearing, the hearing shall be rescheduled and no testimony shall be taken in the respondent's absence." 15 NYCRR § 127.7(f)(8). Cf. 15 NYCRR § 127.9(b). *In other words, if the motorist fails to appear for (or to waive) a Zero Tolerance refusal hearing, the motorist's driving privileges will be suspended indefinitely until he or she petitions DMV and a rescheduled hearing is conducted (or a hearing waiver is received by DMV).*

### § 15:61 Zero Tolerance refusal hearing -- Failure of police officer to appear at hearing

If the arresting officer fails to appear at a "regular" DMV chemical test refusal hearing on the first scheduled hearing date, the hearing will be adjourned. 15 NYCRR § 127.9(c). By contrast, "[i]f a police officer does not appear for a [Zero Tolerance refusal] hearing, the hearing officer shall have the authority to dismiss the charge." VTL § 1194-a(3)(b). See also 15 NYCRR § 127.7(f)(7).

### § 15:62 Zero Tolerance refusal hearing -- Requests for adjournments

VTL § 1194-a(3)(b) provides that:

> Requests for adjournments shall be made and determined in accordance with regulations promulgated by the commissioner. If such a request by the operator for an adjournment is granted, the commissioner shall notify the operator of the rescheduled hearing, which shall be scheduled for the next hearing date. If a second or subsequent request by the operator for an adjournment is granted, the operator's license or permit to drive or non-resident operating privilege may be suspended pending the hearing at the time such adjournment is granted; provided, however, that the records of [DMV] or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard; and provided further, that such hearing shall be scheduled for the next hearing date.

The relevant DMV regulations are found at 15 NYCRR § 127.7(f)(1)-(5):

> *Adjournments of hearings held under [VTL § 1194-a].* (1) Adjournments of hearings may only be granted by the hearing officer responsible for the particular hearing, by a supervisor of such hearing officer or by the Safety Hearing Bureau.
>
> (2) It is [DMV's] general policy to grant a request for adjournment for good cause if such request is received at least [7] days prior to the scheduled date of hearing and if no prior requests for adjournment have been made. Notwithstanding this policy, requests for adjournments made more than [7] days prior to hearing may be denied by the hearing officer, or supervisor of the hearing office[r] or by the Safety Hearing Bureau. Grounds for such a denial include, but are not limited to, such a request being a second or subsequent request for adjournment, or where there is reason to believe such request is merely an attempt to delay the holding of a hearing, or where an adjournment will significantly affect the availability of other witnesses scheduled to testify.
>
> (3) Any motorist or designated representative requesting an adjournment should obtain the name and title of the person granting such request. This information will be required in the event of any dispute as to whether an adjournment was in fact granted. Any request which is not specifically granted shall be deemed denied.
>
> (4) Requests for adjournments within [7] days of a scheduled hearing must be made directly to the hearing officer. Such requests will generally not be granted, unless the initial hearing was scheduled less than [7] days from the date on which respondent was first notified of the hearing by the police officer.
>
> (5) A temporary suspension of a license, permit or privilege may be imposed at the time a second or subsequent adjournment requested by the respondent is granted provided that the records of [DMV] or the evidence already

admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard.

### § 15:63 Zero Tolerance refusal hearing -- Issues to be determined at hearing

VTL § 1194-a(3)(c) provides that a Zero Tolerance refusal hearing shall be limited to the following issues:

(1) Was a valid request to submit to a chemical test made by the police officer in accordance with the provisions of VTL § 1194;

(2) Was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the revocation of such person's license or permit to drive or non-resident operating privilege, whether or not such person is found to have operated a motor vehicle after having consumed alcohol;

(3) Did such person refuse to submit to such chemical test or any portion thereof;

(4) Did such person operate the motor vehicle;

(5) Was such person less than 21 years of age at the time of operation of the motor vehicle; and

(6) Did the police officer make a lawful stop of such person.

### § 15:64 Zero Tolerance refusal hearing -- DMV action where evidence establishes all 6 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds all of the issues in the affirmative, such hearing officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of [VTL § 1194(2)(d)]." VTL § 1194-a(3)(c). See also § 15:17, *supra*.

### § 15:65 Zero Tolerance refusal hearing -- DMV action where evidence fails to establish all 6 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds on any [1] said issue in the negative, the hearing officer shall not revoke the operator's license or permit to drive or non-resident operating privilege and shall immediately terminate any outstanding suspension of the operator's

license, permit to drive or non-resident operating privilege arising from such refusal." VTL § 1194-a(3)(c).

### § 15:66 Zero Tolerance refusal hearing -- Right to appeal adverse decision

"A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to the provisions of [VTL § 1194-a] may appeal the findings of the hearing officer in accordance with the provisions of [VTL Article 3-A (*i.e.*, VTL §§ 260-63)]. VTL § 1194-a(3)(c). See also § 41:67, *infra*.

### § 15:67 Underage offenders and AUO

Aggravated Unlicensed Operation of a Motor Vehicle ("AUO") is a multi-stage offense, in that a person who commits AUO 2nd also, by definition, commits AUO 3rd; and a person who commits AUO 1st also, by definition, commits AUO 2nd. See VTL §§ 511(1)(a); 511(2)(a); 511(3)(a). Thus, an analysis of the elements of AUO 1st requires an analysis of the elements of AUO 2nd and AUO 3rd as well.

The elements of AUO 3rd are:

1. Operation;

2. Of a motor vehicle;

3. Upon a public highway;

4. The defendant's driver's license or privilege to drive in New York is suspended, revoked or otherwise withdrawn by DMV; and

5. The defendant knew or had reason to know that his or her driver's license or privilege to drive in New York had been suspended, revoked or otherwise withdrawn by DMV.

VTL § 511(1)(a).

The elements of AUO 2nd are:

1. AUO 3rd; and

2. Any of the following 4 additional elements:

   (a) A previous AUO conviction within the preceding 18 months; or

(b) The underlying suspension/revocation resulted from (i) a chemical test refusal in violation of VTL § 1194, (ii) *a violation of VTL § 1192-a* (*i.e.*, the Zero Tolerance law), or (iii) a conviction of a violation of any of the provisions of VTL § 1192; or

(c) The underlying suspension was a suspension pending prosecution of a pending DWI charge; or

(d) The defendant had in effect 3 or more scofflaw suspensions imposed on at least 3 separate dates.

VTL § 511(2)(a).

Notably, VTL § 511(2)(a)(ii) does not make reference to a Zero Tolerance law chemical test refusal revocation. Thus, while a VTL § 1192-a suspension/revocation elevates the crime of AUO 3rd to AUO 2nd, a Zero Tolerance law chemical test refusal revocation does not.

The elements of AUO 1st are:

1. AUO 2nd (involving aggravating element (b), (c) or (d) above); and

2. Either of the following 2 additional elements:

(a) DWAI, DWI or DWAI-Drugs in violation of VTL § 1192(1), (2), (3), (4) or (5); or

(b) The defendant had in effect 10 or more scofflaw suspensions imposed on at least 10 separate dates.

VTL § 511(3)(a).

Since VTL § 511(3)(a)(i) does not make reference to VTL § 1192-a and/or VTL § 1194-a, an underage offender charged with a Zero Tolerance law violation cannot be charged with AUO 1st. See also Chapter 13, *supra*.

## § 15:68 Youthful offenders -- License suspension/revocation applies

Although "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense," CPL § 720.35(1), where such adjudication results from a "conviction" of a violation of VTL § 1192, the license suspension/revocation which would

normally arise from such conviction is still applicable. In this regard, VTL § 1193(2)(e)(4) provides:

> Youthful offenders. Where a youth is determined to be a youthful offender, following a conviction of a violation of [VTL § 1192] for which a license suspension or revocation is mandatory, the court shall impose such suspension or revocation as is otherwise required upon conviction and, further, shall notify the commissioner of said suspension or revocation and its finding that said violator is granted youthful offender status as is required pursuant to [VTL § 513].

In such a case, the license suspension/revocation will appear on the person's DMV abstract, but the underlying "conviction" will not. In addition, VTL § 201(7) provides that:

> Where a judge or magistrate reports a license suspension or revocation to the commissioner, following a youthful offender determination, as is required by [VTL § 513], the commissioner shall not make available the finding of the court of youthful offender status to any person, or public or private agency.

### § 15:69 Youthful offenders -- Mandatory surcharge applicable

In the past, the mandatory surcharge provisions of the law only applied where the defendant had been "convicted" of a crime or an offense. See VTL § 1809(1); VTL § 1809-c(1); PL § 60.35(1). In this regard, since "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense," CPL § 720.35(1), a Court could not properly impose a surcharge or crime victim assistance fee where a defendant was adjudicated a youthful offender. See, e.g., People v. Floyd J., 61 N.Y.2d 895, 474 N.Y.S.2d 476 (1984); People v. Michael "M", 161 A.D.2d 911, 557 N.Y.S.2d 177 (3d Dep't 1990); People v. Spencer, 138 A.D.2d 976, 526 N.Y.S.2d 414 (4th Dep't 1988); People v. Huertas, 127 A.D.2d 475, 511 N.Y.S.2d 621 (1st Dep't 1987); People v. Bain, 126 A.D.2d 985, 511 N.Y.S.2d 801 (4th Dep't 1987).

However, effective February 16, 2005, VTL § 1809(10) and PL § 60.35(10) legislatively overrule these cases by expressly making mandatory surcharges and crime victim assistance fees applicable to youthful offender adjudications.

## § 15:70 Youthful offender adjudication cannot be used as predicate conviction for felony DWI charge

A defendant who is charged with DWI or DWAI Drugs after having been "convicted" of a violation of VTL § 1192(2), (3) or (4) (or of Vehicular Assault in the 1st or 2nd degree or Vehicular Manslaughter in the 1st or 2nd degree) within the preceding 10 years can be charged with a class E felony. See VTL § 1193(1)(c)(i).

A defendant who is charged with DWI or DWAI Drugs after having been "convicted" of a violation of VTL § 1192(2), (3) or (4) (or of Vehicular Assault in the 1st or 2nd degree or Vehicular Manslaughter in the 1st or 2nd degree) *twice* within the preceding 10 years can be charged with a class D felony. See VTL § 1193(1)(c)(ii).

However, since "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense," CPL § 720.35(1), a youthful offender adjudication cannot be used as a predicate conviction for a felony DWI charge. See generally People v. Kuey, 83 N.Y.2d 278, 283, 609 N.Y.S.2d 568, 570 (1994) ("Under New York law, . . . a felony conviction of a person given youthful offender status may not be used as a predicate for enhanced sentencing"); People v. Lane, 60 N.Y.2d 748, 751, 469 N.Y.S.2d 663, 665 (1983) ("a youthful offender adjudication may not be counted as a conviction for purposes of second offender status (see CPL 720.35, subd. 1)").

## § 15:71 Youthful offender adjudication cannot be used as predicate conviction for lifetime license revocation

VTL § 1193(2)(c) provides for a lifetime license revocation "where a person has been twice *convicted* of a violation of [VTL § 1192(3), (4) or (4-a)] or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in [PL § 10.00], has resulted from such offense in each instance." (Emphasis added).

However, since "[a] youthful offender adjudication is not a judgment of conviction for a crime or any other offense," CPL § 720.35(1), a youthful offender adjudication cannot be used as a predicate conviction for such lifetime license revocation.

## § 15:72 Use of youthful offender or juvenile delinquency adjudication for impeachment purposes

"It is . . . impermissible to use a youthful offender or juvenile delinquency adjudication as an impeachment weapon, because

'these adjudications are not convictions of a crime.' Nevertheless, the cross-examiner may bring out 'the illegal or immoral acts underlying such adjudications.'" People v. Gray, 84 N.Y.2d 709, 712, 622 N.Y.S.2d 223, 224 (1995) (citations omitted). See also People v. Greer, 42 N.Y.2d 170, 176, 397 N.Y.S.2d 613, 617 (1977) (same).

## OUT-OF-STATE DEFENDANTS

### § 9:7 Effect of out-of-state DWI convictions

Prior to November 1, 2006, VTL § 1192(8) provided that, for purposes of determining the consequences of a violation of VTL § 1192, a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs was deemed to be a prior conviction of DWAI in violation of VTL § 1192(1). Effective November 1, 2006, VTL § 1192(8) provides as follows:

> Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)]; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of [VTL § 1192]. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of [VTL § 1192] which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of [VTL § 1192(1)] for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)].

Thus, a prior out-of-state DWI conviction can now potentially be used as a predicate conviction for a felony DWI charge.

Critically, however, the enabling portion of this change to VTL § 1192(8) expressly provides that it only applies to out-of-state convictions that occurred on or after November 1, 2006. See also People v. Ballman, 15 N.Y.3d 68, 70, 904 N.Y.S.2d 361, 362 (2010) ("This appeal raises the issue whether Vehicle and Traffic Law § 1192(8) allows an out-of-state conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a charge of driving while intoxicated from a misdemeanor to a felony. We hold that it does not").

## § 50.12 Out-of-state defendants

In the past, representation of out-of-state licensees was complicated by the fact of their ineligibility for a conditional license. Essentially, the Department of Motor Vehicles could not place conditions upon a license over which they had no jurisdiction, nor could they issue a conditional license to a person who was not already in possession of a valid New York State driver's license. This situation necessitated legal gymnastics consisting of requesting an adjournment of sufficient duration to allow your client to obtain a valid New York State driver's license. Upon entry of the conviction for a violation of VTL § 1192, this newly acquired license would be suspended and your client issued a conditional license. This situation was particularly painful for truck drivers as well as others who lived in adjoining states, but were employed within the State of New York. In order to remedy this situation, the statute was amended to allow for the issuance of a conditional privilege of "operating a motor vehicle in this state." This conditional privilege is basically identical to the conditional license, but it eliminates the possession of a New York State driver's license as a condition precedent for the conditional operation of a motor vehicle in the State of New York.

CHAPTER 10

# DRIVING WHILE ABILITY IMPAIRED BY DRUGS



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## § 10:1 Generally

Driving while under the influence of drugs is a violation of § 1192(4) of the VTL. With the exception of the specification of drugs as the substance at issue, this section has wording similar to driving while ability impaired by alcohol in violation of VTL § 1192(1).

> No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

VTL § 1192(4). The words "as defined in this chapter" refer to VTL § 114-a which defines a drug as follows:

> The term "drug" when used in this chapter, means and includes any substance listed in section thirty-three hundred six of the public health law.

VTL § 114-a.

Section 3306 of the Public Health Law establishes five schedules of controlled substances and lists those substances. While the list is extensive, its effect is to restrict the application of the statute to the listed substances. Those persons operating a motor vehicle under the influence of substances not set forth in the schedule do not come within the purview of this statute. See People v. Mercurio, N.Y.L.J., 8/30/93, p. 25, Col. 5 (Suffolk Co. Ct.).

In contrast, the California Vehicle Code Section 312 defines a drug as:

> The term "drug" means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

There is no generic statute in New York State which prohibits the impaired operation of a motor vehicle. The statutory framework is specific to the substance at issue. The People must specifically charge the defendant with the statutes pertaining to alcohol, or those pertaining to drugs, or both. In

People v. Bayer, 132 A.D.2d 920, 518 N.Y.S.2d 475 (4th Dep't 1987), the Court articulated the rule as follows:

> Vehicle and Traffic Law § 1192, entitled "Operating a motor vehicle while under the influence of alcohol or drugs", contains three subdivisions relating to alcohol (subds. [1], [2], [3]) and one relating to drugs (subds. [4]). Subdivision (3) prohibits operation of a motor vehicle while defendant "is in an intoxicated condition", but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol. That conclusion is buttressed by examining Vehicle and Traffic Law § 1196(1) which permits conviction of a violation of subdivision (1), (2) or (3) of Vehicle and Traffic Law § 1192, notwithstanding that the charge laid before the court alleged a violation of subdivision (2) or (3), but does not permit conviction of a violation of subdivision (4). Additionally, while a violation of either subdivision (3) or (4) of Vehicle and Traffic Law § 1192 is a misdemeanor, the elements of the two crimes differ. Proof that defendant was in an intoxicated condition is essential to a prosecution under subdivision (3), but is not required under subdivision (4).

People v. Bayer, 132 A.D.2d 920, 518 N.Y.S.2d 475, 476-77 (1987). See also People v. Grinberg, 4 Misc. 3d 670, 781 N.Y.S.2d 584 (N.Y. City Crim. Ct. 2004); People v. Wiley, 59 Misc. 2d 519, 299 N.Y.S.2d 704 (Nassau Co. Dist. Ct. 1969); People v. Cheperuk, 64 Misc. 2d 498, 315 N.Y.S.2d 203 (Nassau Co. Ct. 1970).

## § 10:2 Elements of proof

In People v. Kahn, 160 Misc. 2d 594, 610 N.Y.S.2d 701 (Nassau Co. Dist. Ct. 1994), Judge Mahon set forth the elements of proof.

> In order for the People to prove the defendant guilty beyond a reasonable doubt they must prove the following elements of the crime:
>
> 1) The defendant ingested a drug.

> 2) The drug ingested by the defendant is one proscribed by Public Health Law section 3306. See VTL 114-a.
>
> 3) After ingesting the drug, the defendant operated a motor vehicle. See VTL section 125.
>
> 4) While operating this motor vehicle the defendant's ability to operate the motor vehicle was impaired by the ingestion of the drug.

610 N.Y.S.2d at 703. See also People v. Rose, 8 Misc. 3d 184, ___, 794 N.Y.S.2d 630, 631 (Nassau Co. Dist. Ct. 2005) ("A driving while impaired by drugs prosecution requires that the individual's impairment be shown to have been caused by a drug specifically listed in the Public Health Law").

Here, the Court found the defendant not guilty based upon the fact that the People failed to prove that the defendant suffered impairment, to any extent, of his physical or mental abilities which he was expected to possess as a reasonable and prudent driver. 610 N.Y.S.2d at 703-04. Cf. People v. Crandall, 255 A.D.2d 617, 681 N.Y.S.2d 99 (3d Dep't 1998).

When charging a jury, one of the most common references is the New York Office of Court Administration's Criminal Jury Instructions. In defining the charge of driving a motor vehicle while ability impaired by drugs, the Office of Court Administration ("OCA") parallels the definition of impairment by alcohol and sets forth the following charge:

> In order to drive safely, a driver is expected at all times to be able to think clearly and act carefully. If, by reason of the consumption of drugs, a driver loses to any extent control of his mental faculties and his physical responses, our law considers that he has operated his vehicle while under the influence of a drug or drugs.
>
> The key words in that law are "to any extent."
>
> According to the law, a person's ability to drive safely is impaired by the use of drugs when, by voluntarily consuming drugs, he has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate his vehicle as a reasonable and prudent driver.

> The law does not require proof that such ability to operate his vehicle has been substantially affected. The proof need only show that such ability to drive safely has been affected "to any extent."

*New York Criminal Jury Instructions*, Vol. 3, VTL § 1192(4), pg. 2318S.

While both DWI (alcohol) and DWAI (drugs) are class A misdemeanors, the standards of proof are quite different. The People's burden in proving DWAI (drugs) is lower than that for intoxication by alcohol. The standard for drugs is identical to that of DWAI (alcohol). Specifically, the People's burden in a drug case is impairment, *to any* extent, of the physical and mental abilities a person is expected to possess in order to operate his vehicle as a reasonable and prudent driver. The standard for DWI (alcohol) is:

> [A] greater *degree* of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is *incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver*.

People v. Cruz, 48 N.Y.2d 419, 427, 423 N.Y.S.2d 625, 628 (1979) (emphases added).

## § 10:3 Probable cause to arrest

In People v. Shapiro, 141 A.D.2d 577, 529 N.Y.S.2d 186 (2d Dep't 1988), the Appellate Division, Second Department, upheld the hearing court's finding of probable cause where the evidence indicated erratic driving, dilated pupils, fidgety behavior, presence of white powder, and colloquy with the defendant which indicated that he was not ill or under the influence of prescription medication:

> We agree with the hearing court's conclusion that there was probable cause for the arrest of the defendant and that the seizure of physical evidence from the defendant's car was proper. The evidence adduced at the hearing established that the two arresting officers observed the defendant driving at erratic speeds as well as swerving across a double yellow line. Upon pulling the defendant's vehicle over, the officers further observed that the defendant's pupils

> were dilated, his hair was "disheveled", his clothing was "mussed" and his behavior was "fidgety" and "jumpy". At the same time, Officer Casetelli observed a vial containing white powder on the front seat of defendant's car. After engaging in conversation with the defendant and ascertaining that he was not ill, or under the influence of prescription medication, the officers concluded that the defendant's behavior bore the characteristic manifestations of cocaine influence and thus arrested him for driving while his ability was impaired by the use of drugs.

People v. Shapiro, 529 N.Y.S.2d at 187.

In People v. Kaminski, 151 Misc. 2d 664, 573 N.Y.S.2d 394 (Rhinebeck Just. Ct. 1991), the following evidence was sufficient to establish probable cause to arrest for VTL § 1994(4):

> Upon approaching the vehicle, one of the officers reported smelling the odor of marijuana emanating from the cab. The senior officer conducted four field tests generally associated with developing probable cause to make an arrest under Vehicle and Traffic Law 1192. He testified that the defendant failed all or portions of several of these tests, that the defendant displayed several of the traditional signs of impairment, namely slow speech, bloodshot eyes as well as the odor of marijuana. In addition, the defendant admitted to the officer that he had a "joint" before entering the bridge toll plaza.

People v. Kaminski, 573 N.Y.S.2d at 395.

## § 10:4 Quantifying drug impairment

The major distinction between alcohol and drug cases is that there is an acknowledged correlation between blood alcohol concentrations and impaired driving. Most states have recognized .08 as the blood alcohol concentration correlating to intoxication. A blood alcohol concentration can be determined by analysis of breath, blood or urine. Drugs are far more subjective, and there are no numerical standards associating so many nanograms of a drug with a level of impairment or intoxication. In this regard, People v. Rossi, 163 A.D.2d 660, 558 N.Y.S.2d 698 (3d Dep't 1990) is somewhat of an anomaly. Here, the Appellate Division affirmed vehicular crimes convictions on the ground, in part, that the amount of drugs

detected in the motorist's blood was sufficient to support imposition of criminal liability:

> Defendant also argues that the amount of drugs detected was insufficient to warrant criminal liability. There was testimony from a forensic toxicologist that the amount of drugs detected in defendant's blood, totaling 46 nanograms per milliliter of methamphetamine and 13 nanograms per milliliter of amphetamine, was sufficient to affect driving ability detrimentally. That the amount of drugs in defendant's blood was detected by the private laboratory rather than the State Police Laboratory is of no moment considering that the State Police only test for at least 100 nanograms per milliliter and the applicable statute proscribes any impairment of the ability to drive (cf., People v. Scallero, 122 A.D.2d 350, 352, 504 N.Y.S.2d 318), which can be evidenced not only by alcohol or drug presence in blood but by descriptions of the driver's conduct (id.). Considering the testimony by the forensic toxicologist concerning the effect of the drugs and by the police officers and others concerning defendant's conduct and driving, we do not believe that defendant was improperly convicted based on an insufficient amount of drugs.

558 N.Y.S.2d at 700.

In People v. Prowse, 60 A.D.3d 703, ___, 875 N.Y.S.2d 121, 122 (2d Dep't 2009), the Appellate Division, Second Department, held that:

> The County Court properly admitted into evidence at trial the opinion testimony of a forensic toxicologist with respect to the effect that a certain amount of cocaine would have on a person's ability to operate a motor vehicle, and as to whether the level of cocaine present in a person's body would be higher four hours before a blood sample was drawn. The forensic toxicologist's testimony regarding her qualifications and experience provided a sufficient foundation for her

> subsequent opinion testimony. The County Court was not required to formally declare or certify the forensic toxicologist to be an expert witness.

(Citations omitted).

In People v. Clark, 309 A.D.2d 1076, ___, 766 N.Y.S.2d 710, 711 (3d Dep't 2003), the Appellate Division, Third Department, found that there was legally sufficient evidence to support the defendant's conviction of DWAI Drugs where:

> The evidence is that while on routine parole in the City of Schenectady, Schenectady County on the night of November 17, 2000, two police officers observed a vehicle approaching them without its headlights on. As they watched, it turned into an intersecting street, pulled to the curb and defendant exited the vehicle. He approached the police car, but when the officers started to exit the car, defendant ran. In the ensuing chase and capture, one of the officers used pepper spray to help subdue defendant. A glassine envelope containing a white substance was found in defendant's car and a glass pipe of the type used to smoke crack cocaine was found on defendant's person. As a result, State Trooper Joseph Germano, a certified drug recognition expert, was called and he performed a standardized 12-step evaluation process. He testified that, in his opinion, defendant's ability to operate his vehicle was impaired by the use of crack cocaine. Of note, during the 12-step process, defendant admitted to having smoked crack cocaine earlier that evening.

The mere presence of a metabolite in a person's body at the time of arrest, coupled with observations of impairment, were found insufficient to establish driving while ability impaired by drugs. In People v. Kahn, 160 Misc. 2d 594, 610 N.Y.S.2d 701 (Nassau Co. Dist. Ct. 1994), Police Officer Read testified that he observed the defendant's vehicle weaving and, at one point, leaving the paved portion of the roadway. After stopping the defendant's vehicle, the defendant staggered and swayed, exhibited bloodshot and glassy eyes, slurred speech, and had difficulty producing documents requested by the officer. Officer Read testified that he detected a slight odor of an alcoholic beverage on the defendant's breath. Police Officer Fox testified to similar observations and, in addition, stated that the defendant had indicated that he had taken a medication known as

Ciprin. A laboratory analysis of the defendant's urine revealed the presence of benzodiazapine.

The defendant testified that he had recently returned from a ten-day business trip in South Africa, which subjected him twice to a nine-hour difference in time zones. He also testified that he used Dalmane, a prescription medication used to induce sleep, also known as flurazepam. He testified that he had last taken the drug approximately 48 hours before his arrest.

The defendant's expert witness testified that the clinical effect of Dalmane lasts only eight to ten hours. Thereafter, the person could expect to awaken and function normally. Further, the witness testified that, after Dalmane is ingested, the human body metabolizes the drug into a substance known as benzodiazapine. This metabolite remains detectable in the human blood stream up to 14 days after ingestion. A urine test, such as the one administered to the defendant, can only establish the presence of flurazepam in the human body, not the quantity.

The Court concluded that the People failed to establish that the defendant drove while his ability was impaired by drugs.

> In the absence of a blood test given to the defendant near the time of his arrest, the quantity of the drug flurazepam in the defendant's body while operating his motor vehicle is unknown. In view of the expert testimony, . . . it cannot be said that the mere presence of the metabolite, benzodiazapine, in the defendant's body at the time of his arrest, coupled with the observations of the defendant's behavior . . . establishes beyond a reasonable doubt the defendant's impaired ability to drive on the night in question. To find criminal culpability upon the stricter standard of mere presence of a proscribed drug in the defendant's body, coupled with observations of the defendant's behavior, would, on these facts, fly in the face of generally accepted scientific fact within our medical community and, in our view, impermissibly strain the meaning of the statute.

People v. Kahn, 610 N.Y.S.2d at 704. See also People v. Mercurio, N.Y.L.J., 8/30/93, p. 25, Col. 5 (Suffolk Co. Ct.) (mere presence of metabolites in blood insufficient to prove controlled substance actually impaired the ability of defendant to drive).

## § 10:5 Statute is not unconstitutionally vague

In People v. Percz, 100 Misc. 2d 1018, 420 N.Y.S.2d 477 (Suffolk Co. Dist. Ct. 1979), the defendant argued that VTL § 1192(4) is unconstitutionally vague in that it contains no definition of the term "impaired." The court upheld the statute, concluding that the statute is sufficiently clear so as to warn a person of ordinary intelligence that the conduct contemplated is forbidden.

## § 10:6 Must impairment be voluntary?

The OCA jury charge requires only a finding that the drugs at issue had been voluntarily consumed. Some of the case law, however, seems to require that the impairment resulting from the consumption be voluntary. In People v. Koch, 250 A.D. 623, 294 N.Y.S. 987 (2d Dep't 1937), the defendant had taken a drug known as luminol for the purpose of relieving headaches arising from a fractured skull. The drug had been prescribed by a physician. The defendant, inadvertently, took an overdose which had an intoxicating effect upon him. In reversing and dismissing a conviction for DWI under the statute in existence at that time, the Court stated:

> The statute contemplates only voluntary intoxication resulting from imbibing alcoholic liquors or the voluntary taking in to the system of other intoxicating agents; and not the condition from which the appellant was suffering, induced by the drug.

People v. Koch, 294 N.Y.S. at 989.

Citing People v. Koch, the Appellate Term in People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (App. Term, 9th & 10th Jud. Dist. 1974), held:

> The quality of evidence remains virtually the same in charges of intoxication or impairment. The People must prove that by reason of the impairment the defendant was incapable of operating the motor vehicle in a prudent and cautious manner (cf. People v. Weaver, 188 App. Div. 395, 177 N.Y.S. 71; People v. Bevilacqua, 12 Misc. 2d 558, 170 N.Y.S.2d 423; People v. Davis, 270 Cal.App.2d 197, 75 Cal. Rptr. 627) and that the impairment was *voluntarily induced* (People v. Koch, 250 App. Div. 623, 294 N.Y.S. 987, *supra*).

359 N.Y.S.2d at 963-64 (emphasis added).

In People v. Van Tuyl, the proof indicated that the defendant had been taking butazolidin alka as prescribed by a physician for an arthritic condition of his spine and knees. The defendant had been advised to take two pills daily, but had not been advised regarding potential adverse side effects. Expert testimony indicated that approximately 40% of the patients using butazolidin had severe orientation problems including "confusional state, lethargy, vertigo, unsteadiness afoot, blurred vision and possibly even slurred speech." 359 N.Y.S.2d at 960.

Prior to the accident which led to his arrest, the defendant had attended a cocktail party and had had two drinks consisting of scotch and soda. Charged initially with DWI in violation of VTL § 1192(3), the defendant was convicted of a violation of VTL § 1192(1), DWAI. The testimony at trial was that the defendant weighed 220 pounds. An expert witness for the defense testified that the defendant could not have been intoxicated from the two drinks he consumed.

In reversing and dismissing the information, the Court noted that the proof indicated that impairment was induced by the drug butazolidin. In addition, the Court observed that there was a failure of proof in regard to voluntary impairment, and that butazolidin was not a scheduled drug under VTL § 114-a. Finally, the defendant was convicted of DWAI in violation of VTL § 1192(1). Inasmuch as VTL § 1192(1) was not a lesser included offense of VTL § 1192(4), the conviction could not stand. 359 N.Y.S.2d at 964.

In People v. Calcasola, 80 Misc. 2d 429, 364 N.Y.S.2d 301 (App. Term, 9th & 10th Jud. Dist. 1975), the Court distinguished People v. Van Tuyl, and affirmed a conviction of a defendant who had been adjudicated impaired by virtue of an overdose of methadone. Judge Gagliardi, who wrote the majority opinion in People v. Van Tuyl, dissented in Calcasola on the ground that the proof failed to establish that the defendant had been advised not to operate a motor vehicle while using methadone, and the consumption of the drug was in accordance with a physician's advice and, therefore, any resultant impairment or intoxication was involuntary.

The majority, seemingly, retreated from the position taken in People v. Van Tuyl, and noted that the conviction in Van Tuyl was for a violation of VTL § 1192(1), impairment by alcohol. Since the proof in People v. Van Tuyl indicated that the impairment in issue was the result of the use of a drug, the Court distinguished Van Tuyl on the basis that the defendant was convicted under a statute that was not applicable to drugs. The majority affirmed the conviction in People v. Calcasola, holding that the fact that the defendant was legally participating in the methadone maintenance program did not excuse his operation of a

motor vehicle while impaired by methadone. 364 N.Y.S.2d at 302-03.

### § 10:7 Absence of alcohol held not relevant to drug prosecution

Since the legislative framework is specific for alcohol or drugs, evidence of the absence of alcohol in a drug prosecution would seem to be most pertinent. In People v. Salino, 139 Misc. 2d 386, 527 N.Y.S.2d 169 (N.Y. City Crim. Ct. 1988), the Court held to the contrary. Here, the People attempted to introduce the results of a Breathalyzer test indicating a .00 reading. In suppressing this test result, the Court held:

> The .00% reading of the breathalyzer exam regarding defendant's blood alcohol content is indicative of nothing else other than, at the time of defendant's arrest, no alcohol was present in his blood. This court is unable to see the relevancy of permitting such blood test results into evidence to show that defendant was impaired by drugs. It has no probative worth; additionally, it is neither rational nor logical to allow such results into evidence. To do so would offend due process, concomitantly, the basic rules of circumstantial evidence, and permit an inference on an inference which is impermissible.

527 N.Y.S.2d at 171.

### § 10:8 Drug evaluation and classification

Over the last several years, the Los Angeles Police Department has developed a series of clinical and psycho-physical examinations. These procedures are designed to enable trained police officers to determine whether a suspect is under the influence of drugs and, furthermore, what category of drugs he has been using. In the 1980's, the Los Angeles Police Department developed a series of clinical and psychophysical examinations. These procedures were designed to enable trained police officers to determine whether a subject was under the influence of drugs and furthermore, what category of drugs he had been using. While the program began in Los Angeles, it has expanded throughout the country. In New York, the New York City Police, the Nassau County Police, Bureau for Municipal Police and New York State Police have been actively involved in the training of police officers in these procedures.

The program and procedures are controversial in that their end product is the expression of an opinion by the drug recognition expert ("DRE") as to the use by a defendant of a particular category of drugs. Given the almost limitless possibilities of human physiology, and the potential physical and mental effects of various legal and illegal substances, to say nothing of the possibilities arising out of polydrug use, the admissibility of an opinion by a drug recognition expert is questionable.

In People v. Quinn, 153 Misc. 2d 139, 580 N.Y.S.2d 818 (Suffolk Co. Dist. Ct. 1991), rev'd on unrelated grounds 158 Misc. 2d 1015, 607 N.Y.S.2d 534 (1993), Judge Dounias conducted a hearing pursuant to Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923) and People v. Middleton, 54 N.Y.2d 42, 444 N.Y.S.2d 581 (1981). After hearing extensive testimony, the Court held that both horizontal gaze nystagmus and the DRE protocol met the standards enunciated by Frye and Middleton. 580 N.Y.S.2d at 826.

Following Judge Dounias' grant of judicial recognition, the case proceeded to trial before District Court Judge Ira P. Block. Judge Block noted that there was no testimony elicited at the trial, rather the parties stipulated as to what the testimony would be if the witnesses were called and submitted the test and results as previously received in evidence at the hearing before Judge Dounias. In entering the verdict of guilty, the Judge noted:

> [I]n the within case we had a confession by the defendant, a voluntary submission to a blood test which revealed that the defendant had cocaine in her blood stream, observations of erratic operation of a motor vehicle by two police officers, attempts by the defendant to conceal materials within the car, drugs found in the vehicle and on the person of the defendant . . . were any or all of these not present would this change the effect of this case? We do not pass upon that since that is not before us. Would there be any different effect if any or all of these elements were not present . . . this is another question which does not have to be addressed at this time.

People v. Quinn, N.Y.L.J., 2/11/92, at p. 25-26, Col. 5.

In People v. Villeneuve, 232 A.D.2d 892, 649 N.Y.S.2d 80 (3d Dep't 1996), the Appellate Division, Third Department, rejected defendant's challenge to the admissibility of officer Murphy's testimony as a DRE, stating that:

> Murphy testified about his training, the tests given defendant, the process of metabolization of drugs by the body and specifically the metabolism of cocaine by this defendant. We reject defendant's challenge. The attack on Murphy's expertise was not supported by any evidence. Defendant's conclusary [sic] allegations as to Murphy's limitations as an expert fail to make out a ground for exclusion of his testimony.

Id. at ___, 649 N.Y.S.2d at 83.

### § 10:9 DRE training

The approved training is a three-phase process. The initial phase is not specific to drug recognition, rather it is the NHTSA approved standardized field sobriety test program. This is used to detect alcohol impaired motorists as well as the drugged defendant.

Phase I of the drug recognition training consists of a two-day (16-hour) preschool. Phase II is a seven day (56-hour) classroom program. The two-day preschool defines the term "drug" as it is used in the DRE program and also familiarizes students with the techniques of the drug evaluation process. Phase II provides detailed instruction in the techniques of drug evaluation examination as well as physiology. Students are required to pass a comprehensive written examination before proceeding to Phase III, which consists of field certification.

The field certification portion of the training begins upon completion of the classroom training and is conducted periodically over a period of 60 to 90 days. Students work under the direction of certified instructors and evaluate persons suspected of being impaired by drugs other than alcohol. Students are required to participate and document the results of at least 12 drug evaluations and complete a comprehensive examination. Upon successful completion of the examination and the evaluations, a student is certified as a drug recognition expert. *The DRE*, Winter 1993, Vol. 5, Issue 1, (Phoenix City Prosecutor's Office, Phoenix, Arizona).

DREs are trained in performing the drug recognition evaluation, and distinguishing between seven broad categories of drug groups. The categories have been developed based upon shared symptomatology. The seven categories are:

1) Central nervous system depressants;

2) Central nervous system stimulants;

3) Hallucinogens;

4) Phencyclidine;

5) Narcotic analgesics;

6) Inhalants; and

7) Cannabis.

Much of the training concerns breaking drugs down into these seven categories and discussing their symptomology and the physical manifestations that people exhibit when they are under the influence of these substances. There is also a great deal of training in regard to the effects of combinations of the illegal drugs or polydrug usage.

### § 10:10 Drug classifications: Central nervous system depressants

Central nervous system depressants are defined by the DRE training materials as substances that slow down the operation of the central nervous system which consists of the brain, brain stem and spinal cord. They can slow down the users reactions and cause him or her to process information more slowly. They relieve anxiety and tension, and have a sedative effect. In high enough doses they have the effect of general anesthesia and can induce coma and death. See Preliminary Training For Drug Evaluation And Classification, Administrators Guide, HS172A R4/88, pgs. I-4 to I-5.

Included within this classification are alcohol, valium, xanax and various other tranquilizers and sedatives.

### Central Nervous System Stimulants

Central nervous system stimulants speed up the operation of the central nervous system and the bodily functions controlled by the central nervous system. They can cause the user to become hyperactive, talkative, and to have rapid and repetitive speech patterns. The stimulants increase heart rate, blood pressure and body temperature. They induce emotional reactions of excitement, restlessness and irritability. They can also induce unstable beating of the heart (cardiac arrhythmia), seizures and death. See Preliminary Training for Drug Evaluation And Classification, Administrators Guide, HS172A R4/88, page I-6.

Central nervous system stimulants include such commonly abused drugs as cocaine and amphetamines.

## Hallucinogens

In addition to hallucinations, hallucinogens can distort perception so that the user's perceptions of real stimuli are distorted. What they see, hear and smell are different from the objective reality of what is present. Rather than speeding up or slowing down the central nervous system, "hallucinogens cause the nervous system to send strange or false signals to the brain." Id. at pg. I-7.

They "produce sights, sounds and odors that aren't real; induce a temporary condition very much like psychosis or insanity; and can create a 'mixing' of sensory modalities, so that the user 'hears colors', 'sees music', 'tastes sounds', etc." Id. at pg. I-7.

Included among hallucinogens are LSD and Peyote.

## Disassociative Anesthetics

While similar to hallucinogens, disassociative anesthetics are given its own category because of the various kinds of impairment they create. PCP or phencyclidine is the primary disassociative anesthetic that is commonly abused. It is a synthetic drug and does not occur naturally. People under the influence of PCP can exhibit a combination of symptoms associated with hallucinogens, stimulants and depressants. Id. at I-7.

Like central nervous system depressants, PCP depresses brain wave activity, causing a slow down in thought, reaction time, and verbal responses. It is similar to central nervous system stimulants in that it causes increases in heart rate, blood pressure, adrenalin production, body temperature, and causes muscles to become rigid.

It is akin to hallucinogens in that it distorts or "scrambles" signals received by the brain. PCP distorts sight, hearing, taste, smell and touch. Perceptions of time and space may be affected, and the user can become paranoid, feel isolated and depressed. The user may develop a strong fear of and preoccupation with death, and may become unpredictably violent. Id. at I-8.

## Narcotic Analgesics

The drugs in this category tend to reduce a person's reaction to pain. They produce euphoria, drowsiness, apathy, lessened physical activity and sometimes impaired vision. Persons under the influence may appear as being semi-conscious, or what is commonly referred to as "on the nod". In high enough doses, narcotic analgesics can produce coma, respiratory failure and death. Id. at I-9 to I-10.

Narcotic analgesics include heroin, morphine and codeine.

**Inhalants**

Inhalants are defined by the DRE training materials as fumes of volatile substances. Common among these are gasoline, oil, base paints, glue, aerosol cans, varnish remover, cleaning fluid, and nitrous oxide. Symptoms vary with the inhalant used and the effects can very from the stuporous and passive to irritable, violent and dangerous. Id. at pg. I-10 to I-11.

**Cannabis**

Cannabis includes all forms and products derived from the Cannabis Sativa plant. The active ingredient in cannabis products is the substance known as "Delta-9 Tetrahydrocannabinol", or "THC". Its most common form is marijuana. Marijuana is neither a central nervous system depressant, nor a central nervous system stimulant. Its effects are to interfere with the attention process and produce a distortion of the user's perception of time. Its symptoms include an increased heart beat and reddening of the eyes. Id. at pg. I-11.

## § 10:11 Evaluation procedures

There are basically eight procedures that are used to evaluate a defendant for the purpose of determining whether and/or what group of drugs the defendant has been using. The evaluation is extensive and consumes a fair amount of time during which the DRE is performing procedures that are akin to those done by a nurse or a physician. It should be noted that the claimed rate of accuracy for these evaluations is very high. It should also be noted that over the course of the evaluation, a high percentage of defendants will voluntarily disclose the specifics as to their drug usage.

Drug recognition evaluations are, at present, not done on the road. Rather, they are a post-arrest procedure which is followed once the defendant has been taken into custody and brought to the police station. The defendant is already under arrest, and the drug recognition expert (DRE) is not, generally, present at the time of arrest. The issue of probable cause is, therefore, of great interest particularly where the arrest is for driving while under the influence of drugs in the first instance.

One of the great problems associated with enforcement in this area is the difficulty in developing probable cause. With alcohol, there is the odor of alcoholic beverage and commonly recognized signs of intoxication which have been traditionally used to justify the arrest of DWI defendants. With drugs, the

physical manifestations vary with the drug and personality of the defendant. The fact that DREs are available back at the station once the arrest is made is of little assistance to the officer on the scene if she is unable to develop the probable cause she needs to justify her arrest.

While the DRE program is a response to the increasing number of drugged drivers, it cannot be effective unless it is combined with training for police officers on the street. Since the DREs do not become involved until after the arrest, they will have little to do unless valid arrests are being made. Once the arrest is made, the DRE is called to the station and the evaluation process begins.

### § 10:12 Breath alcohol test

The first part of the drug recognition evaluation is a breath alcohol test. In New York State, the most common possibilities are the Alco-Sensor, BAC DataMaster, Intoxilyzer, and Alcotest 7110.

In a DWI prosecution, the Alco-Sensor would be inadmissible at trial. People v. Thomas, 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dep't 1986), aff'd, 70 N.Y.2d 823, 523 N.Y.S.2d 437 (1987). In a DWI prosecution, breath test devices, other than the Breathalyzer, are subject to challenge particularly where judicial recognition has not been granted in the jurisdiction in which the test result is being offered into evidence. Even a Breathalyzer result requires a fairly extensive foundation consisting of the testimony and documentation set forth in Chapter 42.

In a DWAI (drug) case, the primary purpose in performing the breath alcohol test is to obtain a negative result indicating that alcohol is not a cause or contributing factor to the impaired condition of the defendant. The inference is that if you are not under the influence of alcohol, and you are impaired, the cause of that impairment lies elsewhere, and may be drug related.

While that is the inference, Judge Sparks of the New York City Criminal Court has held that a negative breath alcohol test is not relevant, and, therefore, not admissible in a driving while under the influence of drugs case. People v. Salino, 139 Misc. 2d 386, 527 N.Y.S.2d 169 (1988). In Salino, the defendant obtained a .00% reading on a Breathalyzer. The People attempted to offer this result into evidence as part of their proof of driving while under the influence of drugs. The Court, citing *Richardson on Evidence*, held that the result was inadmissible in that it was an inference based upon an inference. 527 N.Y.S.2d at 171.

## § 10:13 Interview of arresting officer

The next component of the evaluation is the interview of the arresting officer. While any testimony from the DRE in regard to statements obtained from the arresting officer constitutes hearsay, the fact that he interviewed the arresting officer should be admissible. Insofar as the observations of the arresting officer are concerned, they would normally be elicited directly from the arresting officer, and he or she would, normally, testify prior to the DRE.

## § 10:14 Preliminary examination

The preliminary examination consists of a series of questions asked of the defendant by the DRE. The questions are designed to elicit information from the defendant in regard to his physical condition, use of medication, and consumption of food and beverage. In addition, the defendant is asked the time of day to determine whether or not he or she is oriented as to time. The questions are all obtained from the drug evaluation form (See Appendix 5) and the defendant's answers are placed on that form.

## § 10:15 Eye examination

### Eye Movements -- Gaze Nystagmus & Convergence

This portion of the examination consists of a series of tests during which the evaluator determines whether the defendant's eyes move smoothly or with a jerking motion in response to a stimulus. The tests are referred to as *horizontal gaze nystagmus*, *vertical gaze nystagmus*, and *convergence*. In addition to the discussion immediately below, see Chapter 8 for more material on horizontal gaze nystagmus and vertical gaze nystagmus.

## § 10:16 Horizontal gaze nystagmus

The horizontal gaze nystagmus portion consists of three distinct tests of both eyes. The first is called "smooth pursuit."

### Smooth Pursuit

The smooth pursuit portion of the test is performed by moving an object, usually a pen, from a point near the defendant's nose outward towards the side of the defendant's face. The defendant is asked to follow the movement of the pen with his eyes and to do so without moving his head. The DRE starts with the left eye and observes whether or not the eye moves smoothly or with a jerking motion. A "normal" eye will

move smoothly in a manner similar to a marble moving over a hard surface. If the defendant is under the influence of alcohol and/or certain drugs, a nystagmus may be observed. Nystagmus refers to a jerking motion which is similar to rolling a marble over sandpaper. The eye does not proceed smoothly, but moves with an apparent jerking motion. After the left eye is tested, the test is performed on the right eye.

**Maximum Deviation**

The second part of the horizontal gaze nystagmus test is called maximum deviation. On this part of the test, the defendant is asked to follow the stimulus, which is moved to the side of his face. The defendant's left pupil is directed to the corner of the eye and the stimulus is held stationary for a period of approximately four seconds. While the eye is in this position, it is observed for nystagmus. Again, the presence of nystagmus may indicate that the defendant is under the influence of alcohol or certain drugs. This process is repeated with the right eye.

**Onset of Jerkiness**

The third part of the horizontal gaze nystagmus test is called angle of onset. The purpose of the test is to determine the angle with the nose at which the eye commences to jerk. A test is performed by placing the pen about 15 inches from the defendant's nose and by slowly moving the pen toward the outer corner of his eye. The DRE starts with the left eye and watches it closely for the first sign of jerking. If she observes any jerking, the DRE stops moving the pen and holds it steady. The DRE makes sure that the eye is jerking. If it is not, the DRE is required to start the procedure over again by moving the pen further towards the outer portion of the eye and observing for the "onset" of jerking. Once the DRE determines the point of onset, he estimates the angle of this point with the defendant's nose.

**Vertical Gaze Nystagmus**

The fourth part of the eye examination tests for vertical nystagmus. Here, the defendant again is asked to follow the movement of a pen. Instead of being held up and down, the pen is held sideways and the defendant is asked to keep his eyes on the middle of the pen. The pen is then moved up and the defendant's eyes are moved up to maximum elevation and held for a minimum of four seconds. This test is almost identical to the maximum deviation portion of the horizontal gaze nystagmus test, except the movement is vertical.

### Lack of Convergence

The fifth part of the eye test is designed to observe how the defendant's eyes converge. The pen is held about 15 inches in front of the defendant's face with the tip pointing at his nose. The defendant is directed to hold his head still and follow the pen with his eyes. The pen is moved in a slow circle until the technician performing the test observes that the defendant is tracking the pen. The pen is then moved in slowly and steadily towards the bridge of the defendant's nose. The defendant's eyes are then observed to determine whether they move together and converge at the bridge of the defendant's nose.

## § 10:17 Pupil reaction

Pupil reaction consists of a series of tests which are designed to determine the effect of various conditions on the size of the defendant's pupils. The DRE has an eye gauge which contains circles representing different sizes of pupils. These dark circles have diameters ranging from 1.0 millimeters to 9.0 millimeters in half millimeter increments. The eye gauge is held up alongside the defendant's eyes and the gauge is moved up and down until the technician locates the circle closest in size to the defendant's pupil.

Initially, the eye gauge is used during the preliminary examination to determine whether the defendant's pupils are of equal size. Later on, the eye gauge is used under various lighting conditions for the purpose of determining the size of the pupils. The first part of the examination consists of determining the size of the defendant's pupils under normal or room light conditions.

### Dark Room Examination

After determining the size of the defendant's pupils under room light, the defendant is taken into a room which is almost completely dark. The DRE and the defendant wait for 90 seconds to allow their eyes to adjust to the dark. The DRE then takes a penlight and covers the tip of the penlight with his finger or thumb so that there is only a reddish glow and no white light emerges. The glowing tip of the penlight is then moved to the vicinity of the defendant's left eye until the DRE can see the pupil separate and apart from the colored portion of the eye or the iris. The eye gauge is then brought up alongside the defendant's left eye, and the circle nearest in size to the pupil as it appears in the dark room is estimated and noted. The procedure is then repeated with the defendant's right eye.

### Indirect Light

The pupil size is then estimated in indirect light.

Indirect light is obtained by the DRE uncovering the tip of the penlight and shining it across the defendant's left eye so that the light just barely eliminates the shadow from the bridge of his nose. The DRE is careful not to shine the light directly into the defendant's eyes, but rather across them. Again, both eyes are gauged, and the estimated pupil size noted.

**Direct Light**

In the direct light portion of the evaluation, the tip of the penlight is uncovered and is shone directly into the defendant's eyes. Each eye is done in turn, and an estimation of the pupil size obtained.

## § 10:18 Psycho-physical tests

Four psycho-physical or field sobriety tests are administered as part of the drug recognition evaluation. The purpose of the tests are to determine the defendant's physical coordination as well as his ability to understand and follow instructions. The presumption is that a defendant who does not listen or follow instructions, or exhibits a lack of balance and coordination, may be under the influence of a drug.

**Romberg Balance Test**

The first test performed is the Romberg balance test. This involves the technician asking the defendant to stand erect with his feet together and his arms down to his sides. He is told to stay in this position while being given instructions in regard to the performance of the test. He is observed to see if he follows that instruction, or whether he starts the test prior to being told to begin.

The defendant is told that when he is told to "*begin*" he is to tilt his head back slightly and close his eyes. He is told to maintain that position for what he deems to be 30 seconds. The DRE compares this period of time with a watch for the purpose of determining whether the defendant's internal clock is functioning. In addition, the DRE looks for swaying, tremors and other physical symptoms.

**Walk and Turn Test**

The second test is the walk and turn test. In this test, the defendant is asked to walk heel to toe along a line for nine steps, turn around, and walk back nine steps. He is told to watch his feet, and to count off the steps out loud. Again, he is observed to see whether he follows the instructions and whether he begins when he is directed to "*begin*", as opposed to beginning on his own. He is observed to see whether he keeps his

balance, steps off the line, raises his arms while walking, walks heel to toe, stops walking, takes the wrong number of steps, turns improperly, has body tremors, exhibits muscle tension, or makes any statements or sounds.

**One Leg Stand**

The third test is the one leg stand. Here the defendant is told to stand with his feet together, his arms down at his sides, and to raise his left foot in a stiff leg manner approximately six inches off the ground and count to 30. The test is then repeated with the right leg.

The DRE looks for swaying, hopping, body tremors, muscle tension, and whether or not the defendant puts his foot down during the test.

**Finger To Nose Test**

The final psycho-physical test is the finger to nose test. As with all these tests, the defendant is observed for the purpose of seeing whether he follows the instructions given. Here, he is told to put his feet together, stand straight and extend his arms towards the instructor, and to make a fist with each hand. The defendant is then told to extend the index finger from each hand and to bring his arms back down to his sides with the index fingers extended. He is further instructed that when he is told to "*begin*", he is to tilt his head back slightly and close his eyes. He is then told that he is to bring the tip of the index finger up to the tip of his nose, and that upon touching his nose he is to return his arm to his side. He is then told that he will be instructed as to which hand to use by the evaluator who will say the word "right" or "left." He is told to tilt his head back and close his eyes and keep them closed until he is told to open them.

The DRE notes where on his or her face the defendant's fingertips touch, any swaying, body tremors, eyelid tremors, muscle tension and/or any other statements or sounds made by the defendant.

These four psycho-physical tests may or may not be videotaped. In New York City, the New York City Police Department asks the defendant if he or she is willing to perform these tests and have them videotaped. The New York City Police Department does not videotape any other portion of the evaluation.

### § 10:19 Vital signs

Part of the evaluation consists of a check of the defendant's pulse, blood pressure and temperature. This is

performed by the DRE using a blood pressure cuff and thermometer. The pulse is taken three times during the evaluation. The first during the preliminary examination, the second at the time that the blood pressure and temperature are taken, and the third following the examination of the defendant's arms for drug injection sites.

Interestingly, the Oregon Court of Appeals has held that a person's pulse is private and not subject to examination absent a warrant or a constitutionally recognized exception to the warrant requirement. In State v. Stowers, 136 Or. App. 448, 902 P.2d 117 (1995), upon being stopped for a traffic infraction, the officer suspected that the defendant might be under the influence of drugs. After asking the defendant to exit the vehicle, the officer placed his fingers on the defendant's neck and took the defendant's carotid pulse. The court concluded that the taking of the defendant's pulse revealed aspects of the defendant's physical and psychological condition that were not otherwise observable to the public. The court held that a person's pulse is private and is not subject to examination absent a warrant or a constitutionally recognized exception to the warrant requirement.

## § 10:20 Drug administration sites

### Nasal and Oral Examination

Prior to leaving the dark room, the DRE will shine his penlight into the defendant's nose and mouth. The purpose of this is to check for signs of drug use. Certain drugs will leave a residue around the mouth and nose. The DRE may observe signs of redness and irritation in the defendant's nose and mouth, or even blistering. There may be an absence of nasal hair. Frequently, the DRE will detect distinctive odors in the vicinity of the defendant's mouth and nose caused by the use of various drugs.

### Arm and Neck Examination

The arm and neck examination consists of checking the defendant's arms and neck to see if there are needle marks and to determine whether his muscles are rigid, "normal" or relaxed. The DRE runs his hands over the defendant's arms and neck feeling for bumps that would indicate needle marks. Any bumps that are located are examined using a lighted magnifying glass which helps the DRE determine whether or not the bump is a needle mark.

## § 10:21 Urine sample

Finally, the DRE obtains a blood or urine sample from the defendant for submission to a laboratory.

## § 10:22 Drug symptom chart

While the physiology associated with various drugs is far too extensive for this chapter, a copy of the drug symptom chart commonly used by police departments is set forth at Appendix 6.

## § 10:23 Drug Influence Evaluation form

A copy of the Drug Influence Evaluation form which is completed by the Drug Recognition Expert is set forth at Appendix 5.

## § 10:24 Trial Guide

A copy of a trial guide setting forth a suggested direct examination, which was developed for the New York City Police Department and the District Attorneys of the five boroughs of the City of New York, is set forth at Appendix 7.

## § 10:25 Person convicted of DWAI Drugs not eligible for conditional license

A person who is convicted of DWAI Drugs is not eligible for a conditional license, but may be eligible for a restricted use license. See N.Y. Comp. Codes R. & Regs. tit. 15, § 134.7(a)(10); § 50:18, *infra*.

## § 10:26 Plea bargain limitations

VTL § 1192(10)(a)(i) provides that:

> In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2), (3), (4) or (4-a)], any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of [VTL § 1192], other than [VTL § 1192(5) or (6)], and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge;

> provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

In other words, where a defendant is charged with DWAI Drugs, any plea bargain must generally contain at least a plea to DWAI Alcohol.

In People v. Lehman, 183 Misc. 2d 97, 702 N.Y.S.2d 551 (Watertown City Ct. 2000), the Court denied the People's motion to amend/reduce a charge of VTL § 1192(4) (*i.e.*, DWAI Drugs), to VTL § 1192(1) (*i.e.*, DWAI Alcohol), where there was no evidence that the defendant's impairment was in any way caused by alcohol.

However, the Court of Appeals has made clear that:

> [A] plea may be to . . . a crime for which the facts alleged to underlie the original charge would not be appropriate.
>
> A plea is a bargain struck by a defendant and a prosecutor who may both be in doubt about the outcome of a trial. Only the events of time, place, and, if applicable, victim, need be the same for the crime pleaded as for the one charged.

People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) (citations omitted). See also People v. Clairborne, 29 N.Y.2d 950, ___, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); People v. Adams, 57 N.Y.2d 1035, 1038, 457 N.Y.S.2d 783, 784-85 (1982) (same).

## § 10:27 Sufficiency of accusatory instrument charging defendant with DWAI Drugs

"A driving while impaired by drugs prosecution requires that the individual's impairment be shown to have been caused by a drug specifically listed in the Public Health Law." People v. Rose, 8 Misc. 3d 184, ___, 794 N.Y.S.2d 630, 631 (Nassau Co. Dist. Ct. 2005). See also People v. Grinberg, 4 Misc. 3d 670, ___ n.1, 781 N.Y.S.2d 584, 586 n.1 (N.Y. City Crim. Ct. 2004). In this regard, the Rose Court found that an accusatory instrument to a DWAI drugs charge is not necessarily required to include a chemical test result or an admission by the defendant of using a specific drug in order to provide "reasonable cause" to believe that the defendant committed the offense. Id. at ___, 794 N.Y.S.2d at 635.

Rather, "[t]he written record of an opinion of a DRE can, and in the instant case does, provide 'reasonable cause' for believing that the defendant committed the offense charged." Id. at ___, 794 N.Y.S.2d at 635. On the other hand, in the absence of a chemical test result or an admission by the defendant, "the failure to have referred to, summarized, or annexed the drug influence evaluation to the supporting deposition renders the accusatory instrument dismissible." Id. at ___, 794 N.Y.S.2d at 635.

Similarly, in People v. Hill, 16 Misc. 3d 176, ___, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007), the Court held that:

> [W]here testimony of a drug recognition expert is available or the testimony of a lesser expert is combined with an admission or other physical evidence, a laboratory test is not required for conversion of a complaint to an information in cases where the defendant is charged with driving while impaired under VTL § 1192(4).

## § 10:28 Level of impairment required by VTL § 1192(4) is same as for VTL § 1192(1)

In People v. Cruz, 48 N.Y.2d 419, 426-27, 423 N.Y.S.2d 625, 628 (1979), the Court of Appeals defined the degree of impairment required to be "impaired" within the meaning of VTL § 1192(1):

> In sum the prohibition against driving while the ability to do so is impaired by alcohol (Vehicle and Traffic Law, § 1192, subd. 1) is not a vague and indefinite concept as the defendant contends. It is evident from the statutory language and scheme that the question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

The Cruz Court further defined the degree of impairment required to be "intoxicated" within the meaning of VTL § 1192(3):

> In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the

> physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Id. at 428, 423 N.Y.S.2d at 629.

In People v. Shakemma, 19 Misc. 3d 771, 855 N.Y.S.2d 871 (Suffolk Co. Dist. Ct. 2008), the defendant was charged with DWAI Drugs in violation of VTL § 1192(4). The Court noted that being impaired by alcohol is a traffic infraction, not a misdemeanor; and thus held that, since DWAI Drugs is a misdemeanor, "VTL 1192(4) must be interpreted to mean that where marijuana is present the impairment must be *substantial*." Id. at ___, 855 N.Y.S.2d at 873 (emphasis added). However, the Appellate Term reversed, holding that:

> As the statutory prohibitions with respect to operating a motor vehicle while ability impaired by alcohol (Vehicle and Traffic Law § 1192[1]) and while ability impaired by drugs (Vehicle and Traffic Law § 1192[4]) are identical as to the degree of impairment constituting the offense, the People were required to establish only that there was probable cause to infer that defendant's ability to operate a motor vehicle was impaired "to any extent."

People v. Davis, 23 Misc. 3d 30, ___, 879 N.Y.S.2d 268, 269 (App. Term, 9th & 10th Jud. Dist. 2009) (citation omitted). Notably, in the trial court the defendant's name was listed as Davis I. Shakemma, but on appeal the defendant's name was listed as Shakeema I. Davis. See also People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 477 (4th Dep't 1987) ("while a violation of either subdivision (3) or (4) of Vehicle and Traffic Law § 1192 is a misdemeanor, the elements of the two crimes differ. Proof that defendant was in an intoxicated condition is essential to a prosecution under subdivision (3), but is not required under subdivision (4)").

### § 10:29 Defendant under the influence of drugs cannot be charged with common law DWI in violation of VTL § 1192(3)

In People v. Litto, 8 N.Y.3d 692, 840 N.Y.S.2d 736 (2007), the defendant was accused of driving while impaired by a drug not listed in Public Health Law § 3306. Accordingly, he could not be charged with VTL § 1192(4). However, the People charged the defendant with violating VTL § 1192(3), claiming that New York's common law DWI statute is not limited to intoxication caused by alcohol, but rather applies to intoxication caused by any substance, including drugs.

Rejecting this argument, the Court of Appeals held that "[b]ased on the language, history and scheme of the statute, we conclude that the Legislature here intended to use 'intoxication' to refer to a disordered state of mind caused by alcohol, not by drugs." Id. at 694, 840 N.Y.S.2d at 737. See also People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979) ("subdivisions 1, 2 and 3 of section 1192 proscribe separable offenses based upon the degree of impairment caused by alcohol ingestion"); People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 476 (4th Dep't 1987) (VTL § 1192(3) "prohibits operation of a motor vehicle while defendant 'is in an intoxicated condition', but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol").

## § 10:30 DWAI Combined Influence of Drugs or Alcohol and Drugs

VTL § 1192(4-a) makes it a crime for a person to operate a motor vehicle while his or her ability to do so is impaired by a combination of either (a) 2 or more drugs, or (b) alcohol and a drug or drugs. In this regard, VTL § 1192(4-a) provides as follows:

> 4-a. Driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs.

Notably, unlike DWAI Drugs, in violation of VTL § 1192(4) -- which expressly limits the drugs applicable thereto to "a drug as defined in this chapter" -- VTL § 1192(4-a) contains no such limitation. However, VTL § 114-a provides that "[t]he term 'drug' when used in this chapter, means and includes any substance listed in [Public Health Law § 3306]." See People v. Primiano, 16 Misc. 3d 1023, ___, 843 N.Y.S.2d 799, 801 (Sullivan Co. Ct. 2007).

In People v. Schell, 18 Misc. 3d 972, ___, 849 N.Y.S.2d 882, 884 (N.Y. City Crim. Ct. 2008), the Court held that "the People are correct in reasoning that the offense with which the defendant is charged, VTL § 1192 subd. 4-a, contemplates chemicals beyond those listed in Public Health Law § 3306." Notably, the Schell Court did not cite any case law, legislative history or rule of statutory construction in support of its position. In the authors' opinion, the Court's conclusion in Schell is clearly erroneous.

Since VTL § 114-a expressly defines the term "drug" as meaning any substance listed in Public Health Law § 3306 *whenever such term is used in the VTL*, there is no need for either VTL § 1192(4) or VTL § 1192(4-a) to cross-reference VTL § 114-a in order to have this definition apply. Rather, if the Legislature had intended to use a different definition of the term "drug" for purposes of VTL § 1192(4-a), it would have been required to expressly say so. This conclusion is literally compelled by VTL § 100, which provides as follows:

> **Definition of words and phrases.** The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this article except where another definition is specifically provided in any title, article or section for application in such title, article or section.

In People v. Gonzalez, 90 A.D.3d 1668, 935 N.Y.S.2d 826 (4th Dep't 2011), the defendant was convicted of both DWI and DWAI Drugs. On appeal, he claimed that the convictions should be reversed on the ground that he was in actuality guilty of -- but not charged with -- DWAI Combined Influence. The Appellate Division, Fourth Department, affirmed the convictions, holding that "the evidence presented at trial is sufficient to establish that he was separately impaired by alcohol and by drugs." Id. at ___, 935 N.Y.S.2d at 827.

### § 10:31 Penalties for conviction of VTL § 1192(4-a)

The penalties for a conviction of VTL § 1192(4-a) are the same as the penalties for a conviction of VTL § 1192(2), (3) or (4). See VTL § 1193(1)(b); VTL § 1193(2)(b)(2); VTL § 1193(2)(b)(3). See also Chapter 46, *infra*.

### § 10:32 DWAI Drugs conviction reversed for improper cross-examination of defendant's doctor

In People v. Dimiceli, 27 Misc. 3d 84, 902 N.Y.S.2d 774 (App. Term, 9th & 10th Jud. Dist. 2010), the defendant was convicted of DWAI Drugs and Resisting Arrest. The drugs in question were prescribed medications. The Appellate Term reversed the defendant's convictions in the interest of justice based upon the following excerpt of the prosecutor's cross-examination of the defendant's doctor:

> "[THE PROSECUTOR:] * * * [Y]ou found out . . . that the defendant was arrested for this crime, correct?

[THE DOCTOR:] Uh-huh. Yes.

[THE PROSECUTOR:] And when you received word of that, that he was accused of being medicated while driving --

[THE DOCTOR:] Yes.

[THE PROSECUTOR:] -- you ordered an end to all narcotic pain medicine, correct?

[THE DOCTOR:] Could I just refer to my notes?

[THE PROSECUTOR:] Of course.

[THE DOCTOR:] (Perusing.) Because I can't order a sudden end, because then they go into withdrawal, I probably recommended later on that he be detoxed. Here we go, yes, sorry. 4-27-05; gave tapering schedule of meds, but suggest patient be detoxed.

[THE PROSECUTOR:] You followed that up with a letter to Pain Management Services recommending a detox, correct?

[THE DOCTOR:] I followed it up with -- it is back here somewhere. It wasn't the Pain Management Services, ultimately it went to South Oaks, if I remember correctly.

[THE PROSECUTOR:] For a detox program in South Oaks.

And that would be to rid all pain medicine from the body, correct?

[THE DOCTOR:] Correct.

[THE PROSECUTOR:] And then attend a treatment program because of that, correct?

[THE DOCTOR:] Correct.

[THE PROSECUTOR:] And because you got word of the defendant's arrest, you didn't prescribe any more pain medicine for approximately 10 months, correct?

[THE DOCTOR:] Correct."

> There was no evidence that the doctor's decision to taper off defendant's medications, and his recommendation that defendant undergo "detox," were based on any information other than the fact that defendant had been charged with driving while ability impaired in the instant case. The doctor's choice of a course of treatment thus had no probative value with respect to defendant's actual condition before, during, or even after the incident. Because it was not relevant to any issue in the case, the course-of-treatment testimony should not have been admitted.
>
> Furthermore, the testimony was highly prejudicial to defendant. It conveyed the impression that defendant's own doctor believed that he had been overmedicating at the time of the incident. It also conveyed the impression that the doctor believed that defendant was a prescription medication abuser in need of "detox." Particularly in light of the fact that the jury specifically requested the doctor's "detox statement" during its deliberations, we are of the opinion that the testimony was so prejudicial that it deprived defendant of a fair trial. Accordingly, we reverse the judgments of conviction as a matter of discretion in the interest of justice, and remit the matter to the District Court for a new trial.

Id. at ___, 902 N.Y.S.2d at 775-76 (citations omitted).

### § 10:33 Significance of odor of burnt marijuana

In People v. Chestnut, 43 A.D.2d 260, ___, 351 N.Y.S.2d 26, 27 (3d Dep't 1974), aff'd, 36 N.Y.2d 971, 373 N.Y.S.2d 564 (1975), the Appellate Division, Third Department, held that "the smell of marihuana smoke, with nothing more, can be sufficient to provide police officers with probable cause to search an automobile and its occupants." Notably, however, the Court made clear that:

> [I]t is critical to the outcome of this case that we are here concerned with an automobile, which is stopped on the highway and readily movable, whose occupants have been alerted, and whose contents "may never be found again if a warrant must be

> obtained." Equally important is the experience and training of the police officers involved. Here, both Troopers Carmody and Standish had extensive training with marihuana, formally at the State Police Academy in Albany and informally at their local substation. Each, likewise, had smelled marihuana smoke and was familiar with its distinctive odor.

Id. at ___, 351 N.Y.S.2d at 28-29 (citations omitted).

In People v. Hanson, 5 Misc. 3d 67, ___, 785 N.Y.S.2d 825, 827 (App. Term, 9th & 10th Jud. Dist. 2004), the Court applied Chestnut as follows:

> It is well settled that the smell of marijuana alone is sufficient to provide trained and experienced police officers in the area of narcotics probable cause to search a vehicle and its occupants. For a hearing court to make a finding that an officer had probable cause to conduct a search, the officer's expertise, training or experience with respect to knowledge of the smell of burnt marijuana must be adequately developed in the record. As we are bound by the court's return, the hearing court properly determined that the troopers lacked probable cause to search the defendant since there was no testimony regarding their training or experience in identifying the smell of burnt marijuana. Thus, the search of the defendant and the subsequent search of the automobile were not justified, and the marijuana was properly suppressed by the hearing court. In addition, the silver clip containing contraband, the pills, the statements made by the defendant after the illegal search and arrest, and the results of the field sobriety and chemical tests were also properly suppressed under the fruit of the poisonous tree doctrine.

(Citations omitted).

CHAPTER 19

# PLEA BARGAINING



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## § 19:1 Negotiating with the ADA -- A typical approach

You have been retained by a client to represent him in regard to a charge of DWI. After an extensive interview in which you ascertain the facts of his case as well as his personal background, you call the district attorney's office and are

routed to an assistant district attorney (hereinafter referred to as an "ADA") whom you start to advise of your client's situation.

The ADA interrupts you in mid-sentence and asks you where your client was arrested and what he was charged with. Although you deem this interruption discourteous, you answer the question and resume your discourse concerning your client's personal qualities and standing in the community. You are again interrupted and asked if your client has any prior convictions. Although you are somewhat put off by the impatient tone of your adversary, you tolerate his lack of decorum because your client's interests are at stake. Before you are halfway into the facts surrounding the arrest of your client and the essential details which make up the foundation for your arguments in regard to the law, the ADA interrupts you again, offers you a disposition and attempts to terminate the conversation.

## § 19:2 What to tell the ADA

The intemperate and abrupt ADA discussed above is merely reacting to the approach adopted by the attorney in presenting his case. The attorney knows what he wants to impart, but is uninformed as to the information the ADA needs to evaluate the case. First, you should provide the ADA with: 1) your client's name, the charge and the court in which the case is pending; 2) the test result, and 3) your client's prior record, if you know it. These are the items that enable a prosecutor to grasp the case and discuss it intelligently.

Many offices assign ADAs to specific courts. Accordingly, the first thing the ADA wants to know is whether the case is his or some other prosecutor's. Upon hearing your client's name, he will start checking to see if he has a police report in regard to your case. The charge, test result and prior record are critical for his evaluation and formulation of a proposed disposition. Attempting to discuss the case without giving the ADA this basic information is a waste of time. In the prosecutor's mind, you assume the position of a client in your office who insists on detailing a lengthy narrative without giving you any idea of whether the case concerns a matrimonial, contract, criminal charge, etc. Only attorneys blessed with unusual patience are willing to sit and hear a detailed narrative without first determining the area of law in which the matter lies.

## § 19:3 The prosecutor's perspective

An ADA is not an adversary in the same sense as an opponent in a civil case. The ADA has a quasi-judicial responsibility which gives him a broader perspective than that encompassed by the traditional adversarial role. In the private sector, an attorney's negotiating position is determined by the strength of

his case. In the public sector, an ADA's negotiating position is determined more by equitable considerations than the legal or factual strength of his case. An ADA seeks what he perceives as being a fair and just result. Although his perception of equity is subject to challenge, his motivation is rarely questioned. An ADA deals with a large volume of local criminal court cases. Accordingly, it is imperative that each file be swiftly evaluated and disposed of expeditiously. In order to accomplish this, most prosecutors utilize informal criteria to arrive at an acceptable plea bargain.

## § 19:4 Prosecutorial criteria

The primary factors which an ADA considers in arriving at a proposed disposition are:

**(1)** ***The charge and the facts upon which it is based.*** As a general rule, the more common the charge, the more likely the existence of a policy in regard to a negotiated disposition. For example, first offense DWI charges are normally subject to being reduced to DWAI. If the facts involve a personal injury accident, however, the ADA may not be willing to consent to such a reduction. Property damage may also affect the disposition of the case.

**(2)** ***The defendant's age.*** As set forth in Chapter 15 "Underage Offenders," age is a critical factor in determining the effect of a conviction on a defendant's license. It is also a major factor in determining a plea bargain. A relatively young defendant with a prior record may cause an ADA to hesitate in negotiating a disposition.

**(3)** ***The defendant's prior record.*** In virtually every criminal case, the defendant's prior record is one of the most critical (if not the most critical) considerations in arriving at a negotiated disposition. This record will be checked through the Department of Motor Vehicles as well as the Division of Criminal Justice Services. In DWI cases, most courts and district attorney's offices have policies which are predicated upon your client's prior record of alcohol-related convictions. In addition to convictions, the ADA will consider any prior arrests. In plea bargaining, arrests are often given the same weight as convictions. It is important, therefore, that you delve into the details of your client's prior record and be able to explain the circumstances surrounding any prior charges.

**(4)** ***Chemical test result.*** Many district attorney's offices emphasize the significance of a chemical test result and will not agree to the reduction of a DWI charge where the chemical test result exceeds a specified concentration. Such counties will adhere to this policy even though the defendant has no prior

record and would, otherwise, be granted a reduction of the charge.

**(5) *Circumstances of the arrest*.** The politics of the Criminal Justice System dictate that courts and ADAs be responsive to the law enforcement community. The police can have a definite influence on the disposition of a case. The strength of this influence varies from community to community and is affected by both the nature of the case and the defendant. Generally, the client who is polite to the police is easier to defend than one who is not.

In misdemeanor cases, the police will advise the ADA if they were given a "hard time." Conversely, a police officer's indication that your client was "no problem" will often tip the balance in your favor in a close situation. Generally, ADAs are responsive to police who have been harassed by defendants. Accordingly, it is important to interview your client closely as to whether there were any problems at the time of the arrest. If your client tells you that the police gave him a hard time, the chances are that the feeling was mutual and you may have a tougher case than would otherwise be apparent from the facts.

**(6) *Office policy*.** When a prosecutor tells you that his office has a policy in regard to a particular charge, you should find out how firm the policy is, and whether there are exceptions for which you might qualify. Because of the publicity and emphasis accorded DWI enforcement, prosecutorial policy has become increasingly rigid. Reduction of DWI cases to speed or other traffic offenses is rare.

**(7) *Factual, legal and equitable considerations*.** The listing of the facts and legal considerations at the bottom of a list of prosecutorial criteria is probably surprising. In virtually every other legal proceeding, the facts and law would be listed as the primary consideration with all others following thereafter. In the criminal justice system, however, ADAs are rarely acquainted with the factual or legal insufficiency of a criminal case pending in local criminal court. Serious felonies are the exception to this rule because of the police practice of calling in the district attorney at the beginning of the case. In local court misdemeanors, however, the ADA usually knows nothing of the case until well after the arrest. At best, she will have an arrest summary detailing the charge and a statement of the underlying facts. At worst, all she will have is a copy of the information.

Consequently, the determination of legal and factual problems is a defense role. The volume of cases requires an ADA to operate on the presumption that there are no factual or legal problems. In a very real sense, the prosecutor relies upon her

adversary to apprise her of the existence of any such issues. Once apprised, the prosecutor will then check with the police to see whether they confirm the defense assertions.

If the facts or law of your case merit a disposition other than that specified by a prosecutor's policy, it is incumbent upon you to make this fact clear to the ADA and to do so in a manner which is meaningful to her. Bear in mind that your phone call to the ADA will frequently be the first time that she has heard of this arrest. If your claim to distinction is based upon equity, you are probably better off discussing this with the ADA on the telephone.

If your assertion is legal in nature, it might be to your advantage to reduce it to writing in order to allow the ADA an opportunity to review your argument. Legal arguments in criminal cases are predicated upon facts which you obtain from an inherently unreliable source: your client. Prosecutors rely on police reports which are only slightly more reliable. It is not unusual for both attorneys to wind up at trial and discover that they are litigating two different cases. Most criminal cases are determined by which side has the most accurate facts, rather than which is more conversant with the law.

### § 19:5 Specific plea bargains -- The first offender

Until recently, a first-time offender walking into your office could be presented with a fairly straightforward scenario of how their case might be resolved. Typically, you could obtain a reduction of the misdemeanor DWI charge to the violation of Driving While Ability Impaired (hereinafter referred to as "DWAI") with a fine of not less than $300, nor more than $500, together with the state-mandated surcharge. Upon entry of that plea, the court would issue a 20-day order allowing the client to continue his or her driving privileges while the client's paperwork was processed by the Department of Motor Vehicles (hereinafter referred to as "DMV"). Once the client obtained a conditional license application in the mail from DMV, the client would proceed to the local district office, pay the fee for the conditional license, and register for the Drinking Driver Program (hereinafter referred to as "DDP").

Upon entering the DDP, your client would pay a fee for their participation in that program. At the completion of that program, their full license is restored. Recent developments in prosecutorial policy, as well as DMV procedures, however, present some complications in this common scenario.

It is now critical to ascertain from your client what their breath test result, if any, was. This will establish what the plea bargaining parameters are with the District Attorney's

Office. By way of example, the Columbia County District Attorney has a policy of not reducing any DWI case wherein the breath test result is .13 blood alcohol content or higher. To discourage breath test refusals, that office refuses to plea bargain any case in which there is a test refusal. In either case, the offer will be a plea to the misdemeanor DWI charge with a fine of not less than $500 nor more than $1,000, and a state-mandated surcharge. The client's license is subject to a six month revocation, but the conditional license is available and successful completion of the Drinking Driver Program will terminate the revocation arising out of a conviction for DWI. A test refusal revocation, however, will not be terminated by DDP completion.

The DDP may refer your client for alcohol evaluation and, if deemed appropriate, alcohol treatment. Pursuant to VTL § 1196(1), your client can be required to participate in such alcohol treatment for a period of up to eight months. In the event that the officials administering the program recommend additional treatment, your client may be required to stay in that program until satisfactory completion.

From the above brief example, it is critical to know the particular DA's policy as well as those of the DDP and DMV. While the policies of the DMV are rather consistent, it is difficult to generalize with regard to the DA's Offices, because each office has a different standard. As stated above, the Columbia County District Attorney has a .13 or above policy; the Greene County District Attorney has a .20 or above policy, while Ulster County has a .15 cutoff. Many counties have no policy and the first-time offender can obtain an offer of DWAI regardless of the client's test result. You must know the policy in your area in order to avoid surprise and embarrassment when you appear in court.

If your client does not fall within the policy exceptions of the local DA, the first-time offender will be offered a plea to the violation of DWAI resulting in a 90-day suspension of his license. A fine in the range of $300 to $500 will be imposed, and the client will be eligible for a conditional license if he participates in the DDP. In most cases, the client can choose to attend or not attend the DDP. In the event the client chooses to forgo the DDP, his license will be returned to him automatically at the end of the 90-day suspension period upon payment of a suspension termination fee. See VTL § 503(2)(j).

Two further cautionary notes. While it is indeed rare, in addition to the suspension of the license, VTL § 1193(2) also provides for a permissive suspension of your client's motor vehicle registration for the same period of time. Further, should your client's insurance company learn of his conviction for either operating while intoxicated or impaired, his policy is

subject to cancellation on that basis and he will be placed in "the assigned risk pool" for at least thirty-six months. See Ins. Law § 3425.

## § 19:6 The second offender

Many District Attorneys are reluctant to reduce a misdemeanor DWI charge where your client has been convicted of a DWAI in the preceding ten years.

For most individuals, a second offense will often result in an offer to plea to the charge. Where your client is convicted of the misdemeanor DWI, there will be a revocation of her license for a minimum of six months. Additionally, the fine will be anywhere between a minimum of $500 and a maximum of $1,000, and a surcharge. While unlikely, your client can be imprisoned for up to one year in jail, or placed on three years probation.

The questions most asked by clients with a second alcohol-related arrest are regarding their eligibility for a conditional license. On a second offense, a motorist is eligible to participate in the DDP and obtain a conditional license if more than five years have elapsed from the date of the client's last participation in the DDP to the date of the new arrest. If your client did not attend the DDP after their last conviction, then the five year period is determined from the date of conviction to the new arrest. If eligible for a conditional license, the client will have the conditional license until the expiration of the period of revocation; or successful completion of the DDP and any referral, whichever is longer. See Section 136.9 of Title 15 of the NYCRR (attached as Appendix 15).

If your client is not eligible for the DDP, her license will be revoked for at least six months. The client will be required by DMV to obtain an independent alcohol evaluation and treatment before an application for a license is accepted. Section 136.4(a)(2) of Title 15 of the NYCRR requires the Department to deny any application for a license if there is insufficient evidence of alcohol rehabilitative effort. No application will be accepted unless it is accompanied by an alcohol and drug abuse rehabilitative program summary showing successful completion of treatment. A copy of a sample alcohol drug abuse rehabilitative program summary is attached hereto as Appendix 16.

If eligible for a conditional license, your client will have the conditional license until the revocation period is served. Successful completion of the DDP and any referral will not terminate the revocation of a second offender as it does for a first offender.

## § 19:7 Multiple offenders

When representing the multiple offender, the chief objective is a disposition which does not include jail. In the event your client has a prior misdemeanor DWI conviction within the preceding 10 years, and the new offense is a violation of § 1192(2), (3) or (4), they are chargeable with a Class E felony. The maximum sentence for this felony is one and one-third to four years in jail, or a fine of $1,000 to $5,000, or both such fine and imprisonment.

Until recently, most third-time offenders with a DWI conviction within the preceding ten years would be offered a plea to a misdemeanor DWI with a fine and probation. Again, it is important to know the District Attorney's policy for the third-time offender. Absent a policy, here more than in any other case, the particular facts surrounding the arrest will be of utmost importance in negotiating a disposition. If the facts involve a personal injury or property damage accident, this will adversely affect the outcome. If it is a standard vehicle and traffic stop with no accident, chances of a disposition without incarceration are enhanced.

The chemical test result is significant. The lower the test result, the better your chances for a favorable result. Unlike the first or second offender, a refusal to submit to a chemical test may benefit your client. Most prosecutors loath trials where there has been a chemical test refusal absent the additional charge of felony AUO.

Before you work out any disposition, it is imperative that you obtain your client’s lifetime driving record from the Department of Motor Vehicles. Presently, it is necessary to file a Freedom of Information Law request to obtain that record. Defendants with multiple convictions are subject to the Department of Motor Vehicles’ regulations which call for lifetime revocations in some cases. See Chapter 55, *infra*.

Where your client is not eligible for the DDP and serves the applicable minimum period, he must provide evidence of alcohol evaluation and/or treatment prior to relicensure. This must be obtained by your client from a recognized alcohol treatment provider. You must ascertain if the alcohol counseling agency is one which DMV will recognize. DMV requires:

> (4) *Rehabilitative Effort. Rehabilitative effort* shall consist of referral of an individual with a history of abuse of alcohol or drugs to any agency certified by the office of Alcoholism and Substance Abuse and/or agents authorized by professional

> license or professional certification, such as that granted by a Board of Examiners of the State Education Department, for evaluation of the extent of alcohol and/or drug use and satisfactory participation in any treatment recommended by such agency, and/or evidence of abstinence from, or controlled use of alcohol and/or drugs for a period of time sufficient to indicate that such person no longer constitutes a danger to other users of the highway.

15 NYCRR § 136(1)(b)(4).

If the agency does not meet the above criteria, DMV will not accept their evaluation and/or treatment of your client. It is the policy of DMV to prescreen and approve treatment agencies. If the treatment agency selected by your client has not been preapproved, this will significantly delay the processing of his application.

You should maintain a list of local alcohol counseling agencies in your area and know their reputations. By examining your client's prior history, you can predict if he is a likely candidate for referral. The agencies in your area have established reputations. Apprising your client of that reputation will greatly assist him in making the appropriate choice.

VTL § 1193(1)(c) now elevates a misdemeanor DWI to a felony where there has been a conviction of Vehicular Assault in the second or first degree, or a conviction of Vehicular Manslaughter in the second or first degree within the preceding ten years. You can no longer plead your client to any one of these charges in full satisfaction of an indictment and prevent a subsequent misdemeanor DWI arrest from being elevated to a felony.

## § 19:8 Probationary sentences

VTL § 1193(2)(e)(5) provides:

> Probation. When a license to operate a motor vehicle has been revoked pursuant to this chapter, and the holder has been sentenced to a period of probation pursuant to section 65.00 of the penal law for a violation of any provision of this chapter, or any other provision of the laws of this state, and a condition of such probation is that the holder thereof not operate a motor vehicle or not apply for a license to operate a motor

> vehicle during the period of such condition of probation, the commissioner may not restore such license until the period of the condition of probation has expired.

It is generally a condition of probation in a DWI case that your client not own or operate a motor vehicle. Absent a precisely worded plea bargain agreement excluding or limiting that condition, your client will be without a license while on probation. Where possible, this provision should be deleted or limited.

A goal of both the court and the prosecution is to require your client to obtain alcohol counseling. Since that counseling is mandated by DMV as well, an effective means of limiting these probation conditions is to have your client voluntarily undergo alcohol counseling. You should advise the prosecutor and the court that DMV will not accept an application for a new license until provided with proof of alcohol rehabilitation. Once the court and prosecutor are aware of this regulation, they will often be willing to delete, or at least limit that condition of probation.

## § 19:9 Conditioning dismissal on execution of civil release

In the past, ADAs were uncomfortable with requiring the execution of a release as a condition for the dismissal of a marginal case. The reason for this discomfort was the perception that they were trespassing onto the civil realm and that their actions were contrary to public policy.

Cowles v. Brownell, 73 N.Y.2d 382, 540 N.Y.S.2d 973 (1989), reinforces this perception. Here, the Court of Appeals held that a release, given by a plaintiff as a condition for the People's consent to the dismissal of criminal harassment charges, should not be enforced. At the outset, it should be clear that this ruling is case specific and is not a general declaration of the invalidity of civil releases obtained in consideration of the dismissal of criminal charges. The refusal of the majority to broaden the application of its holding is the subject of Judge Titone's concurring opinion which agrees with the result, but would expand the parameters of the ruling beyond this specific case.

*Facts*

On July 20, 1984, Stephen Cowles was arrested by the Amsterdam Police. He alleged that one of the officers, Thomas Brownell, arrested him without cause and beat him without provocation. Mr. Cowles was charged with counts of harassment which were ultimately dismissed based upon Mr. Cowles releasing

the city and the arresting officers from all civil claims arising out of the incident. Following the dismissal, Mr. Cowles brought suit against Officer Brownell for malicious prosecution, false arrest, assault and battery.

*Legal Background*

The defendant police officer's motion to dismiss the civil suit on the grounds of the release was opposed by Mr. Cowles on the ground that the release was unenforceable. Mr. Cowles argued that the District Attorney was aware that Officer Brownell had been involved in many similar instances leading to civil suits and that the District Attorney made a practice of demanding releases in those cases. Supreme Court dismissed the complaint, and was reversed by the Appellate Division, which remitted the case for further proceedings on the grounds that summary judgment had been improperly granted.

At the resultant hearing, Mr. Cowles' attorney testified that the prosecutor had consistently indicated that the criminal charges were unfounded and that the city had been repeatedly sued because of the defendant police officer's conduct. In contrast, the ADA testified that he believed the criminal charges to be valid, but had entered into the agreement in order to avoid the threat of civil suit. Finding that the agreement had been voluntarily entered into, the Supreme Court, once again, dismissed the complaint. This holding was affirmed by the Appellate Division on the grounds that Mr. Cowles was fully aware of the rights he was waiving and the benefit he was receiving.

*Court of Appeals*

In reversing the Appellate Division, the Court of Appeals distinguished this situation from that of a normal plea bargain. In a plea bargain, both the People and the defendant benefit; and the agreement is in the public interest "not only because of economy, but also because a wrongdoer is punished with speed and certainty." 540 N.Y.S.2d at 975.

In contrast, the Court found that the agreement in Cowles benefited the defendant, but placed the integrity of the criminal justice system at issue.

> The same cannot be said of the agreement in this case. Insofar as the integrity of the criminal justice system was concerned -- the paramount interest here -- on this record there was no benefit, only a loss. Assuming plaintiff to have been guilty of the criminal charges leveled against him (as the prosecutor maintains) the People's interest in seeing a wrongdoer punished has not been

> vindicated. Assuming him to have been innocent (as he maintains), or the case against him to have been unprovable, the prosecutor was under an ethical obligation to drop the charges without exacting any price for doing so.

Id.

The Court found not only that there was no benefit, but that the agreement was detrimental to the public confidence in the criminal justice system.

> There is no public interest to be advanced by enforcing the agreement here. Rather, the agreement may be viewed as undermining the legitimate interests of the criminal justice system solely to protect against the possibility of civil liability; it surely does not foster public confidence that the justice system operates evenhandedly.
>
> Insulation from civil liability is not the duty of the prosecutor. The prosecutor's obligation is to represent the people and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution. This obligation cannot be fulfilled when the prosecutor undertakes also to represent a police officer for reasons divorced from any criminal justice concern. To enforce a release-dismissal agreement under these circumstances is simply to encourage violation of the prosecutor's obligation.

Id.

In his concurring opinion, Judge Titone advocates expanding the parameter of the Court's holding from a case specific ruling to a general rule declaring release/dismissal agreements unenforceable. He cites several potential problems arising out of this practice:

> First, as noted by the United States Court of Appeals and acknowledged by the Supreme Court majority in Rumery, such agreements " 'tempt prosecutors to trump up charges in reaction to a defendant's (civil) claims, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights' "(480 U.S. at 394, 107 S.Ct. at 1193,

> *supra*, quoting 778 F.2d 66, 69 (1st Cir.)). Second, the availability of such agreements creates a troublesome conflict of interest for prosecutors, who are called upon to balance the private concerns of witnesses and public servants against the legitimate concerns of their primary client, the People of the State of New York, in the enforcement of the criminal laws (see 480 U.S. at 412-414, 107 S.Ct. at 1202-03 (Stevens, J., dissenting)). Third, they give rise to a serious risk that the societal interest in the prosecution of meritorious criminal charges will be compromised in an effort to protect local law enforcement personnel from the embarrassment and expense that attends civil litigation (see id., at 400, 107 S.Ct. at 1196 (O'Connor, J., concurring)). Finally, by providing potential private litigants with a powerful incentive to forgo arguably meritorious claims, these release/dismissal arrangements interfere with an important mechanism for vindicating individual rights and holding public servants accountable, much "to the detriment . . . of society as a whole" (id.).

Id. at 976.

As matters presently stand, the release/dismissal agreement is still a viable option. Any such agreement, however, must have its basis clearly set forth on the record. The reasons must be "genuine, compelling and legitimately related to the prosecutorial function." Id. at 975. Otherwise, it will not "overcome the strong policy consideration disfavoring enforcement of such agreements." Id.

In People v. Grune, 278 A.D.2d 668, 717 N.Y.S.2d 750 (3d Dep't 2000), the defendant was charged with class D felony DWI. The defendant was offered a plea bargain allowing him to plead guilty to class E felony DWI, together with a recommended sentence of 10 months in jail (instead of 12 months), conditioned upon his waiver of his right to appeal as well as his withdrawal of a notice of claim that he had filed against the County. The defendant appealed, claiming that the requirement that he withdraw his civil claim rendered the plea/sentence illegal. The Appellate Division, Third Department, held as follows:

> There is arguable merit to defendant's contention that the People exceeded their authority in requiring him to waive his right to seek civil damages in exchange for a

> diminished jail sentence. It does not necessarily follow, however, that his waiver of appeal or judgment of conviction should be vacated as a result. To the contrary, the appropriate remedy for the impermissible extraction of a criminal defendant's release of a civil claim is to deny enforcement of the release when and if it is asserted by way of defense in a civil action. Within the context of the present criminal action, the release worked only to defendant's advantage: by giving it, he obtained a two-month reduction in the bargained-for jail sentence. To the extent that the release is unenforceable, an issue which we need not decide, he will have received a preferential sentence in exchange for illusory consideration. Obviously, his release did not induce his plea of guilty or waiver of appeal. Because defendant has raised no valid issue concerning the voluntariness of his plea of guilty or his waiver of appeal, they should be enforced.

(Citations omitted).

### § 19:10 Plea bargain *can* be conditioned upon waiver of right to appeal

In People v. Seaberg, 74 N.Y.2d 1, 543 N.Y.S.2d 968 (1989), the Court of Appeals considered a case where the defendant had been convicted after trial, but was spared a lengthy prison sentence on condition that he complete a rehabilitation program. If he failed to complete the program, he was to be sentenced to one year in jail. As part of this negotiated sentence, the defendant agreed to waive his right to appeal.

The defendant's subsequent appeal to the Appellate Division was dismissed. 139 A.D.2d 53, 530 N.Y.S.2d 278 (1988). In affirming the dismissal of the appeal, the Court held that such waivers are consistent with public policy:

> We conclude that the public interest concerns underlying plea bargains generally are served by enforcing waivers of the right to appeal. Indeed, such waivers advance that interest, for the State's legitimate interest in finality extends to the sentence itself and to holding defendants to bargains they have made. While a defendant always retains the right to challenge the legality of the

> sentence or the voluntariness of the plea (see, People v. Francabandera, 33 N.Y.2d 429, 434, n. 2, 354 N.Y.S.2d 609, 310 N.E.2d 292, *supra*), the negotiating process serves little purpose if the terms of "a carefully orchestrated bargain" can subsequently be challenged (see People v. Prescott, 66 N.Y.2d 216, 220, 495 N.Y.S.2d 955, 486 N.E.2d 813, *supra*). Moreover, the People need not particularize "some legitimate State interest" to justify conditioning a plea bargain on defendant's waiver of the right to appeal (see People v. Ventura, 139 A.D.2d 196, 203, 531 N.Y.S.2d 526). The validity of the waiver is supported by the interests supporting plea bargains generally. Accordingly, we find no public policy precluding defendants from waiving their rights to appeal as a condition of the plea and sentence bargains. . . .

543 N.Y.S.2d at 972.

In People v. Johnson, 14 N.Y.3d 483, ___, ___ N.Y.S.2d ___, ___ (2010), the Court of Appeals held that:

> Because the court did not advise defendant that it was reserving approval of the negotiated disposition until it reviewed the presentencing report or other pertinent information, defendant could not have knowingly and intelligently waived his right to appeal the court's decision not to abide by the original promise of youthful offender treatment and a prison sentence of 1 1/3 to 4 years. Supreme Court's subsequent decision to modify the material terms affecting sentencing therefore vitiated defendant's knowing and intelligent entry of the waiver of appeal. Consequently, once the decision to impose the more severe sentence was announced, it was incumbent on the court to elicit defendant's continuing consent to waive his right to appeal. However, there was no need for the judge to reallocute defendant on his decision to plead guilty because his choice not to withdraw his plea effectively reaffirmed his knowing and intelligent consent to concede guilt. Since defendant was not asked if he further agreed to waive his right to pursue an appeal regarding the modified terms of his sentence,

> he is not foreclosed from requesting appellate review of the propriety of the denial of youthful offender treatment or the severity of the imposed sentence.

## § 19:11 Defendant may not be penalized for asserting right to trial

In People v. Patterson, 106 A.D.2d 520, 483 N.Y.S.2d 55 (2d Dep't 1984), the Court considered a case in which the trial court had increased the defendant's punishment because the defendant had asserted his right to trial. While the Appellate Division held that plea bargaining was an acknowledged part of the criminal justice system, and that such bargaining might encourage a guilty plea by offering a reduced potential sentence, this did not justify the imposition of a greater sentence solely on the basis of the defendant's assertion of his right to trial:

> Once a defendant has been convicted after trial, the sentence to be imposed can reflect the sentencing principles appropriate to the individual case, for the leverages involved in the plea-bargaining process are gone. Therefore, the fact that a sentence imposed after trial is greater than that offered during a plea negotiation is no indication that the defendant is being punished for asserting his right to proceed to trial. A person may not, of course, be punished for doing what the law allows him to do. . . . If a defendant refuses to plead guilty and goes to trial, retaliation or vindictiveness may play no role in sentencing following a conviction. . . . Rather, the conventional concerns involved in sentencing, which include the considerations of deterrence, rehabilitation, retribution, and isolation, must be the only factors weighed when sentence is imposed. . . . In this case, the record establishes that in imposing sentence, the trial court impermissibly increased defendant's punishment solely for asserting his right to a trial. Based upon our independent review of the proper factors to be considered, we have reduced the sentence to one which satisfies the acceptable objectives of sentencing.

483 N.Y.S.2d at 57 (citations omitted). See also People v. Brown, 157 A.D.2d 790, 550 N.Y.S.2d 389 (2d Dep't 1990) (court found no evidence in record to indicate defendant was punished for exercising right to trial).

## § 19:11A Prosecution can validly indict defendant if misdemeanor plea offer is rejected

The Court of Appeals has made clear that the People can validly indict a defendant for felony DWI where the defendant rejects a plea bargain offer of misdemeanor DWI. See People v. Jacquin, 71 N.Y.2d 825, 827, 527 N.Y.S.2d 728, 729 (1988) ("We have considered defendant's remaining argument -- that the prosecutor was vindictive in indicting him for a felony after negotiations for a plea to a misdemeanor charge of driving while intoxicated failed -- and find no merit to it").

## § 19:12 Plea bargain may not be obtained via threat of incarceration

In People v. Beverly, 139 A.D.2d 971, 528 N.Y.S.2d 450 (4th Dep't 1988), the Court reversed and remitted a conviction obtained as a result of the trial court's promise of incarceration if the case went to trial. The defendant was told by the lower court that "if we have to go to trial and work" the judge would probably sentence him to three and a half to seven years, the maximum sentence "on top of" the sentence for another crime. 528 N.Y.S.2d at 450. Citing People v. Glasper, 14 N.Y.2d 893, 252 N.Y.S.2d 92, 200 N.E.2d 776 (1964), and People v. Hollis, 74 A.D.2d 585, 424 N.Y.S.2d 483 (1980), the Appellate Division held that the statement by the trial court "constituted coercion" which rendered the guilty plea involuntary, and mandated reversal of the conviction. 528 N.Y.S.2d at 450. See also People v. Fisher, 70 A.D.3d 114, 890 N.Y.S.2d 477 (1st Dep't 2009).

## § 19:13 Court policy of not accepting plea bargains on eve of trial improper

In People v. Compton, 157 A.D.2d 903, 550 N.Y.S.2d 148 (3d Dep't 1990), the defendant sought to accept a plea bargain which had been previously offered.

> When defendant attempted to plead in accordance with this arrangement, County Court refused to accept the plea on the ground that the case was already set for trial and that it was the court's "policy" not to accept a negotiated plea on the eve of trial. The court further stated that, pursuant to this policy, the only acceptable guilty plea would be one to the top count of the indictment. Although defense counsel objected on the ground that he had never been informed by the court of its policy of imposing time limits for accepting plea

> offers, the court adhered to its refusal to accept the negotiated plea.

Id. at ___, 550 N.Y.S.2d at 149.

On appeal, the Appellate Division, Third Department, held that:

> We cannot endorse a court's general policy of not permitting plea bargains based on circumstances unrelated to the particular defendant and the proposed bargain at issue. Moreover, the record appears to support defendant's contention that he was given no prior notice of the court's policy of terminating all outstanding plea offers once the case was ready for trial.

Id. at ___, 550 N.Y.S.2d at 149-50 (citation omitted).

### § 19:13A Court policy of not accepting plea bargains in DWI cases improper

In People v. Glendenning, 127 Misc. 2d 880, 487 N.Y.S.2d 952 (Westchester Co. Sup. Ct. 1985), a Justice of the Scarsdale Village Court had an announced policy of not accepting plea bargains in DWI cases. The defendant's motion to remove the case to another Court was granted. In this regard, the Westchester County Supreme Court held not only that Village Court's policy was improper, but also that such policy violated various provisions of the Code of Judicial Conduct. In so holding, the Court reasoned:

> The policy of rejecting pleas in Driving While Intoxicated cases is an improper exercise of judicial discretion. The categorical rejection of certain types of pleas is by its nature an impermissible infringement on the prosecutorial function. It is not within the Court's inherent power to instruct the prosecutor regarding his plea bargaining posture. An established policy has precisely this effect. It renders prosecutorial discretion with regard to the type of plea involved meaningless[,] thus forcing the prosecutor to revise his procedures to conform with the Court's wishes. An announced policy also runs contrary to the purposes of plea bargaining. A legitimate goal of a prosecutor's charging decision is to avoid the stigma of a

> particular conviction to a particular defendant. The prosecutor, it should be noted, is in the best position to determine whether resources should be devoted to trials of drunk driving cases or elsewhere. A blanket policy of rejecting these pleas obviates both the need for prosecutorial discretion and the goal of individualized sentences and justice.
>
> Moreover, notwithstanding the importance of keeping drunk drivers off the road, the legislature has not deemed it appropriate to prevent plea bargaining in Driving While Intoxicated cases. The reason for this is obvious. The legislature has deemed it undesirable and not in the public's best interests to impose across-the-board restrictions on plea bargaining. * * *
>
> Thus, by forbidding plea bargaining in Driving While Intoxicated cases, then, the Court is not only interfering with the function of the prosecutor but is also invading the province of the legislature.
>
> The announced policy of the Local Court Judge also runs afoul of the *Code of Judicial Conduct* adopted by the New York State Bar Association effective March 3, 1973.

Id. at ___, 487 N.Y.S.2d at 954-55 (citation omitted).

### § 19:14 Plea bargain cannot waive appeal of illegal sentence

In Agoney v. Feinberg, 132 A.D.2d 829, 517 N.Y.S.2d 834, 836 (3d Dep't 1987), the Court stated that any plea bargain is conditioned upon it being lawful and appropriate. In this case, restitution ordered by the Court was not authorized and could not be validated by the plea bargain. See also People v. West, 80 A.D.2d 680, 436 N.Y.S.2d 424 (3d Dep't 1981); People v. Bourne, 139 A.D.2d 210, 531 N.Y.S.2d 899 (1st Dep't 1988) (waiver of right to appeal does not preclude interest of justice review by Appellate Division of plea bargained sentence, as such review of sentence is not waivable).

## § 19:15 Court is limited in its power to correct erroneous plea bargain

It is a well-settled legal principle that after sentence has commenced, a court which has accepted a plea in violation of the CPL may not vacate the illegal plea and reinstate the original charges. In Kisloff v. Covington, 73 N.Y.2d 445, 541 N.Y.S.2d 737, 539 N.E.2d 565 (1989), the defendant brought an Article 78 proceeding to prohibit the Supreme Court from vacating the defendant's erroneous conviction and sentence. The defendant had entered a plea of guilty to what the parties believed to be the felony of Attempted Grand Larceny, Third Degree. The defendant was sentenced to one and a half to three years pursuant thereto. At the time of the commission of the crime, however, Attempted Grand Larceny, Third Degree, was a Class A misdemeanor. After commencement of sentence, the error was discovered and the defendant was returned to court for the purpose of vacating his conviction, repleading, and being re-sentenced in accordance with the plea bargain. Upon defendant's rejection of this procedure, the Supreme Court vacated his conviction and set the matter down for trial.

Defendant commenced an Article 78 Proceeding seeking prohibition of further prosecution on the felony charge, and to have his original plea reinstated and to be resentenced on the misdemeanor conviction. The Appellate Division granted the application and the People appealed.

In affirming the Appellate Division, the Court of Appeals stated:

> Additionally, we have held recently that a court which has accepted a plea in violation of the Criminal Procedure Law may not vacate the illegal plea and reinstate the original charges after sentence has commenced (Matter of Campbell v. Pesce, 60 N.Y.2d, at 167, 60 N.Y.2d 165, 468 N.Y.S.2d 865, 456 N.E.2d 806, *supra*). In doing so, however, we recognized and reaffirmed a court's power, within the statutory framework, to correct its own error in connection with accepting a plea or imposing sentence. We have recognized such power in instances where the record demonstrates that the Judge merely misspoke, in imposing sentence (People v. Wright, 56 N.Y.2d 613, 614, 450 N.Y.S.2d 473, 435 N.E.2d 1088; People v. Minaya, 54 N.Y.2d 360, 364, 445 N.Y.S.2d 690, 429 N.E.2d 1161, cert. denied 455 U.S. 1024, 102 S.Ct. 1725, 72 L.Ed.2d 144) or it is clear from the record

> that a patent clerical error has been made in imposing sentence (People ex rel. Hirschberg v. Orange County Ct., 271 N.Y. 151, 156, 2 N.E.2d 521). We noted in Matter of Campbell v. Pesce, however, that "[i]n no instance have we recognized a court's inherent power to vacate a plea and sentence over defendant's objection where the error goes beyond mere clerical error apparent on the face of the record and where the proceeding has been terminated by the entry of judgment" (60 N.Y.2d at 169, 60 N.Y.2d 165, 468 N.Y.S.2d 865, 456 N.E.2d 806, *supra*; cf., People v. Bartley, 47 N.Y.2d 965, 419 N.Y.S.2d 956, 393 N.E.2d 1029, *supra* (illegally accepted plea vacated on court's inherent power prior to imposition of sentence)).

541 N.Y.S.2d at 740.

The Court noted that the plea bargain at issue was illegal in both the entry of the plea and the sentence imposed. Once the sentence was imposed and judgment entered, the plea could not be disturbed on the basis of its mistaken entry. Absent defendant's consent to do otherwise, the only remedy was the imposition of a new sentence consistent with the defendant's conviction for a misdemeanor. Id. at 741. See also People v. Antis, 147 Misc. 2d 513, 558 N.Y.S.2d 455 (Fulton Co. Ct. 1990) (absent motion by the people, court has no inherent power to restore case to calendar that has been adjourned in contemplation of dismissal).

In Cummings v. Koppell, 212 A.D.2d 11, 627 N.Y.S.2d 480 (3d Dep't 1995), the court articulated an exception to the principle that after sentence has commenced, a court which has accepted a plea in violation of the CPL may not vacate the illegal plea and reinstate the original charges. Here, the illegal plea was entered in a court that was wholly without jurisdiction over the subject matter of the action. Specifically, a local criminal court accepted a plea to a misdemeanor in full satisfaction of an indictment which charged the defendant with a Class B violent felony. Noting that the jurisdiction of a local criminal court is automatically divested by action of a grand jury, the Appellate Division, Third Department concluded that the local criminal court's acceptance of the plea agreement "transcended mere illegality."

> Petitioner's illegal pleas were entered in a court that was wholly without jurisdiction over the subject matter of the action.

Cummings v. Koppell, 627 N.Y.S.2d at 482. As such, the pleas and resulting convictions were a nullity and did not constitute a previous prosecution for double jeopardy purposes, nor did it constitute a bar to the court vacating the illegal plea and reinstating the original charges.

### § 19:16 Failure to specify fine as part of plea bargain results in waiver

In People v. Youngs, 156 A.D.2d 885, 550 N.Y.S.2d 106 (3d Dep't 1989), defendant was charged with two counts of felony DWI. At the time, VTL § 1192(5) provided for a mandatory fine. Pursuant to a plea agreement, defendant was to be sentenced to 1 to 3 years imprisonment with no fines. However, the sentencing Court imposed the prison sentence, together with the then-mandatory fine.

On appeal, the Appellate Division, Third Department, held (a) that the defendant was entitled to specific performance of his plea bargain, and (b) that County Court should have informed defendant that the plea bargain could not be kept, and afforded defendant an opportunity to withdraw his plea. Id. at 886, 550 N.Y.S.2d at 107. See also People v. Cote, ___ A.D.2d ___, 697 N.Y.S.2d 184 (3d Dep't 1999) (fine imposed at sentencing vacated where it was not part of plea bargain or plea allocution).

### § 19:17 Off the record plea bargain agreement not entitled to judicial recognition

An off-the-record promise made in the course of plea bargaining is not entitled to judicial recognition. In People v. Curdgel, 83 N.Y.2d 862, 611 N.Y.S.2d 827, 634 N.E.2d 199 (1994), the Court stated:

> In order to promote certainty and openness in the plea negotiation process, we generally withhold judicial recognition from plea bargains not submitted for judicial approval (People v. Danny G., 61 N.Y.2d 169, 173, 473 N.Y.S.2d 131, 461 N.E.2d 268).

People v. Curdgel, 611 N.Y.S.2d at 828. See also People v. Huertas, 85 N.Y.2d 898, 626 N.Y.S.2d 750, 650 N.E.2d 408 (1995); Matter of Benjamin v. Kuriansky, 55 N.Y.2d 116, 447 N.Y.S.2d 905, 432 N.E.2d 777 (1982).

### § 19:18 Plea bargain limitations

VTL § 1192(10) contains various plea bargaining limitations which are applicable where a person is charged with certain violations of VTL § 1192. In this regard, VTL § 1192(10) provides:

Plea bargain limitations. (a)(i) In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2), (3), (4) or (4-a)], any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of [VTL § 1192], other than [VTL § 1192(5) or (6)], and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

(ii) In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2), (3), (4) or (4-a)], no plea of guilty to [VTL § 1192(1)] shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the [DDP], including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or substance abuse screening or assessment conducted pursuant to [VTL § 1198-a] or for other good cause shown. The provisions of this subparagraph shall apply, notwithstanding any bars to participation in the [DDP]; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

(iii) In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] and the operator was under the age

of [21] at the time of such violation, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of [VTL § 1192(1)]; provided, however, such charge may instead be satisfied as provided in [VTL § 1192(10)(c)], and, provided further that, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192(1)] is not warranted, such district attorney may consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

(b) In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1) or (6)] while operating a commercial motor vehicle, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of [VTL § 1192] and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney upon reviewing the available evidence determines that the charge of a violation of [VTL § 1192] is not warranted, he may consent, and the court may allow, a disposition by plea of guilty to another charge i[n] satisfaction of such charge.

(c) Except as provided in [VTL § 1192(10)(b)], in any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] by a person who was under the age of [21] at the time of commission of the offense, the court, with the consent of both parties, may allow the satisfaction of such charge by the defendant's agreement to be subject to action by [DMV] pursuant to [VTL § 1194-a]. In any such case, the defendant shall waive the right to a hearing under [VTL § 1194-a] and such waiver shall have the same force and effect as a finding of a violation of [VTL § 1192-a] entered after a hearing conducted pursuant to [VTL § 1194-a]. The

defendant shall execute such waiver in open court, and, if represented by counsel, in the presence of his attorney, on a form to be provided by [DMV], which shall be forwarded by the court to [DMV] within [96] hours. To be valid, such form shall, at a minimum, contain clear and conspicuous language advising the defendant that a duly executed waiver: (i) has the same force and effect as a guilty finding following a hearing pursuant to [VTL § 1194-a]; (ii) shall subject the defendant to the imposition of sanctions pursuant to [VTL § 1194-a]; and (iii) may subject the defendant to increased sanctions upon a subsequent violation of [VTL § 1192] or [VTL § 1192-a]. Upon receipt of a duly executed waiver pursuant to this paragraph, [DMV] shall take such administrative action and impose such sanctions as may be required by [VTL § 1194-a].

(d) In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2-a)], any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of [VTL § 1192(2), (2-a) or (3)], and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may consent and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge, provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition. Provided, further, however, that no such plea shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the [DDP], including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program

> prescribed pursuant to an alcohol or substance abuse screening or assessment conducted pursuant to [VTL § 1198-a] or for other good cause shown. The provisions of this paragraph shall apply, notwithstanding any bars to participation in the [DDP]; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

In People v. Lehman, 183 Misc. 2d 97, 702 N.Y.S.2d 551 (Watertown City Ct. 2000), the Court denied the People's motion to amend/reduce a charge of VTL § 1192(4) (*i.e.*, DWAI Drugs), to VTL § 1192(1) (*i.e.*, DWAI Alcohol), where there was no evidence that the defendant's impairment was in any way caused by alcohol.

However, the Court of Appeals has made clear that:

> [A] plea may be to . . . a crime for which the facts alleged to underlie the original charge would not be appropriate.
>
> A plea is a bargain struck by a defendant and a prosecutor who may both be in doubt about the outcome of a trial. Only the events of time, place, and, if applicable, victim, need be the same for the crime pleaded as for the one charged.

People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) (citations omitted). See also People v. Clairborne, 29 N.Y.2d 950, ___, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); People v. Adams, 57 N.Y.2d 1035, 1038, 457 N.Y.S.2d 783, 784-85 (1982) (same).

### § 19:19 Waiver of test refusal not allowed

VTL § 1194(2)(b) specifies that a report of refusal must be forwarded to the Commissioner of Motor Vehicles "and such transmittal may not be waived even with the consent of all the parties." This legislation was enacted to discourage a practice of neutralizing the refusal as part of the plea bargain by the simple expedient of not submitting the report of refusal to the Commissioner of Motor Vehicles.

## § 19:20 Plea bargaining restrictions applicable to indictment are inapplicable to felony complaint

In People v. McLaurin, 260 A.D.2d 944, 690 N.Y.S.2d 289 (3d Dep't 1999), the Appellate Division, Third Department, held that the plea bargaining restrictions contained in CPL § 220.10:

> [E]xpressly apply "to pleas which may be entered to an indictment" (CPL 220.10). An indictment serves as the basis for prosecution of a criminal action; a felony complaint is not encompassed by the term indictment (see CPL 200.10). We agree with County Court that the plea-bargaining restrictions contained in CPL 220.10 are not triggered by the filing of a felony complaint.

Id. at ___, 690 N.Y.S.2d at 291.

## § 19:21 Court cannot offer defendant a plea bargain without the consent of the People

People v. Christensen, 77 A.D.3d 174, 906 N.Y.S.2d 301 (2d Dep't 2010), resolved a power struggle that arose between the State Police and various local criminal courts when the State Police adopted a policy of refusing to plea bargain traffic tickets. Various Town Justices found the State Police policy to be unfair, and were offering defendants plea bargains similar to those being offered to defendants who were ticketed by other police agencies appearing before the Court. The Appellate Division, Second Department, held that:

> Many district attorneys of counties in New York State, when faced with inadequate resources, have lawfully delegated their authority to prosecute Vehicle and Traffic Law (hereinafter VTL) cases to the police agencies which issue the tickets for those offenses. One such police agency, the Division of New York State Police (hereinafter the Division), adheres to a policy against plea bargaining. On this appeal, we are asked to consider whether a trial court may, in the interest of justice, accept a defendant's plea of guilty to a lesser-included offense over the objection of the People in a case prosecuted by the Division. We conclude that, while we are sympathetic to the burden imposed on the courts by any blanket policy against plea

> bargaining a certain class of offenses, the trial courts are without authority to offer a defendant a plea to a reduced charge without the consent of the People. We also conclude that a district attorney may properly delegate authority to the Division to represent the People in a CPLR article 78 proceeding to challenge a trial court's acceptance of a plea of guilty over the People's objection in a case prosecuted by the Division.

77 A.D.3d at ___, 906 N.Y.S.2d at 303.

CHAPTER 50

# THE DRINKING DRIVER PROGRAM



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## § 50:1 In general

The plea bargain for a first offense DWI case will usually include the imposition of a conditional discharge, the condition being that the defendant participate in the New York State Drinking Driver Program. This program consists of a series of seven classes totaling a minimum of 15 hours which are designed to deter future violations through the education of the violator. VTL § 1196(1).

## § 50:2 Conditional license

The program provides your client with a conditional license which allows him to drive:

> (1) enroute to and from the holder's place of employment,

(2) if the holder's employment requires the operation of a motor vehicle then during the hours thereof,

(3) enroute to and from a class or an activity which is an authorized part of the alcohol and drug rehabilitation program and at which his attendance is required,

(4) enroute to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training,

(5) to or from court ordered probation activities,

(6) to and from a motor vehicle office for the transaction of business relating to such license or program,

(7) for a three-hour consecutive day time period, chosen by the administrators of the program, on a day during which the participant is not engaged in usual employment or vocation,

(8) enroute to and from a medical examination or treatment as part of the necessary medical treatment for such participant or member of the participant's household, as evidenced by a written statement to that effect from a licensed medical practitioner, and

(9) enroute to and from a place, including a school, at which a child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training.

VTL § 1196(7)(a).

A conditional license cannot be used to drive to or from a high school. The reason why is that high schools are not accredited.

## § 50:3 Five-year eligibility

Once a person has participated in the program, she may not do so again for a period of five years. The five years run from the date that the defendant completes the Drinking Driver Program to the date of her commission of a new violation of VTL § 1192.

In Matter of Clark v. Abrams, 161 A.D.2d 1208, 555 N.Y.S.2d 995 (4th Dep't 1990), the defendant attended a Drinking Driver Program from November 16, 1983 to May 7, 1984. On August 31, 1988, the defendant was convicted of DWI. Because the defendant had participated in the program within five years immediately preceding his second offense, he was prohibited from participating in the program. The Monroe County Supreme Court ordered the Commissioner of Motor Vehicles to enroll the defendant in the program. The Commissioner appealed. The Appellate Division, Fourth Department, ruled that the Supreme Court was without authority to order the Commissioner to enroll the defendant in the Drinking Driver Program.

## § 50:4 Prior conviction voids program eligibility

It is common for defendants to obtain a reduction of their first DWI offense to DWAI. Since DWAI bears a 90-day suspension, as opposed to a six-month revocation, many defendants ask if they can defer participating in the Drinking Driver Program. Their intention is to "bank" their eligibility for an anticipated, future, conviction. As admirable as this display of prudence and forethought might, otherwise, be, VTL § 1196(4) precludes such action. A defendant who has a previous conviction for a violation of VTL § 1192 within five years immediately preceding their commission of a new alcohol or drug-related offense, is ineligible for the Drinking Driver Program, whether they participated initially or not. VTL § 1196(4) is intended to preclude the "banking" of eligibility against future transgressions.

## § 50:5 Vacated conviction voids effect of prior participation

In Matter of Smith v. Passidomo, 125 Misc. 2d 942, 480 N.Y.S.2d 973 (Oneida Co. Ct. 1984), the defendant was convicted of DWI in 1980. He enrolled in, and satisfactorily completed, the Drinking Driver Program. In June of 1984, the 1980 conviction was vacated by the Oneida County Court. Based upon a 1983 conviction for DWI, the defendant sought entry into the Drinking Driver Program. He was advised that his prior participation within five years prohibited his being enrolled in the program and given a conditional license. Citing CPL § 160.60 and § 160.50(2)(f), governing termination of criminal actions, the Supreme Court of Oneida County ordered the Department of Motor Vehicles to restore the defendant to his pre-participation status insofar as the Drinking Driver Program was concerned.

## § 50:6 Refusal revocation not terminated by completion of program

Upon successful completion of the program, the individual may apply to the Commissioner for the termination of the suspension or revocation order. The Commissioner may then terminate such order and return the driver's license. VTL § 1196(5).

If the defendant has refused the chemical test, however, she will not be eligible for restoration of full driving privileges until expiration of the revocation period. VTL § 1194(2)(d)(3). The defendant will, however, be allowed to retain her conditional license until the refusal revocation period has expired. A copy of the Department of Motor Vehicles Drinking Driver Program regulations appears at Appendix 56.

## § 50:7 Referral for additional treatment

In advising your client in regard to the Drinking Driver Program, it is imperative that you point out the possibility of referral for additional treatment. Every participant in the program is screened to determine if an alcohol or drug abuse problem exists. Individuals identified as being at risk for alcohol or drug abuse are referred for evaluation. VTL § 1196(1) allows a person to be held for treatment for a period of up to eight months. This period may be extended upon the recommendation of the Department of Mental Hygiene or an appropriate health official administering the program on behalf of a municipality. In practice, defendants identified as problem drinkers are referred for additional treatment to various alcohol treatment facilities. Unsatisfactory participation results in termination of the conditional license and imposition of the original suspension or revocation arising out of the conviction.

## § 50:8 Referral criteria

In preparing these materials, I spoke to Mr. David McGirr, who is a Senior Driver Improvement Analyst with the Department of Motor Vehicles. As Co-coordinator of the Alcohol and Drug Rehabilitation Program, he is familiar with referrals and advised me that approximately 25 to 33-1/3 percent of each class were referred upon completion of the initial seven-week program. Individuals so referred were given an evaluation to determine whether they required additional treatment and, if so, what treatment they should receive.

New York State has recently revised the process to determine whether an individual will be referred for additional treatment. The old referral system was based on a matrix, using the score

obtained on the Michigan Alcoholism Screening Test (MAST) or Mortimer-Filkins Questionnaire as the primary screening instrument. The old system also considered such factors as the BAC of the individual at the time of arrest, whether the individual was a repeat DWI offender, whether the individual attended a Drinking Driver Program while intoxicated, and self-admissions of a problem. Various combinations of these factors were used to refer individuals for additional treatment.

Significantly, the new referral criteria dropped the use of the BAC as a primary referral criterion. Rather, the Research Institute on Addictions Self Inventory (RIASI) Questionnaire is used as the principal screening instrument for alcohol and drug problems. The evaluator will also consider whether the individual is a repeat DWI offender, whether she attended the Drinking Driver Program while intoxicated, and/or whether the individual admitted to the instructors that he/she has a drinking problem and wants help. See Drinking Driver Program Screening Matrix at Appendix 17.

The RIASI Questionnaire has a scoring cutoff point beyond which the individual is likely to be referred.

If an individual has two or more alcohol/drug driving incidents within ten years, such person may be referred on the basis that research demonstrates that repeat offenders are highly likely to recidivate, and to be involved in crashes.

Where an individual provides an unsolicited and direct admission that he/she is currently in treatment, or if the individual requests help for his/her substance abuse problem, the Drinking Driver Program administrator will request that the student sign a statement affirming either of the situations, and refer the individual for additional treatment.

An individual who attends the program while under the influence of alcohol/drugs, or with an detectable odor of alcohol, will be referred.

Also, a student that admits or volunteers that he has been arrested for an alcohol/drug driving violation while enrolled in the program will be required to attend additional alcohol treatment.

### § 50:9 Attorney should advise client of possible referral

One problem faced by attorneys and referral program personnel is that defendants are frequently not aware of their liability in this regard until after a conviction is entered and the proverbial "die is cast." Clients do not generally respond well to a change of rules in midstream. Prior to entering into a

plea bargain, the client is aware that she will be going to a Drinking Driver Program for a period of seven weeks. Unless you advise her of a possible referral, she may be taken by surprise after she has committed herself to this course of action. Since the referral is to a private agency which charges your client for its services, her inconvenience is both personal and financial. A referral is much easier to accept when the client is aware of and accepts this possibility prior to the entry of her guilty plea.

### § 50:10 Appealing the referral

If your client wishes to protest her referral and/or the treatment recommended, her first level of appeal is to the Drinking Driver Program Director. After that, the second appeal would be directed towards one of thirteen Driver Improvement Analysts located throughout the State. Beyond the Driver Improvement Analysts, the next appellate level is to the Commissioner of the Department of Motor Vehicles. The Commissioner's determination is subject to review via an Article 78 proceeding.

Complaints regarding the treatment ordered can result in a transfer over to the Division of Alcohol and Alcohol Abuse for their review and determination of the appropriate treatment.

### § 50:11 Violation of conditional discharge

If your client fails to complete the referral program, she may be brought back to the original court which sentenced her based upon a violation of her conditional discharge. In People v. Ogden, 117 Misc. 2d 900, 459 N.Y.S.2d 545 (1983), the defendant was referred for additional treatment based upon the fact that he had refused the Breathalyzer test upon his initial arrest. Upon his failure to comply with the referral, he was brought back to the City Court of Batavia and charged with a violation of his conditional discharge. In dismissing the alleged violation of his conditional discharge, the Court held that the defendant's referral for additional treatment based upon the fact of his test refusal at the time of arrest was arbitrary, illegal and capricious. Additionally, the Court found that the referral of the defendant to a facility some miles distant from his home was similarly improper particularly where adequate facilities were available locally.

### § 50.12 Out-of-state defendants

In the past, representation of out-of-state licensees was complicated by the fact of their ineligibility for a conditional license. Essentially, the Department of Motor Vehicles could not place conditions upon a license over which they had no

jurisdiction, nor could they issue a conditional license to a person who was not already in possession of a valid New York State driver's license. This situation necessitated legal gymnastics consisting of requesting an adjournment of sufficient duration to allow your client to obtain a valid New York State driver's license. Upon entry of the conviction for a violation of VTL § 1192, this newly acquired license would be suspended and your client issued a conditional license. This situation was particularly painful for truck drivers as well as others who lived in adjoining states, but were employed within the State of New York. In order to remedy this situation, the statute was amended to allow for the issuance of a conditional privilege of "operating a motor vehicle in this state." This conditional privilege is basically identical to the conditional license, but it eliminates the possession of a New York State driver's license as a condition precedent for the conditional operation of a motor vehicle in the State of New York.

### § 50:13 Subsequent arrest upon completion of program

A client with a prior conviction for DWAI, and prior participation in the program within the last five years, is in a most difficult situation. The ADA and the Court are loath to grant another reduction to DWAI, and your client is not eligible for the Drinking Driver Program in any event. Whereas, the VTL provides for a 90-day suspension for a first conviction for DWAI, a second conviction for DWAI within five years results in a six-month revocation.

The primary distinction between subsequent convictions for DWI and for DWAI is that a DWI conviction is a predicate for a future felony charge should your client be so unfortunate as to be rearrested within ten years of his initial conviction for DWI.

### § 50:14 Alcohol rehabilitation required prior to relicensure

Where the defendant has participated in the Drinking Driver Program, and is subsequently convicted of DWI or DWAI within five years of that participation, the Department of Motor Vehicles imposes an additional requirement upon the defendant seeking reinstatement of her license upon expiration of the period of revocation. This requirement mandates her satisfactory participation in an alcohol treatment program approved by the Department of Motor Vehicles. The defendant is obligated to seek out, participate in, and successfully complete an alcohol program prior to her obtaining reinstatement of her driving privileges.

### § 50:15 Third offenders not eligible for conditional license

Under the old rules, a person was generally eligible for a conditional license approximately every five years. In this

regard, a person was ineligible for a conditional license if the person, among other things, (a) had a prior VTL § 1192 conviction within the past 5 years, (b) had participated in the DDP within the past 5 years, or (c) had 2 prior DWI-related convictions/incidents within the past 10 years. See VTL § 1196(4); 15 NYCRR § 134.7; Chapter 50, *supra*.

Pursuant to the new regulations, a person who has 3 or more DWI-related convictions/incidents *within the past 25 years* is ineligible for a conditional license. See 15 NYCRR § 134.7(a)(11)(i).

**§ 50:16 Fees**

The Drinking Driver Program is "user-funded." There is a $75 administrative fee payable to the Department of Motor Vehicles upon making application for the conditional license and program entry. The fee is non-refundable. In addition, there is a $225 program fee which is paid directly to the agent conducting the program. If your client's license was *suspended*, he/she must pay a $50 suspension termination fee before his/her license will be restored. If your client's license was *revoked*, he/she must apply to the DMV for a new license. Although the application will not be approved before the minimum revocation period has passed, the DMV will accept the application for review up to 60 days before the revocation is to end. To apply for a new license, your client must send a $100 non-refundable reapplication fee with the application.

**§ 50:17 Personnel**

The people conducting the Drinking Driver Program are not employees of the Department of Motor Vehicles. Rather, they are "program agents" under contract with the Department of Motor Vehicles. The Department of Motor Vehicles oversees the activities of these agents through field staff who check on "program administration, curriculum implementation, and approval and training of instructional staff, as well as in-class program presentations." Drinking Driver Program Director's Guide, pg. 1.3.

**§ 50:18 Conditional license disqualifications**

The fact that a person is eligible for the Drinking Driver Program does not necessarily mean that he or she is eligible for a conditional license. In this regard, N.Y. Comp. Codes R. & Regs. tit. 15, § 134.7 provides:

> (a) The issuance of a conditional license shall be denied to any person who enrolls in a program if a review of such person's driving record, or additional

information secured by the department, indicates that any of the following conditions apply.

(1) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of operation of a motor vehicle.

(2) The conviction upon which eligibility for a rehabilitation program is based involved a fatal accident.

(3) The person does not have a currently valid New York State driver's license. This paragraph shall not apply to a person whose New York State driver's license has expired, but is still renewable, nor to a person who would have a currently valid New York State driver's license except for the revocation or suspension which resulted from the conviction upon which his eligibility for the rehabilitation program is based, nor to a person who would have a currently valid New York State driver's license except for a suspension or revocation which resulted from a chemical test refusal arising out of the same incident as such conviction.

(4) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction which conviction would, aside from the alcohol-related conviction, result in mandatory revocation or suspension of the person's driver's license.

(5) The person has had two or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for the rehabilitation program is based within the last three years. This

subdivision shall not apply to suspensions which have been terminated by performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of Section 1192 of the Vehicle and Traffic Law arising out of the same incident.

(6) The person has been convicted more than once of reckless driving within the last three years.

(7) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his designated agent tends to establish that the person would be an unusual and immediate risk upon the highway.

(8) The person has been penalized under section 1193(1)(d)(1) of the Vehicle and Traffic Law for any violation of subdivision 2, 3, or 4 of such section.

(9) The person is reentering the rehabilitation program, as provided in section 134.10(c) of this Part, for a second or subsequent time.

(10) The person has been suspended under section 510(2)(b)(v) of the Vehicle and Traffic Law for a conviction of section 1192(4) of such law. Such person may be eligible for a restricted use license pursuant to Part 135 of this Title.

(11)

(i) The person has three or more alohol- or drug-related driving convictions or incidents within the last 25 years. For the purposes of this paragraph, a conviction

for a violation of section 1192 of the Vehicle and Traffic Law, and/or a finding of a violation of section 1192-a of such law and/or a finding of refusal to submit to a chemical test under section 1194 of such law arising out of the same incident shall only be counted as one conviction or incident. The date of the violation or incident resulting in a conviction or a finding as described herein shall be used to determine whether three or more convictions or incidents occurred within a 25 year period.

(ii) For the purposes of this paragraph, when determining eligibility for a conditional license issued pending prosecution pursuant to section 134.18 of this Part, the term "incident" shall include the arrest that resulted in the issuance of the suspension pending prosecution.

(12) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the suspension or revocation.

(13) The person, during the five years preceding the commission of the alcohol or drug-related offense or a finding of a violation of section 1192-a of the Vehicle and Traffic Law, participated in the alcohol and drug rehabilitation program or has been convicted of a violation of any subdivision of section 1192 of such law.

(b) If after a person is enrolled in a rehabilitation program and has been issued a conditional license, but, prior to the

reissuance of an unconditional license, information is received by the department which indicates that such person was not eligible for a conditional license his conditional license will be revoked.

N.Y. Comp. Codes R. & Regs. tit. 15, § 134.7 is attached hereto as Appendix 56.

**§ 50:19 Revocation of conditional license**

A conditional license may be revoked for the following reasons:

1. Failure to attend or satisfactorily participate in the program, or for failure to satisfy the requirements for participation in the program.

2. Conviction of any alcohol or drug related traffic offense, misdemeanor or felony.

3. Failure to attempt in good faith to accept rehabilitation. This will be determined by a Department of Motor Vehicle hearing based upon receipt of notification or evidence that an individual is not attempting in good faith to accept rehabilitation.

4. Conviction for speeding, speed contest or racing, reckless driving, following too closely, or conviction for at least one traffic violation other than parking, stopping, standing, equipment, inspection or other non-moving violations where such violation(s) occurred during the period of validity of the conditional license.

5. Upon receipt of a conviction certificate which indicates that an individual has driven in violation of the conditional license.

6. Upon receipt of a conviction certificate which requires mandatory suspension or revocation action.

7. After a Department of Motor Vehicles hearing upon a complaint that an individual is operating or has operated a motor vehicle in violation of the conditional license.

8. Upon receipt of additional information which would make the individual ineligible.

Drinking Driver Program Director's Guide, pg. 3.10-3.12. See also § 134.9(d) of Part 134 New York State Department of Motor Vehicles' Alcohol and Drug Rehabilitation Program set forth at Appendix 56.

In People v. Mason, 10 Misc. 3d 859, 804 N.Y.S.2d 661 (Nassau Co. Dist. Ct. 2005), the defendant, a commercial driver, had been issued a certificate of relief from disabilities (which had allowed him to obtain a conditional commercial driver's license). The defendant's employer asked the Court to revisit the issue of whether the defendant was entitled to a conditional license due to his alleged "'repeated, brazen disregard with respect to his obligations under the law [including reporting requirements imposed by the Federal Motor Carrier Safety Regulations].'" Id. at ___, 804 N.Y.S.2d at 661. The Court held that "[i]t is the New York State Department of Motor Vehicles which determines eligibility for and issues or declines to issue conditional licenses. All a certificate of relief from disabilities does is eliminate any categoric statutory bar to such issuance. Any questions regarding the conditional license itself must therefore be addressed to the DMV, rather than this Court." Id. at ___, 804 N.Y.S.2d at 662.

**§ 50:20 Entry and re-entry into program**

Initially, a person eligible for the Drinking Driver Program enrolls through the appropriate District Office of the Department of Motor Vehicles. There are 14 District Offices situate throughout the state. If an individual leaves the Drinking Driver Program, she may apply for re-entry. An application for re-entry is made to the District Office staff. In order to apply for re-entry, the licensee must obtain a letter from the Drinking Driver Program stating that the Director of the program is willing to take the person back into the program. This letter is presented to the District Office enforcement section. The enforcement section may

(a) terminate the Conditional License suspension order which is issued as a result of the drop notice.

(b) record the licensee's name and that this is a reentry on the Program Roster (MV-2028).

(c) instruct the licensee to contact the DDP director to complete program reentry.

> (d) call Driver Improvement to have the eligibility date reset.
>
> (e) if the full license was restored prior to the drop out, *i.e.*, based on a DWAI conviction, the license will be reentered in conditional license status.

Drinking Driver Manual, pg. 3.12-3. A conditional license may be issued only upon the first re-entry. Although second and subsequent re-entries may be permitted, a conditional license will not be re-issued in such cases. § 134.10(c) of Part 134, NYS DMV Alcohol and Drug Rehabilitation Program.

### § 50:21 Completion of program documentation

Upon successful completion of the New York State Drinking Driver Program, the motorist will be issued a copy of Form MV-2026 which he/she can use to apply for issuance of an unconditional license. A copy of this form appears as Appendix 57. The motorist must present this certificate along with proof of identity, date of birth, and photo license fee.

### § 50:22 Participation as satisfaction of jail sentence

The last sentence of VTL § 1196(4) states:

> Notwithstanding any contrary provisions of this chapter, satisfactory participation in and completion of a course in such program shall result in the termination of any sentence of imprisonment that may have been imposed by reason of a conviction therefor; provided, however, that nothing contained in this section shall delay the commencement of such sentence.

While this language would seem to indicate that satisfactory participation in the Drinking Driver Program satisfies any sentence of imprisonment, the Appellate Division, Third Department, held this not to be the case. In People v. Hilker, 133 A.D.2d 986, 521 N.Y.S.2d 136 (3d Dep't 1987), the Court affirmed the Tioga County Court's denial of the defendant's CPL § 440.20 motion seeking to set aside his sentence of imprisonment for DWI on the ground that he had satisfactorily completed the Drinking Driver Program. The Court did not, however, explain why § 1196(4) is not applicable, stating:

> Finally, under all the circumstances presented, we conclude that the sentence imposed was neither harsh nor excessive, was

> properly within the discretion of the County Court and, accordingly, not in contravention of the provisions of Vehicle and Traffic Law § 521(1)(c).

521 N.Y.S.2d at 138 [VTL § 521(1)(c) recodified as VTL § 1196(4)].

The Appellate Division, Second Department, in People v. Sofia, 201 A.D.2d 685, 608 N.Y.S.2d 254 (1994), ruled that the court must authorize the participation in the Drinking Driver Program for VTL § 1196(4) to apply. Here, the defendant pleaded guilty to two counts of DWI in exchange for two concurrent sentences of six months incarceration. Following the entry of the pleas, but prior to sentence being imposed, the defendant moved pursuant to VTL § 1196(4) to vacate the jail sentence on the ground that he had already completed the Drinking Driver Program. The Supreme Court denied the motion. The Appellate Court affirmed, concluding:

> As the language of Vehicle and Traffic Law § 1196(4) and 15 NYCRR 134.3 makes clear, whether a defendant may enroll in the alcohol and drug rehabilitation program established by Vehicle and Traffic Law § 1196(4) is a matter to be addressed by the court at sentencing.

People v. Sofia, 608 N.Y.S.2d at 254. It is interesting to note that VTL § 1196(4) provides for a sentencing court to prohibit the entry of a defendant into the Drinking Driver Program. Absent such prohibition, the defendant is eligible for the Program and, logically, successful completion should terminate any sentence of incarceration. This, however, is not the holdings of the cases set forth above.

**§ 50:23 DDP does not terminate sentence for AUO**

The Court of Appeals has determined that although a conviction for VTL § 511(2) could be traced back to a DWAI conviction, VTL § 511(2) is not an alcohol-related traffic offense encompassed in VTL § 1196(4) such that his prison sentence would be vacated upon completion of the Drinking Driver Program. In People ex rel. Paganini v. Jablonsky, 79 N.Y.2d 586, 584 N.Y.S.2d 415 (1992), the defendant was convicted of DWAI in 1986. In 1988, he was again arrested and charged with DWI and AUO 1st. Upon pleading guilty to VTL § 1192(3) and VTL § 511(2), he was sentenced to one year imprisonment for the VTL § 1192 offense, and 180 days for the VTL § 511 offense.

While his appeal was pending, the defendant enrolled in and completed the Drinking Driver Program. He thereafter petitioned the Supreme Court for a writ of habeas corpus claiming that both of his jail sentences should have terminated upon completion of the program. The Court sustained the writ and directed petitioner's immediate release from custody. The Appellate Division reversed, concluding that VTL § 1196(4) was not applicable to his sentence for VTL § 511(2).

Pursuant to VTL § 1196(4), completion of a Drinking Driver Program results in the termination of any sentence of imprisonment imposed by reason of a conviction for an alcohol or drug-related traffic offense. The defendant argued that an alcohol-related traffic offense is any which have alcohol-related conduct as an essential element. The Court of Appeals disagreed, concluding that the goal of the Drinking Driver Program is to induce drivers with alcohol/drug problems to obtain professional help.

The statute and the implementing regulation, by targeting and limiting eligibility to participate in the programs, foster that goal. They reflect a rational policy choice not to extend the termination-of-sentence incentive to Vehicle and Traffic Law offenders who knowingly drive without a license -- the core element of the Vehicle and Traffic Law § 511(2) offense at issue in this case -- because that would not directly foster the particular goals of Vehicle and Traffic Law § 1196 rehabilitation and education programs. That [the defendant's] unlicensed driving conviction may be traced back to a suspension, which was based on his prior refusal to take a chemical test and a prior Driving While Ability Impaired conviction, therefore, does not qualify for the termination-of-sentence remedy.

People v. Jablonsky, 584 N.Y.S.2d at 416.

Our thanks to Thomas J. O'Hern, Esq., for his help with this chapter.

CHAPTER 48

# IGNITION INTERLOCK DEVICE PROGRAM

## § 48:1 In general

Effective August 15, 2010, every person who is convicted of common law DWI, per se DWI, or per se Aggravated DWI (*i.e.*, VTL § 1192(2), (2-a) or (3)) -- committed on or after November 18, 2009 -- will be required to install an ignition interlock device in any vehicle that the person owns or operates (with the exception of certain employer-owned vehicles) for at least 6 months. See VTL § 1193(1)(b)(ii); VTL § 1193(1)(c)(iii). See also VTL § 1198; PL § 65.10(2)(k-1). This chapter addresses various issues associated with the ignition interlock device requirement.

## § 48:2 What is an ignition interlock device?

VTL § 119-a defines "ignition interlock device" (a.k.a. "IID") as:

> Any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent breath alcohol level does not exceed the calibrated setting on the device as required by [VTL § 1198].

See also 9 NYCRR § 358.3(l); 10 NYCRR § 59.1(g); 15 NYCRR § 140.1(b)(1).

An ignition interlock device is required to be calibrated to a "set point" of .025% BAC. See 9 NYCRR § 358.5(c)(2); 9 NYCRR § 358.5(c)(10)(i); 9 NYCRR § 358.5(d)(6); 10 NYCRR § 59.10(c)(2). The term "set point" means "a pre-set or pre-determined BAC setting at which, or above, the device will prevent the ignition of a motor vehicle from operating." 9 NYCRR § 358.3(y).

## § 48:3 Rules and regulations regarding IIDs

The Department of Health ("DOH") is required to publish a list of approved ignition interlock devices. See VTL § 1198(6)(a). In addition, both the Division of Probation and Correctional Alternatives ("DPCA") and the DOH are required to promulgate regulations regarding ignition interlock devices. See VTL § 1193(1)(g); VTL § 1198(6)(b). Such regulations must require, at a minimum, that ignition interlock devices:

> (1) have features that make circumventing difficult and that do not interfere with the normal or safe operation of the vehicle;
>
> (2) work accurately and reliably in an unsupervised environment;
>
> (3) resist tampering and give evidence if tampering is attempted;
>
> (4) minimize inconvenience to a sober user;
>
> (5) require a proper, deep, lung breath sample or other accurate measure of blood alcohol content equivalence;
>
> (6) operate reliably over the range of automobile environments;
>
> (7) correlate well with permissible levels of alcohol consumption as may be established by the sentencing court or by any provision of law; and
>
> (8) [be] manufactured by a party covered by product liability insurance.

VTL § 1198(6)(b).

The relevant DOH regulations are contained in 10 NYCRR Part 59 (a copy of which is set forth at Appendix 3). The relevant DPCA regulations are contained in 9 NYCRR Part 358 (a copy of which is set forth at Appendix 64).

## § 48:4 Definitions

Relevant definitions pertaining to the ignition interlock device program are contained in the DPCA regulations, see 9 NYCRR § 358.3, and, to a lesser extent, in the DOH regulations. See 10 NYCRR § 59.1. In this regard, 9 NYCRR § 358.3 provides as follows:

> (a) The term "blood alcohol concentration" or "BAC" shall mean the weight amount of alcohol contained in a unit volume of blood, measured as grams ethanol/100 ml. blood and expressed as %, grams %, % weight/volume (w/v), and % BAC. Blood alcohol concentration in this Part shall be designated as % BAC.

(b) The term "certificate of completion" shall mean a document issued by the monitor after the conclusion of the ignition interlock period, including any extensions or modifications as may have occurred since the date of sentence which shows either completion of the operator's sentence or a change in the conditions of probation or conditional discharge no longer requiring the need for a device.

(c) The term "circumvent" shall mean to request, solicit or allow any other person to blow into an ignition interlock device, or to start a motor vehicle equipped with the device, for the purpose of providing the operator whose driving privileges [are] so restricted with an operable motor vehicle, or to blow into an ignition interlock device or start a motor vehicle equipped with the device for the purpose of providing an operable motor vehicle to a person whose driving privilege is so restricted or to tamper with an operable ignition interlock device.

(d) The term "county" shall mean every county outside of the city of New York, and the City of New York as a whole.

(e) The term "county executive" shall mean a county administrator, county manager, county director or county president and in cities with a population of one million or more, the mayor.

(f) The term "division" shall mean the division of probation and correctional alternatives.

(g) The term "drinking driver program" shall mean an alcohol and drug rehabilitation program established pursuant to [VTL § 1196].

(h) The term "failed tasks" shall mean failure to install the ignition interlock device or failure to comply with a service visit or any requirement resulting therefrom as prescribed by this Part.

(i) The term "failed tests" shall mean a failed start-up re-test, failed rolling re-test, or missed rolling re-test.

(j) The term "failure report recipients" shall mean all persons or entities required to receive a report from the monitor of an operator's failed tasks or failed tests pursuant to a county's plan which may include, but is not limited to[,] the sentencing court, district attorney, operator's alcohol treatment provider, and the drinking driver program, where applicable.

(k) The term "ignition interlock device" shall mean any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent blood alcohol level does not exceed the calibrated setting on the device as required by standards of the [DOH].

(l) The term "installation/service provider" shall mean an entity approved by a qualified manufacturer that installs, services, and/or removes an ignition interlock device.

(m) The term "lockout mode" shall mean circumstances enumerated in this Part which trigger the ignition interlock device to cause the operator's vehicle to become inoperable if not serviced within [5] calendar days.

(n) The term "monitor" shall mean the local probation department where the operator is under probation supervision or any person(s) or entity (ies) designated in the county's ignition interlock program plan for any operator granted conditional discharge.

(o) The term "operator" shall mean a person who is subject to installation of an ignition interlock device following a conviction of a violation of [VTL § 1192(2), (2-a) or (3),] or any crime defined by the Vehicle and Traffic Law or Penal Law of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element.

(p) The term "qualified manufacturer" shall mean a manufacturer or distributor of an ignition interlock device certified by the [DOH] which has satisfied the specific operational requirements herein and has been approved as an eligible vendor by the [DPCA] in the designated region where the county is located.

(q) The term "region" shall mean counties comprising an area within New York State designated by the [DPCA] where a qualified manufacturer is authorized and has agreed to service.

(r) The term "start-up test" shall mean a breath test taken by the operator to measure the operator's blood alcohol concentration prior to starting the vehicle's ignition.

(s) The term "start-up re-test" shall mean a breath test taken by the operator to measure the operator's blood alcohol concentration required within [5] to [15] minutes of a failed start-up test.

(t) The term "rolling test" shall mean a breath test, administered at random intervals, taken by the operator while the vehicle is running.

(u) The term "rolling re-test" shall mean a breath test, taken by the operator while the vehicle is running, within [1] to [3] minutes after a failed or missed rolling test.

(1) The term "failed rolling re-test" shall mean a rolling re-test in which the operator's BAC is at or above the set point.

(2) The term "missed rolling re-test" shall mean failure to take the rolling re-test within the time period allotted to do so.

(v) The term "service period" shall mean the length of time between service visits.

(w) The term "service visit" shall mean a visit by the operator to[,] or with[,] the installation/service provider for purposes of

having the ignition interlock device inspected, monitored, downloaded, recalibrated, or maintained. It shall also mean[,] where applicable, the act by any operator of sending the portion of the interlock device that contains the data log and the breath testing module to the qualified manufacturer for the purposes of downloading the data, reporting to the monitor, and recalibrating the device.

(x) The term "set point" shall mean a pre-set or pre-determined BAC setting at which, or above, the device will prevent the ignition of a motor vehicle from operating.

(y) The term "STOP-DWI" shall mean special traffic options program-driving while intoxicated.

(z) The term "tamper" shall mean to alter, disconnect, physically disable, remove, deface, or destroy an ignition interlock device or any of its component seals in any way not authorized by this Part.

## § 48:5 Scope of IID program

VTL § 1198(1) provides as follows:

> Applicability. The provisions of this section shall apply throughout the state to each person required or otherwise ordered by a court as a condition of probation or conditional discharge to install and operate an ignition interlock device in any vehicle which he or she owns or operates.

See also 9 NYCRR § 358.2.

## § 48:6 Who *must* be required to install and maintain an IID?

Effective August 15, 2010, literally everyone who is convicted of an alcohol-related misdemeanor or felony DWI, or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element, is required to install and maintain an IID. In this regard, VTL § 1198(2)(a) provides:

> In addition to any other penalties prescribed by law, the court shall require that any

> person who has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by this chapter or the penal law of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element, to install and maintain, as a condition of probation or conditional discharge, a functioning ignition interlock device in accordance with the provisions of this section and, as applicable, in accordance with the provisions of [VTL §§ 1193(1) and (1-a)]; provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked except as provided herein. For any such individual subject to a sentence of probation, installation and maintenance of such ignition interlock device shall be a condition of probation.

In addition, prior to November 1, 2013, VTL § 1193(1)(b)(ii) provided:

> In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for less than [6] months.

Notably, the IID requirement only applied where the defendant was "convicted" of certain DWI offenses. As such, it did not apply to youthful offender adjudications (as such adjudications are not "convictions"). See CPL § 720.10.

VTL § 1193(1)(b)(ii) also provided that the duration of a mandatory IID requirement was "during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than six months." This language led to considerable confusion in that many people who thought that they had received a 6-month IID requirement -- and many Judges who thought that they had imposed a 6-month IID requirement -- were confronted with a situation in which the

installer would not remove the IID without a Court order on the ground that the sentence was for *a minimum of* 6 months as opposed to for *precisely* 6 months. In addition, defendants who installed the IID prior to sentencing were not given credit for "time served."

The Legislature addressed both of these issues in 2013. In this regard, effective November 1, 2013, VTL § 1193(1)(b)(ii) now provides as follows:

> In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, *or adjudicated a youthful offender for*, a violation of [VTL § 1192(2), (2-a) or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] *and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition interlock device for at least [6] months, unless the court ordered such person to install and maintain an ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing*. Provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of this section.

(Emphases added).

Similar changes were made to VTL § 1193(1)(c)(iii). Prior to November 1, 2013, VTL § 1193(1)(c)(iii) provided:

> In addition to the imposition of any fine or period of imprisonment set forth in this

> paragraph, the court shall also sentence such person convicted of a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [6] months.

Effective November 1, 2013, this section provides:

> In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, or adjudicated a youthful offender for, a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition interlock device for at least [6] months, unless the court ordered such person to install and maintain a[n] ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing. Provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of this section.

In People v. Vidaurrazaga, 100 A.D.3d 664, 953 N.Y.S.2d 290 (2d Dep't 2012), the Appellate Division, Second Department, made clear that sentencing Courts have discretion in determining how long the IID requirement will remain in effect (*i.e.*, the IID requirement must remain in effect anywhere from a minimum of 6 months to a maximum of the duration of the period of probation or conditional discharge), and held that:

> Based on the record before us, it is not clear whether the Supreme Court was aware that it had discretion in fixing the duration of the condition requiring the defendant to install and maintain an ignition interlock device in his automobile. We therefore remit the matter to the Supreme Court, Nassau County, for resentencing. We express no opinion as to the appropriate duration of the condition.

Id. at ___, 953 N.Y.S.2d at 293 (citations omitted).

Pursuant to VTL § 1193(1-a), where a defendant is convicted of DWI in violation of VTL § 1192(2) or (3) after having been previously convicted of DWI in violation of VTL § 1192(2) or (3) within the preceding 5 years, the sentencing Court must, *inter alia*:

> [O]rder the installation of an ignition interlock device approved pursuant to [VTL § 1198] in any motor vehicle owned or operated by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to [VTL § 1193(2)(b)], and, upon the termination of such revocation period, for an additional period as determined by the court.

VTL § 1193(1-a)(c)(i).

Moreover, "[a]ny person ordered to install an ignition interlock device pursuant to [VTL § 1193(1-a)(c)] shall be subject to the provisions of [VTL § 1198(4), (5), (7), (8) and (9)]." VTL § 1193(1-a)(c).

### § 48:7 Who *may not* be required to install and maintain an IID?

The IID program only applies to people who have been convicted of a violation of VTL § 1192(2), (2-a) or (3), or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element. See PL § 65.10(2)(k-1) ("The court may require [the IID]

condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"). See also VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2.

Thus, a defendant who has been convicted of DWAI in violation of VTL § 1192(1), DWAI Drugs in violation of VTL § 1192(4), or DWAI Combined Influence in violation of VTL § 1192(4-a), cannot be ordered to install and maintain an IID. See People v. Levy, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)"). See also VTL § 1198(2)(c) ("Nothing contained in [VTL § 1198] shall authorize a court to sentence any person to a period of probation or conditional discharge for the purpose of subjecting such person to the provisions of [VTL § 1198], unless such person would have otherwise been so eligible for a sentence of probation or conditional discharge").

In People v. Uribe, 109 A.D.3d 844, ___, 971 N.Y.S.2d 60, 60 (2d Dep't 2013), the same Court that decided Levy, *supra*, summarily stated (without explanation) that "[t]he County Court correctly imposed an interlock ignition [sic] requirement as an element of the defendant's sentence (see [VTL] §§ 1192[4-a], 1198[2])." However, since a person can violate VTL § 1192(4-a) without consuming alcohol -- and thus the consumption of alcohol is not an essential element of a VTL § 1192(4-a) charge -- it would appear that VTL § 1198(2) does not authorize the imposition of an IID in VTL § 1192(4-a) cases. See also PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"). See generally PL § 60.21 (which is only applicable to VTL §§ 1192(2), (2-a) or (3)).

## § 48:8 Cost, installation and maintenance of IID

The cost of installing and maintaining the ignition interlock device is the responsibility of the defendant:

> [U]nless the court determines such person is financially unable to afford such cost whereupon such cost may be imposed pursuant to a payment plan or waived. In the event of

> such waiver, the cost of the device shall be borne in accordance with regulations issued under [VTL § 1193(1)(g)] or pursuant to such other agreement as may be entered into for provision of the device.

VTL § 1198(5)(a). See also 9 NYCRR § 358.8(a).

In this regard, every qualified IID manufacturer must:

> [A]gree to adhere to a maximum fee/charge schedule with respect to all operator's costs associated with such devices, offer a payment plan for any operator determined to be financially unable to pay the cost of the ignition interlock device where a payment plan is so ordered, and provide a device free of fee/charge to the operator where the cost is waived by the sentencing court, or pursuant to such other agreement as may be entered into for provision of the device. Any contractual agreement between the operator and the qualified manufacturer or its installation/service providers shall permit an early termination without penalty to the operator when a certificate of completion has been issued, where the sentence has been revoked, and whenever the operator has been transferred to a jurisdiction where the manufacturer does not do business. Nothing shall prevent a qualified manufacturer from lowering the fee/charge schedule during the course of an operator's contract and/or the contractual agreement with the [DPCA].

9 NYCRR § 358.5(c)(3).

Although the cost of an IID is considered a fine for purposes of CPL § 420.10(5), it does not replace, but rather is in addition to, any fines, surcharges or other costs imposed by law. See VTL § 1198(5)(a).

The installer/service provider of the ignition interlock device is responsible for the installation, calibration and maintenance of such device. See VTL § 1198(5)(b).

## § 48:9 IID installer must provide defendant with fee schedule

An ignition interlock device installer must:

> [P]rovide to all operators, at the time of device installation a hardcopy statement of fees/charges clearly specifying warranty details, schedule of lease payments where applicable, any additional costs anticipated for routine recalibration, service visits, and shipping where the device includes the direct exchange method of servicing, and listing any items available without charge if any, along with a list of installation/service providers in their respective county, a toll-free 24 hour telephone number to be called from anywhere in the continental United States to secure up-to-date information as to all installation/service providers located anywhere in the continental United States and for emergency assistance, and a technical support number available during specified business hours to reach a trained staff person to answer questions and to respond to mechanical concerns associated with the ignition interlock device.

9 NYCRR § 358.5(d)(2).

### § 48:10 What if defendant is unable to afford cost of IID?

As is noted in the previous section, the cost of installing and maintaining the ignition interlock device is the responsibility of the defendant "unless the court determines such person is financially unable to afford such cost whereupon such cost may be imposed pursuant to a payment plan or waived." VTL § 1198(5)(a). See also 9 NYCRR § 358.5(c)(3); 9 NYCRR § 358.8(a). In this regard, the DPCA has promulgated a form entitled "Financial Disclosure Report" to be used in determining a person's ability to afford the cost of an IID. This form (a copy of which is set forth at Appendix 65) only has to be completed by people seeking a payment plan or a full waiver of the costs of an IID.

Where the defendant claims an inability to afford the costs of an IID, 9 NYCRR § 358.8(b) provides that:

> Any operator who claims financial inability to pay for the device shall submit in advance of sentencing [3] copies of his or her financial disclosure report, on a form prescribed by the [DPCA], to the sentencing court[,] which shall distribute copies to the district attorney and defense counsel. The

> report shall enumerate factors which may be considered by the sentencing court with respect to financial inability of the operator to pay for the device and shall include, but not be limited to[,] income from all sources, assets, and expenses. This report shall be made available to assist the court in determining whether or not the operator is financially able to afford the cost of the ignition interlock device, and[,] if not[,] whether to impose a payment plan. Where it is determined that a payment plan is not feasible, the court shall determine whether the fee/charge for the device shall be waived.

9 NYCRR § 358.4(d)(3) addresses the issue of how IID manufacturers should divide the costs of providing IIDs to indigent defendants:

> [I]n the event more than one qualified manufacturer does business within its region, the county shall establish an equitable procedure for manufacturers to provide ignition interlock devices without costs where an operator has been determined financially unable to afford the costs and has received a waiver from the sentencing court. The equitable procedure should be based upon proportion of ignition interlock devices paid to each qualified manufacturer by operators in the county.

## § 48:11 Notification of IID requirement

Where a Court imposes the IID condition upon a defendant, the Court must notify DMV of such condition. See VTL § 1198(4)(b). In addition, every County must:

> [E]stablish a procedure whereby the probation department and any other monitor will be notified no later than [5] business days from the date an ignition interlock condition is imposed by the sentencing court, any waiver of the cost of the device granted by the sentencing court, and of any intrastate transfer of probation or interstate transfer of any case which either has responsibility to monitor. Such procedure shall also establish a mechanism for advance notification as to date of release where local or state imprisonment is imposed.

9 NYCRR § 358.4(d)(5). See also 9 NYCRR § 358.7(a)(1).

Furthermore, IID installers must "notify the monitor and county probation department when an ignition interlock device has been installed on an operator's vehicle(s) within [3] business days of installation." 9 NYCRR § 358.5(d)(16).

### § 48:12 Defendant must install IID within 10 business days of sentencing

Every defendant sentenced to the IID requirement must:

> [H]ave installed and maintain a functioning ignition interlock device in any vehicle(s) he or she owns or operates within [10] business days of the condition being imposed by the court or[,] if sentenced to imprisonment[,] upon release from imprisonment, whichever is applicable.

9 NYCRR § 358.7(c)(1).

In this regard, IID installers are required to install an IID within 7 business days of a defendant's request that the device be installed. See 9 NYCRR § 358.5(d)(1). Notably, where the defendant's vehicle needs repairs before installation can take place, the 7-day installation period commences when such repairs are completed. See 9 NYCRR § 358.5(d)(12).

### § 48:13 Defendant must provide proof of compliance with IID requirement within 3 business days of installation

Every defendant who has an IID installed must, "within [3] business days of installation, submit proof of installation to the court, county probation department, and any other designated monitor." 9 NYCRR § 358.7(c)(1). See also VTL § 1198(4)(a). If the defendant fails to provide proof of installation, the Court may, absent a finding of good cause for the failure which is placed in the record, revoke, modify or terminate the defendant's sentence of probation or conditional discharge. See VTL § 1198(4)(a).

An issue had arisen as to how to handle situations in which the defendant failed to install an IID due to the fact that the defendant did not own -- and claimed that he or she would not operate -- a motor vehicle during the duration of the IID requirement. In this regard, effective November 1, 2013, VTL § 1198(4)(a) defines "good cause" for not installing an IID as follows:

> Good cause may include a finding that the person is not the owner of a motor vehicle if such person asserts under oath that such person is not the owner of any motor vehicle and that he or she will not operate any motor vehicle during the period of interlock restriction except as may be otherwise authorized pursuant to law. "Owner" shall have the same meaning as provided in [VTL § 128].

### § 48:14 DMV will note IID condition on defendant's driving record

Where a Court notifies DMV that it has imposed the IID condition upon a defendant, DMV must note such condition on the defendant's driving record. VTL § 1198(4)(b). See also VTL § 1198(3)(f).

### § 48:15 How often does defendant have to blow into IID?

The operator of a vehicle equipped with an ignition interlock device is not merely required to blow into the device to start the vehicle. Rather:

> [T]he operator after passing the start-up test allowing the engine to start, [must] submit to an initial rolling test within a randomly variable interval ranging from [5] to [15] minutes. Subsequent rolling tests shall continue to be required at random intervals not to exceed [30] minutes for the duration of the travel. A start-up re-test shall be required within [5] to [15] minutes of a failed start-up test. A rolling re-test shall be required within [1] to [3] minutes after a failed or missed rolling test.

9 NYCRR § 358.5(c)(2).

### § 48:16 Lockout mode

When an ignition interlock device goes into "lockout mode," it causes the operator's vehicle to become inoperable if not serviced within 5 calendar days. See 9 NYCRR § 358.3(n). "An ignition interlock device shall enter into a lockout mode upon the following events: [1] failed start-up retest, [1] missed start-up re-test, [1] failed rolling re-test or [1] missed rolling re-test within a service period, or [1] missed service visit." 9 NYCRR § 358.5(c)(2).

## § 48:17 Circumvention of IID

It is a class A misdemeanor:

> (a) for a defendant subject to the ignition interlock device requirement to request, solicit or allow any other person to either (i) blow into an ignition interlock device, or (ii) start a motor vehicle equipped with an ignition interlock device, for the purpose of providing the defendant with an operable motor vehicle;
>
> (b) for a person to either (i) blow into an ignition interlock device, or (ii) start a motor vehicle equipped with an ignition interlock device, for the purpose of providing a person sentenced to the ignition interlock device requirement with an operable motor vehicle;
>
> (c) to tamper with or circumvent an otherwise operable ignition interlock device; and/or
>
> (d) for a defendant subject to the ignition interlock device requirement to operate a motor vehicle without such device.

VTL § 1198(9)(a)-(e).

Every ignition interlock device is required to have a label affixed to it "warning that any person tampering, circumventing, or otherwise misusing the device is guilty of a misdemeanor and may be subject to civil liability." VTL § 1198(10). See also 10 NYCRR § 59.12(f).

## § 48:18 Duty of IID monitor to report defendant to Court and District Attorney

9 NYCRR § 358.7(d)(1) provides, in pertinent part, that:

> Upon learning of the following events:
>
> > (i) that the operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates;
> >
> > (ii) that the operator has not complied with service visits requirements;

(iii) a report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof;

(iv) a report of a failed start-up re-test;

(v) a report of a missed start-up re-test;

(vi) a report of a failed rolling re-test;

(vii) a report of a missed rolling re-test; and/or

(viii) a report of a lockout mode;

the applicable monitor shall take appropriate action consistent with public safety. Where under probation supervision, the county probation department shall adhere to Part 352. With respect to any operator sentenced to conditional discharge, the monitor shall take action in accordance with the provisions of its county ignition interlock program plan.

In this regard:

*At a minimum, any monitor shall notify the appropriate court and district attorney, within [3] business days, where an operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates, where the operator has not complied with a service visit requirement, any report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof, any report of a lock-out mode, and/or any report of a failed test or re-test where the BAC is .05 percent or higher.*

Id. (emphasis added).

As part of its report to the Court and District Attorney:

The monitor may recommend modification of the operator's condition of his or her sentence or release whichever is applicable as otherwise authorized by law, including

> extension of his/her ignition interlock period, a requirement that the operator attend alcohol and substance abuse treatment and/or drinking driver program, referral to [DMV] to determine whether [DMV] may suspend or revoke the operator's license, or recommend revocation of his/her sentence or release.

9 NYCRR § 358.7(d)(2).

"Where the operator is under supervision by the division of parole, the monitor shall coordinate monitoring with the division of parole and promptly provide the parole agency with reports of any failed tasks or failed tests." 9 NYCRR § 358.7(d)(3).

### § 48:19 Use of leased, rented or loaned vehicles

Where a defendant is subjected to the ignition interlock device requirement, such requirement applies to every motor vehicle operated by the defendant including, but not limited to, vehicles that are leased, rented or loaned. See VTL § 1198(7)(a). In this regard, a defendant who is sentenced to the ignition interlock device requirement must "notify any other person who rents, leases or loans a motor vehicle to him or her of such driving restriction." VTL § 1198(7)(b).

A violation of VTL § 1198(7)(a) or (b) is a misdemeanor. See VTL § 1198(7)(c). It is also a misdemeanor for a person to knowingly rent, lease or lend a motor vehicle to a person known to be subject to the ignition interlock device requirement unless such vehicle is equipped with an IID. See VTL § 1198(7)(b), (c).

### § 48:20 Use of employer-owned vehicles

Where a defendant who is sentenced to the ignition interlock device requirement is required to operate a motor vehicle owned by the defendant's employer for work-related purposes, the defendant is allowed to operate such vehicle without an ignition interlock device under the following conditions:

1. Only in the course and scope of the defendant's employment;

2. Only if the employer has been notified that the defendant is subject to the ignition interlock device requirement;

3. Only if the defendant has provided the Court and the Probation Department with written proof indicating that the defendant's employer is aware of the ignition

interlock device requirement and has granted the defendant permission to operate the employer's vehicle without an ignition interlock device only for business purposes; and

4. The defendant has notified the Court and the Probation Department of his or her intention to so operate the employer's vehicle.

VTL § 1198(8). See also 15 NYCRR § 140.5(c); 9 NYCRR § 358.7(c)(5).

A motor vehicle owned by a business entity that is wholly or partly owned or controlled by a defendant subject to the ignition interlock device requirement does not qualify for the "employer vehicle exemption." See VTL § 1198(8); 15 NYCRR § 140.5(c); 9 NYCRR § 358.7(c)(5).

## § 48:21 Pre-installation requirements

Prior to installing an IID, an installer must "obtain and record the following information from every operator":

> (i) photo identification;
>
> (ii) the name and policy number of his/her automobile insurance;
>
> (iii) the vehicle identification number (VIN) of all motor vehicles owned or routinely driven by the operator, and a statement disclosing the names of all other individuals who operate the motor vehicle(s) owned or driven by the operator; and
>
> (iv) a notarized affidavit from the registered owner of the vehicle granting permission to install the device if the vehicle is not registered to the operator.

9 NYCRR § 358.5(d)(13). See also 9 NYCRR § 358.7(c)(3).

## § 48:22 Mandatory service visit intervals

Every defendant sentenced to the IID requirement must:

> [S]ubmit to service visits within [30] calendar days of prior installation or service visits for the collection of data from the ignition interlock device and/or for inspection, maintenance, and recalibration

> purposes where the device does not automatically transmit data directly to the monitor; and submit to an initial service visit within [30] calendar days of installation and service visits within [60] calendar days of prior service visits where the device either automatically transmits data directly to the monitor for inspection, maintenance, or recalibration purposes or the device head is sent to the qualified manufacturer every [30] calendar days for such purposes, including data download.

9 NYCRR § 358.7(c)(2).

### § 48:23 Accessibility of IID providers

A qualified ignition interlock device manufacturer must:

> [A]gree to service every county within [its] region and ensure that there shall be an installation/service provider within 50 miles from the operator's residence or location where the vehicle is parked or garaged, whichever is closest[,] and ensure repair or replacement of a defective ignition interlock device shall be made available within the same 50 mile radius by a fixed or mobile installation/service provider, or through a qualified manufacturer sending a replacement, within 48 hours of receipt of a complaint, or within 72 hours where an intervening weekend or holiday. Mobile servicing may be permissible provided that the above facility requirements are met and a specific mobile servicing unit with regular hours is indicated.

9 NYCRR § 358.5(c)(4).

### § 48:24 Frequency of reporting by IID providers

A qualified ignition interlock device manufacturer must:

> [G]uarantee that an installation/service provider or the manufacturer shall download the usage history of every operator's ignition interlock device within [30] calendar days between service visits or if the operator fails to appear for a service visit(s) as soon thereafter as the device can

be downloaded, and provide the monitor with such information and in such format as determined by the [DPCA].

9 NYCRR § 358.5(c)(5).

In addition, the manufacturer must:

> Further guarantee that the installation/service provider shall take appropriate, reasonable and necessary steps to confirm any report of failed tasks, failed tests, circumvention, or tampering and thereafter notify the appropriate monitor within [3] business days of knowledge or receipt of data, indicating:
>
> > (i) installation of a device on an operator's vehicle(s);
> > (ii) report of a failed start-up re-test;
> >
> > (iii) report of a missed start-up re-test;
> >
> > (iv) report of a failed rolling re-test;
> >
> > (v) report of a missed rolling re-test;
> >
> > (vi) report of the device entering lockout mode;
> >
> > (vii) failure of an operator to appear at a scheduled service visit; or
> >
> > (viii) report of an alleged circumvention or tampering with the ignition interlock devices as prohibited by [VTL § 1198(9)(a), (c) or (d)], or an attempt thereof.

Id.

### § 48:25 Defendant entitled to report of his/her IID usage history

An ignition interlock device manufacturer must:

> [P]rovide, no more than monthly to the operator upon his or her request, the operator's usage history, including any report of failed tasks, failed tests,

> circumvention, or tampering. An operator may only make [1] request during any month for such information. Such request shall be in writing and provide either an email address or self-addressed stamped envelope.

9 NYCRR § 358.5(c)(6).

### § 48:26 IID providers must safeguard personal information

A qualified ignition interlock device manufacturer must:

> [A]gree to safeguard personal information with respect to any operator and any reports and provide access to such records only as authorized herein, by law, or by court order. All records maintained by the manufacturer and any of its installation/service providers with respect to ignition interlock devices in New York State shall be retained in accordance with section 358.9.

9 NYCRR § 358.5(c)(7). See also 9 NYCRR § 358.5(c)(10)(vii).

> Any monitor may disseminate relevant case records, including failed tasks or failed reports not otherwise sealed or specifically restricted in terms of access by state or federal law[,] to appropriate law enforcement authorities, district attorney, treatment agencies, licensed or certified treatment providers, the judiciary, for law enforcement and/or case management purposes relating to criminal investigations and/or execution of warrants, supervision and/or monitoring of ignition interlock conditions, and treatment and/or counseling. Personal information in any financial disclosure report shall only be accessible to the monitor, court, and district attorney for purposes related to determination of financial affordability. Case record information is not to be used for noncriminal justice purposes and shall otherwise only be available pursuant to a court order. In all such instances, those to whom access has been granted shall not secondarily disclose such information without the express written permission of the monitor that authorized access.

9 NYCRR § 358.7(e).

## § 48:27 Post-revocation conditional license

When the ignition interlock device program first came into effect, it had limited applicability. For example, the program only applied to defendants who were placed on probation for DWI, and thus it generally only applied to recidivist drunk drivers. See generally People v. Letterlough, 86 N.Y.2d 259, 268-69, 631 N.Y.S.2d 105, 110 (1995). Such defendants generally were either ineligible for, and/or were in any event prohibited from obtaining, a regular conditional license during the mandatory license revocation period. However, DMV was authorized to grant such defendants a "post-revocation conditional license" for use during the remainder of the term of probation. See VTL § 1198(3)(a).

Now that literally everyone who is convicted of an alcohol-related misdemeanor or felony DWI, or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element, will be required to obtain an ignition interlock device -- regardless of whether they are on probation and regardless of whether they are repeat offenders -- the concept of the post-revocation conditional license has become outdated. In this regard, DMV's position is that, for purposes of determining eligibility for a conditional license, it will treat a defendant subject to the IID requirement the same as it would have treated him/her prior to August 15, 2010. See Chapter 50, *infra*. In other words, defendants who would be eligible for a conditional license if they were not subject to the IID requirement (e.g., most first offenders) will still be eligible for a conditional license after August 15, 2010, notwithstanding the language of VTL § 1198(3)(a).

To the extent that a "post-revocation conditional license" is still a relevant concept, such a license is akin to a regular conditional license. It allows the defendant to drive:

> (1) enroute to and from the holder's place of employment,
>
> (2) if the holder's employment requires the operation of a motor vehicle then during the hours thereof,
>
> (3) enroute to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training,
>
> (4) to and from court ordered probation activities,

> (5) to and from [DMV] for the transaction of business relating to such license,
>
> (6) for a [3] hour consecutive daytime period, chosen by [DMV], on a day during which the participant is not engaged in usual employment or vocation,
>
> (7) enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of the participant's household, as evidenced by a written statement to that effect from a licensed medical practitioner,
>
> (8) enroute to and from a class or an activity which is an authorized part of the alcohol and drug rehabilitation program and at which participant's attendance is required, and
>
> (9) enroute to and from a place, including a school, at which a child or children of the participant are cared for on a regular basis and which is necessary for the participant to maintain such participant's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training.

VTL § 1198(3)(b). See also 15 NYCRR § 140.5(b).

A person is ineligible for a post-revocation conditional license if he or she has either (a) "been found by a court to have committed a violation of [VTL § 511] during the license revocation period," VTL § 1198(3)(a), or (b) been "deemed by a court to have violated any condition of probation set forth by the court relating to the operation of a motor vehicle or the consumption of alcohol." Id. See also 15 NYCRR § 140.4(a).

DMV cannot deny an application for a post-revocation conditional license "based solely upon the number of convictions for violations of any subdivision of [VTL § 1192] committed by such person within the [10] years prior to application for such license." VTL § 1198(3)(a). See also 15 NYCRR § 140.4(b). By contrast:

> A post-revocation conditional license shall be denied to any person if a review of such person's driving record, or additional information secured by [DMV], indicates that any of the following conditions apply:

(1) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of the operation of a motor vehicle.

(2) The conviction upon which eligibility is based involved a fatal accident.

(3) The person has been convicted more than once of reckless driving within the last [3] years.

(4) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of [DMV] tends to establish that the person would be an unusual and immediate risk upon the highway.

(5) The person has been penalized under section [VTL § 1193(1)(d)(1)] for any violation of [VTL § 1192(2), (2-a), (3), (4) or (4-a)].

(6) The person has had a post-revocation conditional license within the last [5] years.

(7) The person has other open suspension or revocation orders on their record, other than for a violation of [VTL § 1192(1), (2), (2-a), (3), (4) or (4-a)].

(8) The person has [2] convictions of a violation of [VTL § 1192(3), (4) or (4-a)] where physical injury has resulted in both instances.

(9) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction, which conviction, aside from the alcohol-related conviction, resulted in the mandatory revocation of the person's license for leaving the scene of an accident involving personal injury or death.

(10) The person has had [2] or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for

> the rehabilitation program is based[,] within the last [3] years. This subdivision shall not apply to suspensions which have been terminated by performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of [VTL § 1192] arising out of the same incident.
>
> (11) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the revocation.

15 NYCRR § 140.4(c).

A post-revocation conditional license may be revoked by DMV for "sufficient cause," including, but not limited to, "failure to comply with the terms of the condition[s] of probation or conditional discharge set forth by the court, conviction of any traffic offense other than one involving parking, stopping or standing[,] or conviction of any alcohol or drug related offense, misdemeanor or felony[,] or failure to install or maintain a court ordered ignition interlock device." VTL § 1198(3)(c). See also 15 NYCRR § 140.5(d).

"Upon the termination of the period of probation or conditional discharge set by the court, the person may apply to [DMV] for restoration of a license or privilege to operate a motor vehicle in accordance with this chapter." VTL § 1198(3)(a). In this regard, 15 NYCRR § 136.10 provides that:

> Upon the termination of the period of probation set by the court, the holder of a post-revocation conditional license may apply to the commissioner for restoration of a license or privilege to operate a motor vehicle. An application for licensure shall be approved if the applicant demonstrates that he or she:
>
> (a) has a valid post-revocation conditional license; and
>
> (b) has demonstrated evidence of rehabilitation as required by this Part.

## § 48:28 *Intra*state transfer of probation/conditional discharge involving IID requirement

9 NYCRR § 358.7(b) addresses the situation where a defendant subject to the ignition interlock device requirement either (a) resides in another County at the time of sentencing, or (b) desires to move to another County subsequent to sentencing. Where the defendant is on probation:

> Where the operator is under probation supervision and resides in another county at the time of sentencing or subsequently desires to reside in another county, upon intrastate transfer of probation, the receiving county probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in its region. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the receiving county probation department from a qualified manufacturer in the operator's region of residence. Where intrastate transfer occurs after sentencing and the installation of a different device is required as a result of the transfer, the device shall be installed within [10] business days of relocation. All intrastate transfer of probation shall be in accordance with Part 349.

9 NYCRR § 358.7(b)(1).

Where the defendant is subject to a conditional discharge:

> Where an operator has received a sentence of conditional discharge and resides in another county at the time of sentencing or thereafter, the receiving county monitor shall select the class of ignition interlock device available from a qualified manufacturer in its region for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence. The receiving county monitor shall perform monitor services and the sentencing court retains jurisdiction of the operator. Upon knowledge, the monitor of

> the sentencing county shall provide necessary operator information in advance to the receiving county monitor. The receiving county monitor shall notify the sentencing court and county district attorney pursuant to paragraph (d) of this section.

9 NYCRR § 358.7(b)(2).

## § 48:29 *Inter*state transfer of probation/conditional discharge involving IID requirement

9 NYCRR § 358.7(b)(3) and (4) address the situation where a defendant subject to the ignition interlock device requirement either (a) resides in another State at the time of sentencing, or (b) desires to move to another State subsequent to sentencing. In such a situation:

> (3) Where an operator, subject to probation supervision or a sentence of conditional discharge, resides or desires to reside out-of-state and is an offender subject to the interstate compact for adult offender supervision pursuant to [Executive Law 259-mm], the governing rules of such compact shall control. Additionally, Part 349 shall apply with respect to transfer of supervision of probationers. Where transfer is permitted, the receiving state retains its authority to accept or deny the transfer in accordance with compact rules. Where an operator is subject to probation supervision and is granted reporting instructions and/or acceptance by a receiving state, the sending probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in the receiving state. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the sending county probation department from a qualified manufacturer in the receiving state region. The device shall be installed prior to relocation or return where feasible. A qualified manufacturer shall make necessary arrangements to ensure the county monitor in New York State and the receiving state receive timely reports from the manufacturer and/or installation/service provider; and

> (4) Where an operator resides or desires to reside out-of-state, is not subject to the interstate compact for adult offender supervision and such compact's governing rules, and has been given permission to return or relocate by the sentencing court or monitor, the same provisions with respect to selection specified in paragraph [3] of this subdivision applies and the device shall be installed prior to relocation or return. A qualified manufacturer shall make necessary arrangements to ensure the county monitor receives timely reports from the manufacturer and/or installation/service provider. *Pursuant to the compact, an operator convicted of his or her first DWI misdemeanor is not subject to the compact.*

(Emphasis added).

### § 48:30 VTL § 1198 does not preclude Court from imposing any other permissible conditions of probation

PL § 60.36 provides that:

> Where a court is imposing a sentence for a violation of [VTL § 1192(2), (2-a) or (3)] pursuant to [PL §§ 65.00 or 65.05] and, as a condition of such sentence, orders the installation and maintenance of an ignition interlock device, the court may impose any other penalty authorized pursuant to [VTL § 1193].

See also VTL § 1198(3)(e) ("Nothing contained herein shall prevent the court from applying any other conditions of probation or conditional discharge allowed by law, including treatment for alcohol or drug abuse, restitution and community service").

### § 48:31 Imposition of IID requirement does not alter length of underlying license revocation

"Imposition of an ignition interlock condition shall in no way limit the effect of any period of license suspension or revocation set forth by the commissioner or the court." VTL § 1198(3)(d).

### § 48:32 IID requirement runs consecutively to jail sentence

PL § 60.21 provides that whenever a person is sentenced to imprisonment for a conviction of VTL § 1192(2), (2-a) or (3), the

Court is also required to both (a) sentence the person to either probation or a conditional discharge, and (b) order the person to install an ignition interlock device. Such period of probation or conditional discharge is required to run *consecutively* to any period of imprisonment, and to commence immediately upon the person's release from imprisonment. Specifically, PL § 60.21 provides that:

> Notwithstanding [PL § 60.01(2)(d)], when a person is to be sentenced upon a conviction for a violation of [VTL § 1192(2), (2-a) or (3)], the court may sentence such person to a period of imprisonment authorized by [PL Article 70] and shall sentence such person to a period of probation or conditional discharge in accordance with the provisions of [PL § 65.00] and shall order the installation and maintenance of a functioning ignition interlock device. Such period of probation or conditional discharge shall run consecutively to any period of imprisonment and shall commence immediately upon such person's release from imprisonment.

It seems clear that this statute, which was enacted as part of a series of statutes and statutory amendments collectively known as "Leandra's Law," see Chapter 496 of the Laws of 2009, was intended to be read in conjunction with the ignition interlock device requirement. In other words, it appears clear that the intent of PL § 60.21 is to preclude a person from receiving credit for "time served" on the IID portion of his or her sentence while the person is incarcerated. See generally People v. Panek, 104 A.D.3d 1201, 960 N.Y.S.2d 801 (4th Dep't 2013).

This raises the question: If a person has been sentenced to a longer period of incarceration than would otherwise permit a term of probation (or conditional discharge), see PL § 60.01(2)(d), what is the potential consequence of violating a condition of such probation (or conditional discharge)?

In People v. Brown, 40 Misc. 3d 821, ___, 970 N.Y.S.2d 391, 393 (Erie Co. Sup. Ct. 2013), the Court recognized the inherent conflict between PL § 60.21 and PL § 60.01(2)(d), and held that:

> After review of PL §§ 60.01, 60.21, 65.00, 70.00 and V & T Law §§ 1193, 1198, it is apparent that the legislature has not established a term of imprisonment as a penalty for a violation of probation pursuant to V & T Law § 1193-1(c)(iii) and PL § 60.21. The only penalty set forth for failure to

> install an ignition interlock device as a condition of probation is a new charge pursuant to V & T Law § 1198-9, a class "A" Misdemeanor.
>
> As the court has no authority to impose a term of imprisonment for this violation of probation the question of Double Jeopardy is moot.
>
> This leaves the question of what sanction the court may impose for a violation of probation in this situation. Since the court cannot impose a term of imprisonment, the choice of remedies is either continued probation or a fine pursuant to PL § 60.01-3(b) or (e).

In People v. Brainard, 111 A.D.3d 1162, ___, 975 N.Y.S.2d 498, 500 (3d Dep't 2013), the Appellate Division, Third Department, citing Brown, held that:

> County Court has authority to enforce the condition of defendant's conditional discharge. The condition is that defendant install and maintain an ignition interlock device (see Penal Law § 65.10[2][k-1]). If the court has reasonable cause to believe that he has violated that condition, the court may file a declaration of delinquency, order defendant to appear and hold a hearing (see CPL 410.30, 410.40, 410.70). If the court finds defendant delinquent, it may revoke his conditional discharge and impose another sentence, such as a term of probation or a fine. Thus, the court does have the authority to enforce the terms of the conditional discharge.

(Citations omitted). "Additionally, operation of a vehicle without a court-ordered ignition interlock device is a class A misdemeanor (see [VTL] § 1198[9][d], [e]), which would subject defendant to further punishment upon conviction." Id. at ___, 975 N.Y.S.2d at 500. The Court also held that PL § 60.21 does not violate Double Jeopardy. Id. at ___, 975 N.Y.S.2d at 499-500.

In People v. Flagg, 107 A.D.3d 1613, 967 N.Y.S.2d 577 (4th Dep't 2013), the defendant pled guilty to Vehicular Manslaughter 2nd, in violation of PL § 125.12(1), and common law DWI, in violation of VTL § 1192(3). The defendant was resentenced to "a term of probation with respect to each count requiring defendant to equip with an ignition interlock device (IID) any vehicle

owned or operated by him." Id. at ___, 967 N.Y.S.2d at 578. On appeal, the Appellate Division, Fourth Department, held as follows:

> As the People correctly concede . . ., the resentence is illegal insofar as County Court directed that defendant serve a term of five years of probation following the indeterminate term of imprisonment of 2 to 6 years on the conviction of vehicular manslaughter in the second degree (see Penal Law § 60.01[2][d]). Contrary to defendant's contention that the term of imprisonment therefore must be reduced, however, we agree with the People that the proper remedy is to vacate the term of probation imposed on the vehicular manslaughter count. We therefore modify the resentence accordingly. Section 60.21 requires a court to sentence a defendant convicted of a violation of Vehicle and Traffic Law § 1192(2), (2-a), or (3) to a period of probation or conditional discharge and to order the installation and maintenance of a functioning IID. Section 60.21 does not apply, however, to vehicular manslaughter in the second degree.

Id. at ___, 967 N.Y.S.2d at 578.

In People v. Dexter, 104 A.D.3d 1184, 960 N.Y.S.2d 773 (4th Dep't 2013), the defendant, who pled guilty to DWI as a class E felony, was sentenced to 1 to 3 years in prison by a 1-year period of conditional discharge with an IID requirement. The Appellate Division, Fourth Department, held that the 1-year conditional discharge was illegal -- not because PL § 60.21 is illegal -- but rather because PL § 65.05(3)(a) mandates that the period of conditional discharge "shall be" 3 years for felony offenses, and "'[n]either County Court nor this Court possesses interest of justice jurisdiction to impose a sentence less than the mandatory statutory minimum.'" Id. at ___, 960 N.Y.S.2d at 774 (citation omitted). See also People v. Barkley, 113 A.D.3d 1002, 978 N.Y.S.2d 920 (3d Dep't 2014); People v. O'Brien, 111 A.D.3d 1028, 975 N.Y.S.2d 219 (3d Dep't 2013); People v. Marvin, 108 A.D.3d 1109, 967 N.Y.S.2d 897 (4th Dep't 2013).

In People v. Bush, 103 A.D.3d 1248, ___, 959 N.Y.S.2d 361, 362 (4th Dep't 2013), the Appellate Division, Fourth Department, held that "the portion of [defendant's] sentence imposing a three-year conditional discharge and an ignition interlock device requirement is illegal inasmuch as he committed the offense prior to the effective date of the statute imposing those requirements."

## § 48:33 Applicability of IID requirement to parolees

Executive Law § 259-c(15-a) requires that everyone who is released from State Prison on parole or conditional release after serving a sentence for felony DWI or Vehicular Assault/Vehicular Manslaughter must install an ignition interlock device in any vehicle that they own or operate during the term of such parole or conditional release. Specifically, Executive Law § 259-c(15-a) provides that:

> Notwithstanding any other provision of law, where a person is serving a sentence for a violation of section 120.03, 120.04, 120.04-a, 125.12, 125.13 or 125.14 of the penal law, or a felony as defined in [VTL § 1193(1)(c)], if such person is released on parole or conditional release the board shall require as a mandatory condition of such release, that such person install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such parole or conditional release for such crime. Provided further, however, the board may not otherwise authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of the vehicle and traffic law.

## § 48:34 IID cannot be removed without "certificate of completion" or "letter of de-installation"

An IID installer can "remove an ignition interlock device and return the vehicle to normal operating condition only after having received a certificate of completion or a letter of de-installation from the monitor as authorized pursuant to section 358.7 of this Part." 9 NYCRR § 358.5(d)(4). In this regard, 9 NYCRR § 358.7(a)(2) provides that "[w]here a monitor learns that the operator no longer owns or operates a motor vehicle in which an ignition interlock device has been installed, the monitor may issue a letter of de-installation directly to the installation/service provider which authorizes removal of the device."

## § 48:35 Constitutionality of VTL § 1198

Courts have reached differing conclusions with regard to whether VTL § 1198 is Constitutional. Compare People v. Pedrick, 32 Misc. 3d 703, 926 N.Y.S.2d 269 (Rochester City Ct. 2011)

(statute is Constitutional), with People v. Walters, 30 Misc. 3d 737, 913 N.Y.S.2d 893 (Watertown City Ct. 2010) (certain aspects of statute are unconstitutional).

### § 48:36 Necessity of a Frye hearing

In People v. Bohrer, 37 Misc. 3d 370, 952 N.Y.S.2d 375 (Penfield Just. Ct. 2012), the Court held that evidence of a failed IID test is admissible, without first conducting a Frye hearing, at a violation of conditional discharge hearing held pursuant to CPL § 410.70.

CHAPTER 6

# FIELD SOBRIETY TESTS



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## § 6:1 Nature of tests

In determining whether there is reasonable cause to believe that a person is driving while intoxicated, many police departments use "field sobriety tests." A suspect is requested to step from his vehicle and engage in a number of physical acts which are designed to test the person's coordination for the purpose of determining intoxication. The finger-to-nose, one-leg stand, walk and turn, finger count, alphabet, Romberg and numerous other tests have become a common part of DWI arrest procedure. Motorists are generally cooperative and rarely refuse to participate in these tests.

## § 6:2 Validity and relevancy of tests

It is interesting to note that the issue of the validity and relevancy of field sobriety tests is rarely raised. Attorneys

closely cross-examine the administration of the tests and their clients' performance. The validity of the tests as an indicator of intoxication, and the subjectivity of the judgment of the police officer, are far less commonly challenged.

In People v. Frank L. Bevis, Jr., County Court, Broome County, (trial verdict on 6/28/96), County Court Judge Patrick H. Mathews gave the following charge to the jury:

> In this case, the People offered testimony regarding, so called, field sobriety tests, on the issue of intoxication. I caution you there is no established scientific reliability regarding the degree to which, if any, these tests can in any particular case accurately determine whether an individual is under the influence of alcohol and, if so, to what extent. Intoxication has a legal definition as it relates to the crime of driving while intoxicated. The legal definition refers to the degree to which alcohol consumption has affected the physical and mental abilities of the driver as they relate to operating an automobile. To the extent the field sobriety tests, considering all the circumstances that might affect their performance, may or may not, in your opinion, reveal impaired ability in such things as coordination, reaction time, and mental functioning, they are a relevant factor to consider in determining the issue of intoxication. In this regard, however, I caution you there are a multitude of factors which might affect one's ability to perform any particular field sobriety test. You should consider these various factors in determining how much weight, if any, to give to the defendant's performance of field sobriety tests. Regarding the officer's opinion regarding the degree of the defendant's intoxication, you are free to accept or reject his opinion, for only the jury may ultimately determine the facts in this case. In evaluating the officer's opinion you should give it such weight as you believe it deserves based on your determination as to whether the facts he based his opinion on were fully established to your satisfaction; and all of the other evidence in this case.

In People v. DiNonno, 171 Misc. 2d 335, 659 N.Y.S.2d 390 (App. Term, 2d Dep't 1997), the Court held that field sobriety tests:

> [A]re not truly scientific in nature. Rather, they are based upon the indisputable fact that intoxication affects physical coordination and mental acuity and they are designed to enhance the ability of the officer who administers them to detect "unstable responses." Although their evaluation is necessarily to some extent subjective, so too are any of the ordinary indicia of intoxication and therefore this fact does not serve to preclude admissibility. Since the tests are not scientific in nature, proof of their acceptance in the scientific community is not required.

171 Misc. 2d at 335, 659 N.Y.S.2d at 390 (citation omitted). See also People v. DeRojas, 196 Misc. 2d 171, ___, 763 N.Y.S.2d 386, 388 (App. Term, 2d Dep't 2003).

## § 6:3 Refusal to participate in field sobriety tests does not violate VTL

A driver does not have to participate in field sobriety tests. Although a driver is deemed to have given consent to a "chemical test" for the purpose of determining intoxication pursuant to VTL § 1194(2), field sobriety tests are not chemical tests. Further, one of the bases for obtaining a chemical test is the existence of reasonable grounds to believe that the suspect driver has operated in violation of VTL § 1192. Field sobriety tests are used to develop those reasonable grounds. However, although there is no common law, nor statutory requirement to perform field sobriety tests; similarly, there is no statutory, nor common law prohibition against the introduction into evidence of a refusal to perform these tests. The prosecutor may attempt to introduce the refusal to perform these tests into evidence.

In People v. Sheridan, 192 A.D.2d 1057, 596 N.Y.S.2d 245 (4th Dep't 1993), the Appellate Division, Fourth Department, held that since "[t]here is no statutory or other requirement for the establishment of rules regulating field sobriety tests," the police are not required to inform a defendant that he or she has a right to refuse to perform such tests. Id. at 1059, 596 N.Y.S.2d at 245-46.

## § 6:4 Refusal to perform field sobriety tests as evidence

Although a defendant is not obligated to perform field sobriety tests, see § 6:3, *supra*, the refusal to perform such tests may be admissible against him or her at trial. In People v. Berg, 92 N.Y.2d 701, 685 N.Y.S.2d 906 (1999), the Court of Appeals held that "evidence of defendant's refusal to submit to certain field sobriety tests [is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause." Id. at 703, 685 N.Y.S.2d at 907. On the other hand, the Court noted that "the inference of intoxication arising from failure to complete the tests successfully 'is far stronger than that arising from a refusal to take the test.'" Id. at 706, 685 N.Y.S.2d at 909 (citation omitted).

Similarly, in People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983), the Court held that:

> It is true that the admission into evidence of defendant's refusal to submit to the sobriety test here cannot be deemed a violation of his Federal or State privilege against self-incrimination on the basis that it was coerced. . . . There is no constitutional violation in so using defendant's refusal even if defendant was not specifically warned that it could be used against him at trial. . . .
>
> [However,] though *admissible*, the defendant's refusal to submit to co-ordination tests in this case on the ground that they would be painful because of his war wounds was nevertheless of *limited probative value* in proving circumstantially that defendant would have failed the tests.

Notably, the Powell Court made clear that "'[t]his court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged' (People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626, 196 N.E.2d 263)." Id. at 786, 463 N.Y.S.2d at 476.

## § 6:5 Description of tests

After pulling a vehicle over, the officer will ask the driver to step out of the vehicle in order to perform field sobriety tests. The determination of intoxication, however, starts well before this. Initially, the officer will evaluate

the odor of the driver's breath, condition of eyes, color of face, demeanor, dexterity, speech, and clothing. Although alcohol, itself, does not have an odor, the police are taught to sense the odor of alcoholic beverage coming from the vehicle. Because alcohol dilates the blood vessels, the eyes are examined to determine if they are bloodshot. Similarly, the face tends to flush as a result of dilation of the blood vessels.

As for demeanor, the officer is trained to note any changes in the driver's attitude. Although a request for the driver's license and registration is routine in most traffic stops, this provides the officer an opportunity to observe the driver's coordination and dexterity. The clarity and coherence of one's speech is affected by alcohol. Finally, police are trained to observe the driver's clothing. Although these initial observations may provide sufficient suspicion for arrest, the field sobriety tests are most often relied upon.

## § 6:6 The "standardized" field sobriety tests

In recent years, there has been a national attempt to standardize the field sobriety tests used by police officers across the country. This effort has been spearheaded by the National Highway Traffic Safety Administration which has sponsored training throughout the country in the performance of these standardized field sobriety tests (SFST). The manual, "DWI Detection and Standardized Field Sobriety Testing" is the training manual used to provide this training.

The manual can be obtained from the National Technical Information Services at 5285 Port Royal Road, Springfield, Virginia 22161. The telephone number is (703) 487-4650. At seminars, I have been given the telephone number: 1-800-553-6847. The cost of the Teacher's Manual is $120.00; and $98.00 for the Student Manual. I have found little or no use for the Teacher's Manual, but the Student Manual has been invaluable in conducting cross-examinations.

The manual sets forth the protocol of three standardized field sobriety tests which have been recommended based upon research conducted for the National Highway Traffic Safety Administration by Dr. Marcelline Burns and Herbert Moskowitz. This research is set forth in "Psychophysical Tests for DWI"; June 1977 NHTSA Report No. DOT HS-HO2 424 (available from National Technical Information Service, Springfield, Virginia 22161). The initial report was followed up with another report entitled "Development and Field Test of Psychophysical Tests for DWI Arrests", March 1981, NHTSA Report No. DOT HS-805 864 (available from NTIS, Springfield, Virginia 22161). This report was authored by V. Tharp, Dr. Marcelline Burns and Herbert Moskowitz. An overview of these reports and their objective are set forth in Chapter VIII of the aforementioned student manual.

The result of this research was recognition and validation of three standardized field sobriety tests. These are horizontal gaze nystagmus, the walk and turn test, and the one leg stand test. Insofar as other tests are concerned, the manual refers to the "alphabet test," "the countdown," which consists of counting backwards and the "finger count," which consists of having the defendant touch the tip of his or her thumb, in turn, to the tip of each finger on the same hand while simultaneously counting up -- one, two, three, four; then reversing direction on the fingers while simultaneously counting down -- four, three, two, one. Insofar as these tests are concerned, the manual states:

> These techniques are not as reliable as the standardized field sobriety tests but they can still be useful for obtaining evidence of impairment. These techniques should not replace the SFST.

SFST Manual, VI-4.

## § 6:7 The "validated" tests

**Horizontal Gaze Nystagmus, Walk and Turn & One-Leg Stand**

We now consider the three tests validated by the government sponsored studies: Horizontal Gaze Nystagmus, (hereinafter HGN), the Walk and Turn; and the One-Leg Stand:

> The three standardized tests were found to be highly reliable in identifying subjects whose BACs were 0.10 or more. Considered independently, the nystagmus test was 77% accurate, the Walk-and-Turn, 68% accurate, and the One-Leg Stand, 65% accurate. However, Horizontal Gaze Nystagmus used in combination with Walk-and-Turn, was 80% accurate.

SFST Manual, VIII-11.

At the outset, it is interesting to note two important things. First, even when these tests are perfectly performed, there is ample room for error. If the combination of tests is 80% accurate, it is also 20% inaccurate.

Secondly, these tests do not speak to "intoxication", they speak to the blood alcohol concentration of .10%. Since these tests are not performed with calibrated instruments; and, since, the percentage range for error is unacceptable insofar as the determination of blood alcohol concentrations are concerned,

conclusions based upon a defendant's performance of these tests should be objected to as inadmissible.

**Standardized Field Sobriety Tests Must Be Administered Precisely as Taught**

The SFSTs are as much a police competency test as they are a field sobriety test. The validity of the tests depend upon their being administered in exactly the manner set forth in the manual. Validation of the tests is completely dependent upon this precision in their administration:

> But it is also necessary to emphasize one final and major point. This validation applies **ONLY WHEN THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER; AND ONLY WHEN THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE; AND ONLY WHEN THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**
>
> **IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.**

SFST Manual, VIII-12.

## § 6:8 The Horizontal Gaze Nystagmus test

Chapter 8 provides a detailed description of this field sobriety test as well as the law pertaining to it.

## § 6:9 The Walk and Turn test

The walk and turn test is a field sobriety test based on the concept of divided attention, which requires the individual to divide his attention among mental tasks and physical tasks.

Essentially, the test requires a person to assume a heel to toe position placing their right heel against their left toe. The initial instructions call for the person to stand in that position while they receive instructions in regard to the performance of the test. They must stand there with their arms down at their side and must wait for the police officer to finish his or her instructions before they commence the test. After the person being tested is placed in this heel to toe position, they are given the following instructions:

> - When I tell you to start, take nine heel-toe-toe steps down the line, turn around, and take nine heel-to-toe steps back up the line. (Demonstrate 2 or 3 heel-to-toe steps.)

- When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this. (Demonstrate).

- While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud.

- Once you start walking, don't stop until you have completed the test.

- Do you understand the instructions? (Make sure suspect understands.)

- Begin, and count your first step from the heel-to-toe position as "One".

SFST Manual, VIII-19.

The test interpretation portion of the manual lists behaviors which are most likely to be observed in someone with a .10 or more blood alcohol concentration. These behaviors are:

A. Cannot keep balance while listening to the instructions. (Manual states that this clue should not be recorded unless the defendant fails to maintain the heel to toe position throughout the instructions. The clue should not be recorded if the suspect merely sways or uses his or her arms to balance, but maintains the heel to toe position.)

B. Starts before the instructions are finished.

C. Stops while walking to steady self.

D. Does not touch heel-to-toe.

E. Steps off the line.

F. Uses arms to balance.

G. Improper turn.

H. Incorrect number of steps.

SFST Manual, VIII-20.

The officer is taught that:

> If the suspect exhibits two or more distinct clues on this test or fails to complete it, classify the suspect's BAC as above 0.10. Using this criterion, you will be able to correctly classify about 68% of your suspects.

SFST Manual, VIII-21.

**Test Conditions**

The manual requires that the walk-and-turn test be performed on a designated straight line. My clients never seem to get the opportunity to perform this test on a real line. They are constantly being asked to walk along an imaginary line. The officer never specifies whether it is my client's imagination, or the officer's which governs. Inevitably, the client is graded off for stepping off the imaginary line. The fact that this manual requires a *visible* line is very helpful.

The manual states that:

> Some people have difficulty with balance even when sober. The test criteria for Walk-and-Turn is not necessarily valid for suspects 65 years of age or older, persons with injuries to their legs, or persons with inner ear disorders. Individuals wearing heels more than 2 inches high should be given the opportunity to remove their shoes. Individuals who cannot see out of one eye may also have trouble with this test because of poor depth perception.

SFST Manual, VIII-21.

According to the Bureau for Municipal Police Manual, the individual is to walk heel-to-toe along a straight line, turn around in a prescribed fashion, and return in the same manner. The officer is only to conduct this test if there is a reasonably level and smooth surface and a visible straight line present. If there is not a straight line available, the officer may draw one on the pavement with chalk, or, to provide another "simple" field sobriety test, have the suspect draw the line.

Prior to having the defendant perform the test, the officer is required to determine if the defendant has any handicaps which would prevent proper performance of the test. Next, the individual is instructed to place her left foot on the line, and place her right foot ahead of the left, in heel-to-toe position.

The subject is then instructed to place her arms down at her sides, and to maintain that position until the officer has completed instructions. According to the manual, this stance is not difficult for a sober person in reasonably good physical condition to maintain.

Next, the suspect is instructed to take nine heel-to-toe steps along the line, turn on the line, and return nine heel-to-toe steps, counting each step out loud. With regard to the turning procedure, after completion of the ninth step, the defendant is asked to keep her front foot on the line, and turn by taking several small steps with the other foot. Finally, the subject is instructed to watch her feet at all times, keeping her arms to her side, and continue walking without stopping until the test is completed.

The officers are trained to look for eight clues. The first two clues occur during the instruction stage. The officer observes whether the individual can maintain her balance, and whether she starts too soon. With regard to the balance, the defendant fails only if her feet break apart.

While the individual is walking, the following four clues are checked. First, if the individual stops while walking, misses heel-to-toe, steps off the line, and/or uses her arms to balance, the officer is to note it. With regard to a heel-to-toe miss, a gap of at least one-half inch is required. Similarly, the driver must move an arm six inches or more from the side to fail the arms-at-side test.

With regard to the turn, the officer looks to determine if the individual staggers, stumbles, falls, or turns in any way other than instructed. Next, the driver must take the requested number of steps. Interestingly, an individual who takes the correct number of steps, but errs in the verbal count, has not failed this portion of the test. Finally, the officer records "can't do test at all" if the suspect steps off the line three or more times, falls, or crosses her legs and is unable to move.

If the person exhibits at least two out of the possible eight clues, the BMP Manual instructs that the implication is that she has a .10 or higher BAC. If the person exhibits zero or one clue, the implication is that she has a BAC less than .10. Using these guidelines, this test is considered 68% reliable.

### § 6:10 The One-Leg Stand test

This test requires the suspect to stand on one leg and count in accordance with the instructions of the officer. The suspect is told initially to stand with their feet together and their arms down at their sides and to listen to the instructions. They

are told not to start to perform the test until told to do so. The following instructions are then given to the suspect:

> • When I tell you to start, raise one leg, either leg, approximately six inches off the ground, toes pointed out. (Demonstrate one leg stance.)
>
> • You must keep both legs straight, arms at your side.
>
> • While holding that position, count out loud for thirty seconds in the following manner: "one thousand and one, one thousand and two, until told to stop." (Demonstrate a count as follows: "one thousand and one, one thousand and two, etc." Officer should not look at his foot when conducting the demonstration -- OFFICER SAFETY.)
>
> • Keep your arms at your sides at all times and keep watching the raised foot.
>
> • Do you understand? (Make sure suspect indicates misunderstanding.)
>
> • Go ahead and perform the test. (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.)
>
> Observe the suspect from at least 3 feet away. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds. If the suspect is counting quickly, have the suspect continue counting until told to stop.

SFST Manual, VIII-23.

The officer is to look for the following clues:

> A. <u>The suspect sways while balancing</u>. This refers to side-to-side or back-and-forth motion while the suspect maintains the one-leg stand position.
>
> B. <u>Uses arms for balance</u>. Suspect moves arms 6 or more inches from the side of the body in order to keep balance.

C. Hopping. Suspect is able to keep one foot off the ground, but resorts to hopping in order to maintain balance.

D. Puts foot down. The suspect is not able to maintain the one-leg stand position, putting the foot down one or more times during the 30-second count.

Note: If suspect cannot do test or puts foot down three or more times, record as if all four clues were observed. Consideration should be given to terminating the test if the suspect cannot safely complete it.

Remember that time is critical in this test. Research has shown that a person with a BAC above 0.10 can maintain balance for up to 25 seconds, but seldom as long as 30.

If an individual shows two or more clues or fails to complete the One-Leg Stand, there is a good chance the BAC is above 0.10. Using that criterion, you will correctly classify about 65% of the people you test as to whether their BAC's are above or below 0.10.

Observe the suspect from at least 3 feet away, and remain as motionless as possible during the test so as not to interfere. If the suspect puts the foot down, give instructions to pick the foot up again and continue counting from the point at which the foot touched the ground. If the suspect counts very slowly, terminate the test after 30 seconds. If the suspect is counting quickly, have the suspect continue counting until 30 seconds have elapsed.

SFST Manual, VIII-24.

The manual requires that the test be administered on a reasonably level and smooth surface with adequate lighting to provide the suspect with a visual frame of reference. The manual cautions that some people have difficulty with the one-leg stand even when sober. It states that the test criteria is not necessarily valid for people 65 years of age or older, or 50 pounds or more overweight. In addition, people with injuries to their legs, or inner ear disorders, may have difficulty with the test. Again, individuals having heels more than 2 inches high are to be given the opportunity to remove their shoes. SFST Manual, VIII-25.

With the one-leg stand, the State Police are to instruct the suspect to stand erect, feet together, arms at side, and to raise her foot forward approximately 6 to 12 inches off the ground without bending the leg at the knee. The driver then counts a certain number of seconds without putting her foot down.

In addition to the foregoing instructions, the BMP Manual requires the individual to keep the toes on her raised foot pointed down, raise the foot six inches, count out loud for thirty seconds, and to watch the raised foot at all times.

While the New York State Police Manual merely instructs the officer to describe whether the individual was sure, wobbling, needs support, and/or falling, the BMP Manual sets forth four "clues" for this test. The first clue is swaying. Swaying is defined as a very distinct, very noticeable side-to-side or front-to-back movement of the elevated foot or the suspect's body. Slight tremors of the foot or body are not considered swaying. Next, a movement of the arms six inches or more from the side is a clue. The third clue is hopping. Lastly, if the individual puts her foot down prior to thirty seconds, this clue is noted. However, because some suspects count slowly, the individual's placing the foot down after thirty seconds is not a clue. Where the person exhibits at least two of the four possible clues, the implication is that the individual has a BAC of .10 or more. Where the person exhibits zero or one clue, the implication is that the BAC is below .10%. Using these factors, this test is deemed 65% reliable.

### § 6:11 The "non"-standardized field sobriety tests -- The Romberg test

The Romberg test is used to determine balance. The New York State Police are trained to have the suspect stand at "attention" position, heels and toes together, arms at side, head tilted back and eyes closed for approximately ten seconds. The officer looks for excessive body sway. As with most of these tests, the acceptable amount of body sway is subjective.

Pursuant to the Impaired Driver Recognition Program conducted by the Bureau of Municipal Police (BMP) of the Division of Criminal Justice Services, the officer asks the driver to stand with feet together and hands down at sides. The driver is told to listen to the instructions and not to begin until the officer says so. He is then instructed to close his eyes, tilt his head slightly back, and estimate 30 seconds. When the individual believes 30 seconds has passed, the individual is to open his eyes and say, "Now." While conducting the test, the officer checks his watch and moves about to determine if the subject sways from side to side, forward and back, or circular. A time period of 25 to 35 seconds is considered passing. If the

subject fails to open his eyes within 90 seconds, the test is stopped.

### § 6:12 The Finger-to-Nose test

With the finger-to-nose test, the State Police Manual and BMP Manual state that the suspect is instructed to stand erect with feet together, eyes closed, arms stretched out to the side at shoulder height, with the index finger of each hand extended. Then, the suspect is instructed to touch the tip of her nose with the tip of her finger by swinging the arm in at the elbow. The process is then repeated for the other hand. The officer may alter the test by requesting the individual to bring her arms up from her side.

The BMP Manual instructs the officer to observe whether the subject actually touches the tip of her finger to the tip of her nose, brings her arms down immediately; and follows directions as to which hand to use. The New York State Police Manual instructs the officer to determine if the driver followed instructions and, whether the individual, when attempting the test, was sure, uncertain and/or missed.

### § 6:13 The Alphabet test

The alphabet test may come in various forms. The New York State Police are trained to ask the driver to repeat aloud the alphabet from A to Z. Often, this test is modified with the subject instructed to start with a letter other than A and/or stopping with a letter other than Z.

The Municipal Police are instructed to ask the person if she knows the alphabet. Upon receiving an affirmative answer, the individual is asked to recite the alphabet out loud, starting with the letter the officer picks. After the individual stops or misses letters, the officer asks her, "Are you done?" The officer is taught to make a note of the type of speech the individual has.

### § 6:14 Mitigation

While the prosecutor will point out the specific aspects of the test that the defendant failed, defense counsel can focus in on the areas of the test which the driver performed satisfactorily. For example, while the driver may not have touched the tip of her nose while performing the finger-to-nose test, the driver may have stood erect with feet together, kept eyes closed at all times, stretched her arms out to the side at shoulder height, extended the index finger of each hand, and properly swung her arm in at the elbow. The driver's failure to touch the exact tip of her nose may appear less severe in view of

her satisfactory completion of the remainder of the test. Further, defense counsel may point out, where applicable, that the defendant was commanded to perform these tests on a graded, rocky side of a busy highway, while neighbors were driving by, police car lights flashing, and in the general state of fear one experiences when being pulled over by a uniformed police officer in a marked police car.

### § 6:15 Field sobriety tests and the 5th Amendment

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." It is well settled that, in the absence of Miranda warnings, or an exception thereto, a Court must suppress any verbal statements of a defendant that are both (1) communicative or testimonial in nature, and (2) elicited during custodial interrogation. See Pennsylvania v. Muniz, 496 U.S. 582, 590, 110 S.Ct. 2638, 2644 (1990).

### § 6:16 ___ Is the defendant in custody?

In many cases it will be clear that the defendant is in custody at the time that he or she is requested to submit to field sobriety tests. For example, the defendant in Muniz was asked to perform such tests both at a roadside stop and later after he was arrested and transported back to the police station. On the other hand, in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the Supreme Court made clear that, although the protections of Miranda apply to misdemeanor traffic offenses, persons detained during "ordinary" or "routine" traffic stops are not "in custody" for purposes of Miranda. See also Pennsylvania v. Bruder, 488 U.S. 9, 109 S.Ct. 205 (1988).

However, in both Berkemer and Bruder the Court made clear that it "did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not 'delay formally arresting detained motorists, and . . . subject them to sustained and intimidating interrogation at the scene of their initial detention.'" Bruder, 488 U.S. at 10 n.1, 109 S.Ct. at 207 n.1 (quoting Berkemer). In other words, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Berkemer, 468 U.S. at 440, 104 S.Ct. at 3150.

### § 6:17 ___ Is the defendant subjected to custodial interrogation?

The United States Supreme Court has made clear that the critical issue in determining whether a defendant was subjected

to custodial interrogation is whether, while in custody, he or she was asked any questions, or given any instructions, that were "likely to be perceived as calling for [a] verbal response." Muniz, 496 U.S. at 603, 110 S.Ct. at 2651. "Thus, custodial interrogation for purposes of Miranda includes both express questioning and words or actions that . . . the officer knows or reasonably should know are likely to 'have . . . the force of a question on the accused,' and therefore be reasonably likely to elicit an incriminating response." Id. at 601, 110 S.Ct. at 2650 (citation omitted). This is true regardless of whether the verbal response is itself "testimonial or communicative" in nature. See id. at 603 n.17, 110 S.Ct. at 2651 n.17.

Thus, a request that a DWI suspect who is in police custody (a) count during the "walk and turn" and "one leg stand" field sobriety tests, or (b) perform the "alphabet" field sobriety test, constitutes custodial interrogation. See id. at 603 n.17, 110 S.Ct. at 2651 n.17 ("Muniz's counting at the officer's request qualifies as a response to custodial interrogation"); Bruder, 488 U.S. at 11 n.3, 109 S.Ct. at 207 n.3 ("We thus do not reach the issue whether recitation of the alphabet *in response to custodial questioning* is testimonial and hence inadmissible under Miranda v. Arizona") (emphasis added).

Similarly, asking a DWI suspect who is in police custody the question "Do you know what the date was of your sixth birthday?" constitutes custodial interrogation. Muniz, 496 U.S. at 598-99, 110 S.Ct. at 2649. Indeed, the Supreme Court has made clear that, where a defendant is in police custody, even pedigree questions constitute custodial interrogation. Id. at 601, 110 S.Ct. at 2650 ("We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation").

By contrast, in People v. Berg, 92 N.Y.2d 701, 685 N.Y.S.2d 906 (1999), the Court of Appeals held that "evidence of defendant's *refusal* to submit to certain field sobriety tests [is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause." Id. at 703, 685 N.Y.S.2d at 907 (emphasis added). Stated another way, the Court held that "defendant's refusal to perform the field sobriety tests was not compelled, and therefore was not the product of custodial interrogation." Id. at 704, 685 N.Y.S.2d at 908. See also People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983).

### § 6:18 ___ Are defendant's responses to field sobriety tests "testimonial or communicative" in nature?

In Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830 (1966), the Supreme Court held that the Fifth

Amendment protects a defendant only from being compelled to either testify against himself or herself "or otherwise provide the State with evidence of a testimonial or communicative nature." See also People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987) ("Evidence is 'testimonial or communicative' when it reveals a person's subjective knowledge or thought processes"). In Pennsylvania v. Bruder, 488 U.S. 9, 11 n.3, 109 S.Ct. 205, 207 n.3 (1988), the Court expressly left unanswered the question of whether a person's response to the alphabet field sobriety test is "testimonial."

Two years later, in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) the Court addressed the issue of "whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses. . . ." 496 U.S. at 584, 110 S.Ct. at 2641. The Court stated that "'in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.'" Id. at 594, 110 S.Ct. at 2646 (quoting Doe v. United States, 487 U.S. 201, 210, 108 S.Ct. 2341, 2347 (1988)).

"Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component." Id. at 597, 110 S.Ct. at 2648 (footnote omitted).

> Whatever else it may include, therefore, the definition of "testimonial" evidence articulated in Doe must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition in Doe that "*[t]he vast majority of verbal statements thus will be testimonial" because "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts*."

Id. at 596-97, 110 S.Ct. at 2648 (emphasis added) (citation omitted).

Under this definition, the Court held that Muniz's response to the question "Do you know what the date was of your sixth birthday?" was testimonial:

> When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for

> whatever reason, could not remember or calculate that date, he was confronted with the trilemma. . . . Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

Id. at 598-99, 110 S.Ct. at 2649.

Thus, Muniz makes clear that responses to questions designed to demonstrate a lack of "lucid thinking" are testimonial in nature, precisely because they convey information with regard to a person's subjective thought processes. Nonetheless, the Court expressly left open the question of whether a request that a person "count aloud from 1 to 9 while performing the 'walk and turn' test and that he count aloud from 1 to 30 while balancing during the 'one leg stand' test" calls for a "testimonial" response. Id. at 603 n.17, 110 S.Ct. at 2651 n.17.

However, in People v. Berg, 92 N.Y.2d 701, 685 N.Y.S.2d 906 (1999), the Court of Appeals stated, in *dicta*, that:

> Reciting the alphabet and counting are not testimonial or communicative because these acts do not require a person to reveal knowledge of facts relating to the offense or to share thoughts and beliefs with the government. Instead, these tests attempt to determine whether alcohol has impaired the reflexive process by which the alphabet and numbers are recalled from memory and spoken.

Id. at 705, 685 N.Y.S.2d at 909. See also People v. Hasenflue, 252 A.D.2d 829, ___, 675 N.Y.S.2d 464, 466 (3d Dep't 1998); People v. Turner, 234 A.D.2d 704, ___, 651 N.Y.S.2d 655, 657 (3d Dep't 1996).

Similarly, Miranda warnings are not required to be given to a DWI suspect prior to the administration of physical performance tests:

> Physical performance tests do not reveal a person's subjective knowledge or thought processes but, rather, exhibit a person's degree of physical coordination for observation by police officers. The defendant's responses to those tests in this case indicated he had imbibed alcohol, not because the tests revealed defendant's thoughts, but because his body's responses differed from those of a sober person (see People v. Boudreau, 115 A.D.2d 652, 654, 496 N.Y.S.2d 489). We conclude, therefore, the Miranda warnings were not required to be given to defendant prior to the administration of the performance tests.

People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987). See also People v. Berg, 92 N.Y.2d 701, 703, 705, 685 N.Y.S.2d 906, 907, 908-09 (1999); People v. Jacquin, 71 N.Y.2d 825, 826, 527 N.Y.S.2d 728, 729 (1988) ("Performance tests need not be preceded by Miranda warnings and, generally an audio/visual tape of such tests, including any colloquy between the test-giver and the defendant *not constituting custodial interrogation*, is admissible") (emphasis added); People v. Dougal, 266 A.D.2d 574, ___, 698 N.Y.S.2d 66, 69 (3d Dep't 1999); People v. Villeneuve, 232 A.D.2d 892, ___, 649 N.Y.S.2d 80, 83 (3d Dep't 1996). See generally Muniz, 496 U.S. at 592, 110 S.Ct. at 2645 ("Under Schmerber and its progeny, . . . any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses").

Berg does expressly leave open one question in this regard -- "While the *results* of the field sobriety tests defendant was asked to perform are not testimonial or communicative, we do not in this case address whether defendant's *refusal* to perform the tests was also non-testimonial." 92 N.Y.2d at 705, 685 N.Y.S.2d at 909.

## § 6:19 Constitutionality of NYPD's policy of only offering field sobriety tests to English-speaking DWI suspects

The New York City Police Department apparently has a policy of only offering field sobriety tests to English-speaking DWI suspects. The policy has been challenged on both Equal Protection and Due Process grounds. In People v. Salazar, 112

A.D.3d 5, ___, 973 N.Y.S.2d 140, 141-42 (1st Dep't 2013), the Appellate Division, First Department, held that "the failure of the police to administer a physical coordination test to a non-English speaking defendant of Hispanic origin arrested for driving while intoxicated [does not] violate equal protection [or] due process [even though] such tests are routinely administered to English-speaking defendants."

Salazar resolved a conflict amongst the lower Courts. Compare People v. Perez, 27 Misc. 3d 880, 898 N.Y.S.2d 402 (Bronx Co. Sup. Ct. 2010), People v. Burnet, 24 Misc. 3d 292, 882 N.Y.S.2d 835 (Bronx Co. Sup. Ct. 2009), and People v. Perez, 27 Misc. 3d 880, 898 N.Y.S.2d 402 (Bronx Co. Sup. Ct. 2010) (holding policy Constitutional), with People v. Garcia-Cepero, 22 Misc. 3d 490, 874 N.Y.S.2d 689 (Bronx Co. Sup. Ct. 2008), and People v. Molina, 25 Misc. 3d 362, 887 N.Y.S.2d 784 (Bronx Co. Sup. Ct. 2009) (holding policy unconstitutional).

# DEALING WITH THE ALCOHOLIC CLIENT

**by**

**PETER GERSTENZANG, ESQ.**



One of the most controversial areas of DUI defense is the issue of your client's alcohol abuse. For many lawyers, there is no issue because they do not consider this to be a legitimate area of professional concern. At most, the referral of a client to alcohol treatment is pursuant to prosecutorial or judicial mandate as a prerequisite for a desired disposition. Beyond this, many attorneys believe that neither their professional qualifications, nor the legitimate demands of criminal defense permit their intrusion into their client's substance abuse problem.

While there are legitimate arguments to be made for and against attorney involvement in the counseling of clients in this area, I believe that a DUI defense attorney has a professional obligation to include substance abuse counseling as part of their representation of a DUI defendant.

## WHAT IS AN ALCOHOLIC?

While the definition of alcoholism is subject to interpretation, I work with the premise that alcoholism can be defined as where the abuse of alcohol creates a significant and continuing problem in the life of the client. Generally, my threshold for the initiation of a discussion of alcohol abuse is a client with a prior alcohol related conviction. While anyone who drinks and drives (and probably everyone who drinks and drives) can, at one time or another, drive while legally intoxicated, the statistical frequency required for two arrests is pretty high. People who infrequently play the lottery rarely win a significant prize. "Winning" twice under such conditions really strains credulity.

Of course, any rule of thumb must be tempered by the increasing prevalence of falsely accused motorists. The reduction of blood alcohol concentrations in the last decade coupled with reduced standards of competence and the inaccuracy of chemical testing has produced growing numbers of the innocent accused.

Where this is not the case, however, I do initiate a discussion of substance abuse. Alcoholism is a disease and it has been my experience that it is genetically based. With rare

exception, the alcoholic client has parents, grandparents or other close relatives who are alcoholics. Contrary to popular belief, a person does not have to drink every day or have a bottle in a paper bag as an accoutrement in order to qualify for this diagnosis.

Alcoholics are like ice cream, they come in many flavors. One of the most common stratagems of denial is to compare oneself to the quintessential "vanilla" alcoholic. The "vanilla" alcoholic is, of course, the guy drinking cheap wine out of a paper bag. She may be the person who drinks every day, or is, otherwise, a "heavy" drinker. Interestingly enough, I rarely get a "vanilla" alcoholic as a client. Either these folks cannot afford our fees or their constant drinking has caused them to become adept at avoiding detection in all kinds of situations including driving.

**THE "BINGE" ALCOHOLIC**

The most common alcoholic that I encounter is what is known as the "binge" alcoholic. These are the people who do not have a problem with alcohol unless they drink. What I mean is that they do not need to drink on a daily basis and do not have a constant desire to drink. These are the folks who plan on stopping off after work for a beer or two and wind up drinking far more than they planned. My best guess is that the consumption of alcohol triggers a biochemical reaction which causes them to abandon their original plan and to drink far beyond what they contemplated when they stopped off at the tavern on their way home from work.

In many ways, the binge alcoholic is easier to treat because they do not seem to have the same physiological need for alcohol experienced by the "vanilla" alcoholic. If they can be convinced that they have a problem, they tend to do well in treatment and tend to stay abstinent for lengthy periods of time. Like any alcoholic, they tend to relapse, but the absence of a persistent need to drink is a distinct advantage.

In contrast to drug abuse, alcohol abusers have socially accepted institutions in which to practice their abuse. The landscape is dotted with bars, taverns and restaurants in which a person can meet and obtain the group support of fellow drinkers. It is hard to feel that there is something wrong with drinking when everyone else is drinking too. While alcohol abuse does not seem to be as prevalent as smoking once was, the drinking culture is more than sufficient to support the denial of the vast majority of drinking alcoholics. Accordingly, repeat arrests for driving under the influence provides a strong foundation for raising the possibility that a client might have an alcohol abuse problem.

One of the things that I discuss with clients is the shock, unpleasantness, and expense of their original arrest. We discuss the embarrassment of being handcuffed, fingerprinted and photographed. We talk about what it was like to go to court in front of a group of people and go through the process of being convicted after their first arrest. I inquire as to whether they thought, at that time, that they would ever go through this process again. Not one of my clients has ever indicated that they enjoyed the first arrest and thought it would be interesting to repeat the experience. I then ask whether they thought that the repeat experience indicated that they had control over the decision to drink and drive.

If the first time was so awful, why would you subject yourself to a repeat arrest if you were in control of the situation. While many will claim the excuse of some emotional upset that triggered their drinking, the vast majority will acknowledge that once they started drinking, they were able to control neither the decision to drink more, nor the decision to drive.

It is this inability to make rational decisions, once consumption of alcohol has commenced that is the hallmark of the alcoholic. It is also the basis of the failure of the Criminal Justice System to deter drunk driving. We constantly hear prosecutors and judges talking about out clients making bad choices. They, of course, refer to the fact that the client chose to drink and drive. The truth is that the alcoholic does not choose to drink and drive. The only real decision that they make is to drink in the first instance.

Once they start drinking, they are no longer capable of rational choice. Accordingly, the deterrent effect of legal sanctions is generally ineffective after drinking has commenced. A more realistic, if not practicable, legislative scheme would punish the consumption of alcohol in the first instance. It is at least arguable that a sober alcoholic is exercising poor judgment when they choose to drink. Once they drink, it is more the case that they have no judgment, as opposed to poor judgment.

Accordingly, I focus on that decision to drink. We talk about the fact that they drove to get to the place where they had their first drink and that they knew that they had a car and that they were going to drive after they drank. We discuss the fact that they did not plan to become intoxicated, but that they drank more than they would have chosen to do had they been in control. It is this isolation and identification of the lack of control that is the first step towards recognizing and accepting their alcoholism.

## ALCOHOL TREATMENT

For many lawyers, the requirement that their client participate in alcohol treatment is just another undesirable consequence to be avoided if possible. They convey this to the client so that where the client is mandated to participate in treatment, the attitude is that this is something you must do in order to satisfy the requirements of a court disposition and you just have to endure it so that you can obtain your "I was there" button.

Unfortunately, being present in alcohol treatment accomplishes very little insofar as treatment is concerned. Alcohol treatment is more akin to purchasing exercise equipment. Regardless of how much you paid for the equipment, it will have no effect on your fitness unless you actively use the equipment. Similarly, alcohol treatment is something an alcoholic must participate in in order to develop the skills necessary to maintain their sobriety.

## ALCOHOL TREATMENT PROVIDERS

It is imperative that lawyers develop a list of legitimate alcohol treatment providers. Alcohol treatment is generally rendered in a group setting and continues over varying periods of time depending upon needs of the individual. Referring your client to a disreputable treatment provider is a gross disservice. For a price, these "providers" will either give your client an evaluation that says they do not need treatment, or will run them through a few sessions in order to meet the requirements of a court disposition. In either event, the client is simply being set up for the next arrest.

## "AND COUNSELOR AT LAW"

Most alcoholics have varying degrees of denial. They do not want to accept their alcoholism, nor do they want to participate in treatment. They are, however, receptive to their attorney. A lawyer can get through to a client in a way that virtually no one else can. The fact that the client has retained the attorney is a statement of trust. They are paying for your advice and your card says "attorney and counselor at law." A working knowledge of alcoholism is as much a part of a DUI defense lawyer's arsenal as standardized field sobriety testing and breath alcohol instrumentation. We are in a unique position to help a client confront their alcoholism and obtain desperately needed treatment. The charge of driving while intoxicated is just one of a myriad of problems that arise from alcohol abuse.

In his "Dark Tower" series, Stephen King creates a character named Eddie who is referred to as the "prisoner." Eddie is a heroin addict and objects to being called a "prisoner." The

reference to Eddie as a prisoner, derives from his heroin addiction and the fact that he is imprisoned by that addiction. In his book, On Writing, Stephen King explains that he, himself, is an alcoholic, and provides great insight into the disease.

Physiologically, Stephen King's characterization of the alcoholic or drug abuser as a "prisoner" is quite apt. In the article, *HOW IT ALL STARTS IN YOUR BRAIN*, by Sharon Begley appearing in "Newsweek," Feb. 12, 2001, at 40, Ms. Begley reports on results of MRI studies of the brain of people addicted to alcohol and drugs. She details how the chronic use of alcohol and drugs creates chronic depression and severely limits the physiological ability of the addict to experience normal joy and happiness. The article is quite powerful and very persuasive. I routinely hand copies of the article to clients and discuss the implications of its findings.

Interestingly, most of my clients recognize the validity of the article's conclusions in their own experience. One client who had two DWI charges pending at the same time checked himself into a residential treatment facility even though we were successful in defending both charges and he knew he was not going to have an alcohol related conviction. He recognized that he was in a far more profound prison than that threatened by the Criminal Justice System.

All of us are focused on preserving the freedom of our clients. What we need to understand is that our alcoholic and drug addicted clients come to us in a state of physiological incarceration. They need both our services as attorney and counselor at law if they are to be emancipated from both the Criminal Justice System and their addiction.

# APPENDIX 3

# New York State Department of Health Rules and Regulations for Chemical Tests (Breath, Blood, Urine and Saliva)

## PART 59 CHEMICAL ANALYSIS OF BLOOD, URINE, BREATH OR SALIVA FOR ALCOHOLIC CONTENT

(Statutory authority: Environmental Conservation Law, § 11-1205(6); Vehicle and Traffic Law, §§ 1194(4)(c), 1198(6))

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Sec.**



### Section 59.1. Definitions

(a) **Techniques and methods** means the collection, processing and determination of the alcoholic content of body fluids such as human blood, saliva or urine, and of breath or alveolar air by protocols and/or instruments determined by the commissioner to be acceptable.

(b) **Per centum by weight of alcohol** as used in the Vehicle and Traffic Law and the Environmental Conservation Law means percent weight per volume, that is, grams of alcohol per 100 milliliters of whole blood.

(c) **Chemical tests/analyses** include breath tests conducted on breath analysis instruments approved by the commissioner in accordance with section 59.4 of this Part.

(d) **Training agency or agencies** means the Office of Public Safety of the Division of Criminal Justice Services, the Divi-

sion of State Police, the Nassau County Police Department, the Suffolk County Police Department, and/or the New York City Police Department.

(e) **Commissioner** means the New York State Commissioner of Health.

(f) **Department** means the New York State Department of Health.

(g) **Ignition interlock device** means any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent breath alcohol level does not exceed the calibrated setting on the device as required by standards in this Part.

(h) **Blood alcohol concentration (BAC)** means the weight amount of alcohol contained in a unit volume of blood, measured as grams ethanol/100 ml blood and expressed as %, grams %, % weight/volume (w/v), and % BAC. Blood alcohol concentration in this Part shall be designated as % BAC.

(i) **Testing laboratory** means a nationally recognized, independent materials testing laboratory that is not affiliated with, and operates autonomously from, any ignition interlock device manufacturer, is properly equipped and staffed to carry out test procedures required by this Part, and is independently accredited in accordance with requirements for the competence of testing and calibration laboratories promulgated as a standard by the International Organization for Standardization (ISO), or other commensurate standard acceptable to the department.

(j) **Breath analysis instrument** means a device that complies with section 59.4 of this Part.

(k) **Saliva** means oral fluid.

(l) **Calibration** means the activity of verifying that a value generated by the instrument is in acceptable agreement with the assigned value for a traceable and/or certified reference standard, including any adjustment to the instrument to bring it into acceptable agreement.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

### Section 59.2. Techniques and methods for determining blood and urine alcohol

(a) All blood and urine alcohol determinations shall be made by quantitative methods and reported as whole blood alcohol concentration (BAC) to the second decimal place as found; for example, 0.137 percent found shall be reported as 0.13 percent weight per volume. If specimens other than whole blood are analyzed, the following conversions shall apply:

(1) three fourths of the determined concentration of alcohol in the urine shall be equivalent to the corresponding BAC; and

(2) nine tenths of the determined concentration of alcohol

in the serum or plasma shall be equivalent to the corresponding BAC.

(b) Analytical procedures for blood and urine alcohol analysis shall include the following controls in conjunction with any sample or series of 10 samples analyzed sequentially or simultaneously:

(1) a blank analysis as appropriate; and

(2) analysis of a suitable reference sample of known alcoholic content greater than or equal to 0.08 percent weight per volume, the result of which analysis shall agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume or such limits as specified by the commissioner.

(c) An analysis of urine shall be made upon two specimens collected at least 30 minutes apart.

(d) If a blood specimen is to be collected for analysis, an aqueous solution of a nonvolatile antiseptic shall be used on the skin. Alcohol or phenol shall not be used as a skin antiseptic.

(e) Specimens shall be clearly identified at the time of collection.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.3. Blood, urine and saliva alcohol analysis; permits**

(a) Individuals performing chemical analyses for blood, urine and saliva alcohol content may apply to the commissioner for a permit.

(b) A permit for the performance of chemical analyses for blood, urine and saliva alcohol content shall be issued by the commissioner to an applicant who:

(1) is a high school graduate and has one year of laboratory experience acceptable to the commissioner; or

(2) has satisfactorily completed two years of college study and has six months of laboratory experience acceptable to the commissioner; and

(3) demonstrates to the satisfaction of the commissioner proficiency in the chemical analyses of the alcoholic content of blood and any other sample type that the commissioner requires; and

(4) has access to appropriate laboratory facilities for the performance of such analyses.

(c) The applicant shall demonstrate proficiency in the techniques and methods of analysis by correctly analyzing and reporting results, within limits of accuracy established by the commissioner, for 75 percent of the samples for each set of proficiency tests issued by the commissioner.

(d) A permit shall be issued for a period of one year and may be renewed annually thereafter. A permit shall not be is-

sued or renewed if, for two consecutive sets of proficiency tests, the applicant or permit holder:

(1) does not meet the proficiency requirements of this section; or

(2) fails to report proficiency test results; or

(3) reports results after three weeks from the date of distribution of proficiency test samples, except that the commissioner, for good cause, may extend such time on request made during such three-week period.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.4. Breath analysis instruments**

(a) The commissioner approves, for use in New York State, breath analysis instruments found on the Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA), published in the Federal Register on March 11, 2010 (75 Fed. Reg. 11624-11627, available for public inspection and copying at the Department of Health Records Access Office, Corning Tower, Empire State Plaza, Albany, NY 12237). A facsimile of that list is set forth in subdivision (b) of this section. At the request of a training agency, the commissioner may approve a breath analysis instrument that has been accepted by NHTSA but is not on the Conforming Products List published in the Federal Register on March 11, 2010, if the commissioner determines that approval of such instrument is appropriate.

(b) Conforming Products List of Evidential Breath Measurement Devices

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| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada: | | |
| Alert J3AD* | X | X |
| Alert J4X.ec | X | X |
| PBA3000C | X | X |
| BAC Systems, Inc., Ontario, Canada: | | |
| Breath Analysis Computer* | X | X |
| CAMEC Ltd., North Shields, Tyne and Ware, England: | | |
| IR Breath Analyzer* | X | X |
| CMI, Inc., Owensboro, Kentucky: | | |
| Intoxilyzer Model: | | |
| 200 | X | X |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| 200D | X | X |
| 240 (aka: Lion Alcolmeter 400+ outside the U.S.) | X | X |
| 300 | X | X |
| 400 | X | X |
| 400PA | X | X |
| 1400 | X | X |
| 4011* | X | X |
| 4011A* | X | X |
| 4011AS* | X | X |
| 4011AS -A* | X | X |
| 4011AS -AQ* | X | X |
| 4011 AW* | X | X |
| 4011A27 -10100* | X | X |
| 4011A27 -10100 with filter* | X | X |
| 5000 | X | X |
| 5000 (w/Cal. Vapor Re-Circ.) | X | X |
| 5000 (w/3/8" ID Hose option) | X | X |
| 5000CD | X | X |
| 5000CD/FG5 | X | X |
| 5000EN | X | X |
| 5000 (CAL DOJ) | X | X |
| 5000VA | X | X |
| 8000 | X | X |
| PAC 1200* | X | X |
| S -D2 | X | X |
| S -D5 (aka: Lion Alcolmeter SD -5 outside the U.S.) | X | X |
| Draeger Safety, Inc. (aka: National Draeger) Irving, Texas: | | |
| Alcotest Model: | | |
| 6510 | X | X |
| 6810 | X | X |
| 7010* | X | X |
| 7110* | X | X |
| 7110 MKIII | X | X |
| 7110 MKIII -C | X | X |
| 7410 | X | X |
| 7410 Plus | X | X |
| 7510 | X | X |
| 9510 | X | X |
| Breathalyzer Model: | | |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| 900 | X | X |
| 900A* | X | X |
| 900BG* | X | X |
| 7410 | X | X |
| 7410 -II | X | X |
| EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin: | | |
| AlcoQuant 6020 | X | X |
| Gall's Inc., Lexington, Kentucky: | | |
| Alcohol Detection System-A.D.S. 500 | X | X |
| Guth Laboratories, Inc., Harrisburg, Pennsylvania: | | |
| Alcotector BAC -100 | X | X |
| Alcotector C2H5OH | X | X |
| Intoximeters, Inc., St. Louis, Missouri: | | |
| Photo Electric Intoximeter* | | X |
| GC Intoximeter MK II* | X | X |
| GC Intoximeter MK IV* | X | X |
| Auto Intoximeter* | X | X |
| Intoximeter Model: | | |
| 3000 | X | X |
| 3000 (rev B1)* | X | X |
| 3000 (rev B2)* | X | X |
| 3000 (rev B2A)* | X | X |
| 3000 (rev B2A) w/FM option* | X | X |
| 3000 (Fuel Cell)* | X | X |
| 3000 D* | X | X |
| 3000 DFC* | X | X |
| Alcomonitor | | X |
| Alcomonitor CC | X | X |
| Alco-Sensor III | X | X |
| Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000) | X | X |
| Alco-Sensor IV | X | X |
| Alco-Sensor IV XL | X | X |
| Alco-Sensor V | X | X |
| Alco-Sensor AZ | X | X |
| Alco-Sensor FST | X | X |
| Intox EC/IR | X | X |
| Intox EC/IR II | X | X |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| Intox EC/IR II (Enhanced with serial number 10,000 or higher)X | | |
| Portable Intox EC/IR | X | X |
| RBT -AZ | X | X |
| RBT -III | X | X |
| RBT III -A | X | X |
| RBT IV | X | X |
| RBT IV with CEM (cell enhancement module) | X | X |
| Komyo Kitagawa, Kogyo, K.K., Japan: | | |
| Alcolyzer DPA -2* | X | X |
| Breath Alcohol Meter PAM 101B* | X | X |
| Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, Colorado: | | |
| PBA 3000B | X | X |
| PBA 3000-P* | X | X |
| PBA 3000C | X | X |
| Alcohol Data Sensor | X | X |
| Phoenix | X | X |
| Phoenix 6.0 | X | X |
| EV 30 | X | X |
| FC 10 | X | X |
| FC 20 | X | X |
| Lion Laboratories, Ltd., Cardiff, Wales, United Kingdom: | | |
| Alcolmeter Model: | | |
| 300 | X | X |
| 400 | X | X |
| 400+ (aka: Intoxilyzer 240 in the U.S.) | X | X |
| SD -2* | X | X |
| SD -5 (aka: S -D5 in the U.S.) | X | X |
| EBA* | X | X |
| Intoxilyzer Model: | | |
| 200 | X | X |
| 200D | X | X |
| 1400 | X | X |
| 5000 CD/FG5 | X | X |
| 5000 EN | X | X |
| Luckey Laboratories, San Bernardino, California: | | |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| Alco-Analyzer Model: | | |
| 1000* | | X |
| 2000* | | X |
| Nanopuls AB, Uppsala, Sweden: | | |
| Evidenzer | X | X |
| National Patent Analytical Systems, Inc., Mansfield, Ohio: | | |
| BAC DataMaster (with or without the Delta-1 accessory): | | |
| BAC Verifier DataMaster (w/or without the Delta-1 accessory) | X | X |
| DataMaster cdm (w/or without the Delta-1 accessory) | X | X |
| DataMaster DMT | X | X |
| Omicron Systems, Palo Alto, California: | | |
| Intoxilyzer Model: | | |
| 4011* | X | X |
| 4011AW* | X | X |
| PAS International, Fredericksburg, Virginia: | | |
| Mark V Alcovisor | X | X |
| Plus 4 Engineering, Minturn, Colorado: | | |
| 5000 Plus 4* | X | X |
| Seres, Paris, France: | | |
| Alco Master | X | X |
| Alcopro | X | X |
| Siemans-Allis, Cherry Hill, New Jersey: | | |
| Alcomat* | X | X |
| Alcomat F* | X | X |
| Smith and Wesson Electronics, Springfield, Massachusetts: | | |
| Breathalyzer Model: | | |
| 900* | X | X |
| 900A* | X | X |
| 1000* | X | X |
| 2000* | X | X |
| 2000 (non-Humidity Sensor)* | X | X |
| Sound-Off, Inc., Hudsonville, Michigan: | | |
| AlcoData | X | X |
| Seres Alco Master | X | X |
| Seres Alcopro | X | X |
| Stephenson Corp.: | | |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|---|---|
| Manufacturer and model | Mobile | Nonmobile |
| Breathalyzer 900* | X | X |
| Tokai-Denshi Inc., Tokyo, Japan: | | |
| ALC -PRO II (US) | X | X |
| U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, California: | | |
| Alco-Analyzer 1000 | | X |
| Alco-Analyzer 2000 | | X |
| Alco-Analyzer 2100 | X | X |
| Verax Systems, Inc., Fairport, New York: | | |
| BAC Verifier* | X | X |
| BAC Verifier Datamaster | X | X |
| BAC Verifier Datamaster II* | X | X |

* Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(c) No law enforcement agency shall use a breath analysis instrument unless the training agency has verified that representative samples of the specific make and model perform properly. Maintenance shall be conducted as specified by the training agency, and shall include, but shall not be limited to, calibration at a frequency as recommended by the device manufacturer or, minimally, annually.

(d) Training agencies shall be responsible for maintaining records pertaining to verification and maintenance (including calibration) of breath analysis instruments and standards; provided, however, that record keeping maintenance may be delegated, in whole or in part, to the law enforcement agency using the breath analysis instrument(s).

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.5. Breath analysis; techniques and methods**

The following breath analysis techniques and methods shall be a component of breath analysis instrument operator training provided by training agencies and shall be used by operators performing breath analysis for evidentiary purposes:

(a) A breath sample shall be collected at the direction and to the satisfaction of a police officer and shall be analyzed with breath analysis instruments meeting the criteria set forth in section 59.4 of this Part.

(b) The subject shall be observed for at least 15 minutes

prior to the collection of the breath sample, during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have placed anything in his/her mouth; if the subject should regurgitate, vomit, smoke or place anything in his/her mouth, an additional 15-minute waiting period shall be required.

(c) A system purge shall precede both the testing of each subject and the analysis of the reference standard.

(d) The result of an analysis of a reference standard with an alcoholic content greater than or equal to 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the commissioner. An analysis of the reference standard shall precede or follow the analysis of the breath of the subject in accordance with the test sequence established by the training agency. Readings for the reference standard, a blank and the subject's breath, shall be recorded.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

### Section 59.6. Breath analysis permit program

Training agencies shall submit an application for approval of a breath analysis permit program or a training program for breath analysis to the commissioner. Other agencies seeking approval of such programs shall submit an application to the commissioner through the Office of Public Safety of the Division of Criminal Justice Services. The application shall include:

(a) a description of the techniques and methods to be utilized;

(b) the make and model of the breath analysis instruments used;

(c) an outline of the material presented in the breath analysis instrument operator and technical supervisor training program;

(d) the name of the individual primarily responsible for each training program and for the breath analysis program;

(e) the name and qualifications of one or more individuals meeting the requirements for technical supervisor under section 59.9 of this Part; and

(f) such other information as the commissioner shall require.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

### Section 59.7. Breath analyzer operator permits

(a) A permit valid for two years shall be issued by the commissioner to breath analysis instrument operators who have completed an approved program based upon standards acceptable to the training agency and certified by the commissioner. Such program shall consist of a minimum of 24 hours of instruc-

tion and training with identified learning objectives, supervised by one or more individuals certified as technical supervisors, and shall include:

(1) three hours of instruction on the effects of alcohol on the human body;

(2) five hours of instruction on operational principles of the selected techniques and methods, including a functional description and a detailed operational description of the breath analysis instrument(s) with a demonstration;

(3) five hours of instruction on the legal aspects of chemical tests generally, and of the particular techniques and methods to be employed;

(4) three hours of instruction on supplemental information to include nomenclature appropriate to the field of chemical tests for alcohol;

(5) six hours of laboratory participation using approved breath analysis instruments and simulators, or other reference standards;

(6) a passing score on a one-hour formal examination designed to evaluate whether the operator has met the course learning objectives; and

(7) a demonstration of analytical proficiency on each breath analysis instrument for which the operator is seeking certification.

(b) A permit as a breath analysis instrument operator shall be renewed for a two-year period, provided that, within the 120 calendar days preceding the permit's expiration date, the operator: completes a retraining program that minimally includes an instructional course in breath analysis designed to refresh and update the operator's knowledge in areas described in subdivision (a) of this section; satisfactorily meets the course's learning objectives as determined by a technical supervisor; demonstrates analytical proficiency on each breath analysis instrument for which the operator is seeking permit renewal; and attains a passing score on a formal examination; or, in lieu of such formal retraining, with the concurrence of the responsible training agency, provided that the operator and his/her superior officer submits to the training agency, a written declaration that the operator has performed six or more breath analyses on subjects in accordance with this Part on each breath analysis instrument for which the operator is seeking permit renewal during the 24 months preceding permit expiration. Notwithstanding such a submission, every four years all operators shall participate successfully in the retraining course described in this subdivision.

(c) (1) Whenever a breath analysis instrument operator's permit is not renewed prior to the expiration date, the commissioner may extend such expiration date for 30 calendar days, provided that the training agency and operator jointly submit a written request for such extension, describing the

reasons for the failure to renew in a timely manner. The operator's permit shall remain valid during the 30-day extension period.

(2) If the operator fails to meet the conditions for permit renewal pursuant to subdivision (b) of this section within the extension period authorized pursuant to paragraph (1) of this subdivision, the permit shall become void and not renewable; an operator whose permit becomes void may apply for a new permit by repeating the requirements of subdivision (a) of this section; and the effective date of any such new permit shall be the date of commissioner approval, without back dating to the date on which the prior permit became void.

(d) A training agency shall submit to the commissioner documentation of breath analysis instrument operator training for initial issuance and renewal of a permit in a format designated by the commissioner.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.8. Revocation or suspension of permits**

(a) The commissioner or the training agencies may at any time and from time to time require breath analysis instrument operators or technical supervisors to demonstrate their ability to operate properly the breath analysis instrument(s) for which they hold a permit.

(b) The operator's permit may be revoked by the commissioner based on information acquired by the commissioner, or a training agency, that the operator does not conduct breath tests in accordance with techniques and methods as instructed by the training agency, that the operator's performance is unreliable, or the operator is incompetent. Upon revocation, the operator shall return any and all permits to the commissioner.

(c) The training agency may suspend the permit of any operator under its supervision when, in its judgment, the operator does not conduct breath tests in accordance with techniques and methods as established by the training agency, the operator's performance is unreliable or the operator is incompetent. The training agency shall immediately notify the commissioner in writing of any such suspension and furnish a copy of such notice to the suspended operator, who shall not be permitted to operate the breath analysis instrument until such time as the suspension is removed.

(d) An operator whose permit has been suspended by the training agency may appeal to the commissioner who shall decide whether suspension shall be affirmed or set aside. The commissioner may reinstate the permit of the operator making such appeal under such conditions as the commissioner deems necessary.

(e) An operator whose permit has been revoked shall not be eligible for a new permit within 12 months from the date of revocation or at such other time as may be determined by the commissioner.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

## Section 59.9. Technical supervisor; qualifications and certification

(a) The commissioner may authorize certification of an applicant as technical supervisor for a period of four years, provided such applicant submits satisfactory evidence through the training agency that he/she meets the following qualifications:

(1) thirty semester hours of college credits, including eight semester hours of chemistry;

(2) certification as an operator of the breath analysis instrument(s) to be supervised, or possession of equivalent experience or training to qualify as an operator; and

(3) satisfactory completion of a technical supervisor's course, the content of which shall include:

(i) advanced survey of current information concerning alcohol and its effect on the human body (one hour);

(ii) operational principles and theories applicable to the program (two hours);

(iii) breath analysis instrument maintenance and calibration (two hours);

(iv) legal aspects of chemical testing (one hour); and

(v) principles of instruction (two hours); or

(4) training and experience equivalent to a technical supervisor's course and acceptable to the commissioner.

(c) A technical supervisor shall have responsibility for:

(1) breath analysis instrument operator training, competency evaluation, and periodic examination to ensure maintenance of technical knowledge and proficiency;

(2) maintenance, including calibration of breath analysis instruments and equipment under his/her supervision and preparation and standardization of chemicals used for testing and/or evaluation of such chemicals, by direct performance of such tasks or by delegating performance to another person with demonstrated competency, but who need not be qualified as a technical supervisor; provided, however, whenever such tasks are so delegated, the technical supervisor shall review the work product to ensure that the assigned designee's performance meets expectations; and

(3) periodic inspection of breath analysis instrument performance.

(d) A technical supervisor's certificate may be renewed for a period of four years upon submission of a written application and statement that he/she has carried out his/her duties in accordance with this Part. Suspension or revocation pursuant to section 59.8 of this Part of a breath analysis instrument operator's permit held by a technical supervisor shall result in

suspension or revocation, respectively, of the individual's certification as a technical supervisor.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

### Section 59.10. Certification criteria for ignition interlock devices

(a) A manufacturer of ignition interlock devices shall apply to the department to certify a device for use in New York State. The application shall be on a form or format specified by the department with documents appended as necessary to provide the requisite information, and shall include, but not be limited to:

(1) name and address of the manufacturer, and contact information, including identification of a person to respond to department inquiries;

(2) name and model of the ignition interlock device;

(3) a detailed description of the ignition interlock device, including: instructions for its installation and operation; technical specifications, including, but not limited to, accuracy; calibration stability; data security; and capability for data collection and recording, tamper detection, and retesting; and unsupervised operation in a range of environmental conditions;

(4) the manufacturer's statement that all ignition interlock devices of the same make and model sold or offered for sale or lease, for which certification is sought, meet the requirements of this Part; and

(5) a certificate or other document from an insurance carrier licensed in New York State demonstrating that the manufacturer holds product liability insurance with minimum liability limits of one million dollars per occurrence and three million dollars aggregate. The documentation shall include the issuing company's statement that at least thirty (30) days notice will be provided to the department whenever the issuing company intends to cancel the insurance before the policy's expiration date. Liability coverage shall include defects in product design and materials, as well as in manufacture, calibration, installation and removal of devices.

(b) The manufacturer shall provide the testing laboratory with:

(1) six representative instruments of each ignition interlock device model for which certification is sought, from which the testing laboratory shall select at least two for testing;

(2) instructions for device installation and operation; and

(3) a description of the device's capabilities, including, but not limited to: security; data collection and recording; tamper detection; circumvention prevention; retesting; and unsupervised operation in a range of environmental conditions.

(c) At the request of a manufacturer of ignition interlock devices, the commissioner shall certify the ignition interlock device for use in New York State, provided the manufacturer:

(1) demonstrates, through arrangements with a testing laboratory, that the model meets or exceeds the model specifications for breath alcohol ignition interlock devices adopted by NHTSA and published in the Federal Register on April 7, 1992 (57 Fed. Reg. 11772–11787, available for public inspection and copying at the Department of Health Records Access Office, Corning Tower, Empire State Plaza, Albany, NY 12237);

(2) demonstrates, through arrangements with a testing laboratory, that the device meets the model specifications specified in paragraph (1) of this subdivision when calibrated to a set point of 0.025% BAC;

(3) has requested certification for a device that employs fuel cell technology or another technology with demonstrated comparable accuracy and specificity;

(4) has demonstrated that the certified device can and would be installed to allow normal operation of the vehicle after it is started, except as specifically approved by the department; and

(5) has demonstrated compliance with all the requirements of this Part.

(d) Certification shall be effective as of the date of its issuance.

(e) Certified ignition interlock devices installed in vehicles shall be uniquely serial-numbered.

(f) Each certification shall cover only one model of ignition interlock device. Modifications to a model of a device, without regard to the manufacturer's assigning a new model number, shall be reported to the department as required in section 59.12 of this Part.

(g) The department may deny, suspend or revoke the certification of an ignition interlock device for reasons including:

(1) the device does not meet the requirements for certification specified in this Part, including but not limited to, the commissioner's determination that the testing laboratory misrepresented a device's meeting such requirements;

(2) the manufacturer has failed to comply with any requirement of this Part or of Part 358 of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York;

(3) substantial evidence exists that devices manufactured, sold, leased, offered for sale or leased, or installed in vehicles do not function in accordance with the specifications in this Part or are easily circumvented or tampered with;

(4) substantial evidence exists that the manufacturer has

not made adequate provision for effective and timely maintenance, inspection, calibration and repair of installed devices;

(5) the manufacturer is no longer in the business of manufacturing devices;

(6) the manufacturer fails to retain the required product liability insurance, including through cancellation or nonrenewal;

(7) the manufacturer has been convicted of a crime or offense related to fraud; or

(8) the ignition interlock device does not meet federal model specifications for breath alcohol ignition interlock devices adopted by NHTSA after the specifications referred to in paragraph (1) of subdivision (c) of this section are adopted.

(h) Notice of an ignition interlock device's certification, discontinuation, suspension and revocation shall be published in the State Register, and shall be provided promptly to the Division of Probation and Correctional Alternatives. The commissioner shall make available a list of certified ignition interlock devices upon request.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.11. Testing of ignition interlock devices**

(a) The department may require a testing laboratory, as defined in section 59.1 of this part, to submit its credentials for department review prior to accepting any report submitted by the testing laboratory in support of an ignition interlock device manufacturer's application for certification.

(b) The testing laboratory shall provide, directly to the department, a detailed report of test data and findings of the ignition interlock device's performance on each standard, generated by the testing laboratory, documenting that at least two representative instruments of an ignition interlock device model have successfully met the requirements of subdivision (c) of section 59.10 of this Part.

(c) The testing laboratory's report shall minimally include: a description of tests performed; data and findings for each test conducted, with numerical readouts as appropriate; a description of the effectiveness of the ignition interlock device's security provisions, if any, for detection and recording of attempted tampering and preventing circumvention; the reliability of the device's data recording features; and a description of the effectiveness of the device over a range of environmental conditions. The report shall include a dated and signed attestation by the person supervising such testing that identifies the ignition interlock device model and manufacturer, and states that all tests on the named device model were conducted in accordance with NHTSA specifications.

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

**Section 59.12. Continued ignition interlock device certification**

(a) An ignition interlock device certification shall remain in effect until:

(1) the manufacturer files a written request for discontinuance;

(2) the department issues to the manufacturer a written notice of suspension or revocation of approval; or

(3) the manufacturer modifies the device so that it does not meet the federal model specifications for breath alcohol ignition interlock devices in effect when it was certified.

(b) No manufacturer who makes an operational modification to a model of an ignition interlock device that has been certified pursuant to this Part shall release the modified device for use pursuant to Vehicle and Traffic Law Section 1198 without having obtained the express approval of the department. Manufacturers shall submit to the department a description of the intended operational modification(s), and the commissioner shall determine either that the existing certification shall continue in effect for the ignition interlock device as modified or that the manufacturer must apply for separate certification for the modified device. For purposes of this section, "operational modification" means any change to product design or function that would or could affect the device's anti-circumvention, anti-tampering or analytical features, as determined by the department.

(c) A manufacturer shall ensure that the department is provided with documentation of current insurance by notifying the department in writing of each renewal of coverage, each change of issuing company, and each change in liability limits.

(d) The department may require manufacturers whose devices are certified pursuant to this Part to periodically renew the certifications. Information required for renewal of certification shall minimally include:

(1) verification that information on file with the department, including, but not limited to, manufacturer's address and contact person, is current;

(2) an attestation that the department has been notified of any operational modification made to the certified model, or that no modification was made; and

(3) documentation of current insurance coverage.

(e) Each device shall be provided with a supply of disposable spit-trap mouthpieces, and the manufacturer shall ensure availability of additional mouthpieces.

(f) A manufacturer shall provide to installation/service providers that install its certified device(s) a sufficient number of labels to label each device installed and replace labels as needed. The label shall contain a notice printed in at least 10-point boldface type, reading as follows: "WARNING—ANY PERSON TAMPERING, CIRCUMVENTING OR OTHERWISE

MISUSING THE DEVICE IS GUILTY OF A MISDEMEANOR AND MAY BE SUBJECT TO CIVIL LIABILITY."

[Current through amendments included in the New York State Register, Volume XXXV, Issue 31, dated July 31, 2013. Effective date: Dec. 7, 2011.]

# APPENDIX 5

# Drug Influence Evaluation Form

**NEW YORK STATE DRUG INFLUENCE EVALUATION**

| | | | |
|---|---|---|---|
| Evaluator | DRE # | Rolling Log # | Evaluator's Agency |
| Recorder/Witness | Crash: ☐ None ☐ Fatal ☐ Injury ☐ Property | | Arresting Officer (Name, ID#) |
| Arrestee's Name (Last, First, Middle) | Date of Birth | Sex / Race | Arresting Officer Agency |
| Date Examined / Time /Location | Breath Results: Test Refused ☐ Results Instrument #: | | Chemical Test: Urine ☐ Blood ☐ Test or tests refused ☐ |
| Miranda Warning Given By: ☐ Yes ☐ No | What have you eaten today? When? | What have you been drinking? How much? | Time of last drink? |
| Time now/ Actual | When did you last sleep? How long? | Are you sick or injured? ☐ Yes ☐ No | Are you diabetic or epileptic? ☐ Yes ☐ No |
| Do you take insulin? ☐ Yes ☐ No | Do you have any physical defects? ☐ Yes ☐ No | | Are you under the care of a doctor or dentist? ☐ Yes ☐ No |
| Are you taking any medication or drugs? ☐ Yes ☐ No | Attitude: | | Coordination: |
| Speech: | Breath Odor: | | Face: |
| Corrective Lenses: ☐ None ☐ Glasses ☐ Contacts, if so ☐ Hard ☐ Soft | Eyes: ☐ Reddened Conjunctiva ☐ Normal ☐ Bloodshot ☐ Watery | Blindness: ☐ None ☐ Left ☐ Right | Tracking: ☐ Equal ☐ Unequal |
| Pupil Size: ☐ Equal ☐ Unequal (explain) | Vertical Nystagmus ☐ Yes ☐ No | Able to follow stimulus ☐ Yes ☐ No | Eyelids ☐ Normal ☐ Droopy |

| Pulse and time | HGN | Left Eye | Right Eye |
|---|---|---|---|
| 1 ___ / ___ | Lack of Smooth Pursuit | | |
| 2 ___ / ___ | Maximum Deviation | | |
| 3 ___ / ___ | Angle of Onset | | |

Convergence

ONE LEG STAND

| | 1st Nine | 2nd Nine |
|---|---|---|
| Cannot keep balance | | |
| Starts too soon | | |
| Stops walking | | |
| Misses heel-toe | | |
| Steps off line | | |
| Raises arms | | |
| Actual steps taken | | |

| L | | R |
|---|---|---|
| ☐ | Sways while balancing | ☐ |
| ☐ | Uses arms to balance | ☐ |
| ☐ | Hopping | ☐ |
| ☐ | Puts foot down | ☐ |

Modified Romberg Balance — approx approx

Walk and Turn Test

| Internal clock estimated as 30 seconds | Describe turn | Cannot do test (explain) | Type of footwear: |
|---|---|---|---|

Draw lines to spots touched

| PUPIL SIZE | Room Light (2.5 – 5.0) | Darkness (5.0 – 8.5) | Direct (2.0 – 4.5) |
|---|---|---|---|
| Left Eye | | | |
| Right Eye | | | |

Nasal area:

Oral cavity:

Rebound Dilation: ☐ Yes ☐ No

Pupillary Unrest: ☐ Yes ☐ No

Reaction to Light:

RIGHT ARM

LEFT ARM

| Blood pressure | Temperature |
|---|---|

Muscle tone: ☐ Normal ☐ Flaccid ☐ Rigid

Comments:

| What drugs or medications have you been using? | How much? | Time of use? | Where were the drugs used? (Location) |
|---|---|---|---|

| Date / Time of arrest: | Time DRE was notified: | Evaluation start time: | Evaluation completion time: | Precinct/Station: |
|---|---|---|---|---|

| Officer's Signature: | DRE # | Reviewed/approved by / date: |
|---|---|---|

Opinion of Evaluator:

| | | | | |
|---|---|---|---|---|
| ☐ Rule Out | ☐ Alcohol | ☐ CNS Stimulant | ☐ Dissociative Anesthetic | ☐ Inhalant |
| ☐ Medical | ☐ CNS Depressant | ☐ Hallucinogen | ☐ Narcotic Analgesic | ☐ Cannabis |

Revised 5/2013

# APPENDIX 6

# Drug Symptom Chart

**DRUG ABUSE RECOGNITION PROGRAM: SYMPTOMOLOGY CHART**

| | HGN | VERT NYST | NON-CONV | PULSE | PUPIL SIZE / REACTION | POSSIBLE EFFECTS | DURATION OF EFFECTS | METHODS OF INGESTION | OVERDOSE SYMPTOMS |
|---|---|---|---|---|---|---|---|---|---|
| ALCOHOL | YES | POSS WITH HIGH B.A. | YES | POSS UP | NEAR NORMAL / SLOW | BLOODSHOT/WATERY EYES, ALCOHOL BEV. ODOR, UNCOOR-DINATED, SLURRED SPEECH, ELEV. B.P. | RAPID ABSORPTION<br>RATE OF METABOLIZATION: .02 B.A. REDUCTION PER HOUR | ORAL | COMA, COLD/ CLAMMY SKIN, RAPID AND WEAK PULSE, TOTAL LOSS OF CONTACT W/WORLD, DEAD ON INC |
| DEPRESSANTS | YES | POSS WITH HIGH DOSE | YES | DOWN | NEAR NORMAL / SLOWED | BLOODSHOT/WATERY EYES, NO ALCOHOL ODOR, UNCOORDI-NATED, SLURRED SPEECH, DROWSY | BARBITURATE: 1-16 HR<br>METHAQUALONE: 4-8 HR<br>TRANQUILIZERS: 4-8 HR<br>CHLORAL HYDRTE: 5-8 HR | ORAL INJECTED | COMA, COLD/ CLAMMY SKIN, RAPID AND WEAK PULSE, TOTAL LOSS OF CONTACT W/WORLD, DEATH |
| INHALANTS | GENERALLY PRESENT BUT DEPENDS ON SUBSTANCE | | | UP | DEPENDS ON SUBSTANCE / NEAR NORMAL | DOOR OF SUBSTANCE, CONFUSED, REDDENED NASAL PASSAGES, WATERY EYES, SNEEZING / COUGHING | VARIABLE (DEPENDS ON SUBSTANCE) | INHALATION | UNCONSCIOUS COMA DEATH |
| PHENCYCLIDINE | YES | YES | YES | UP | NEAR NORMAL / NEAR NORMAL | SLOW SPEECH, MEMO-RY LOSS, AGITATION, BLANK STARE, NON-COMMU NICATIVE, RIGIDITY, CYCLIC BE-HAVIOR, GAIT ATAXIA | ONSET: 1-5 MIN<br>PEAK: 15-30 MINS<br>HALF LIFE: 4-6 HRS<br>NORMALCY: 24-48 HRS | ORAL SMOKED INJECTION ABSORBED INHALATION | VIOLENT BEHAVIOR, PARANOIA, SEIZURES, PSYCHOSIS, HEART FAILURE, DEATH |
| CANNABIS | NO | NO | YES | UP | NEAR NORMAL OR SLIGHT DILATION / NEAR NORMAL | REDDENING OF CONJUNCTIVAE, LACK OF INHIBITIONS, BODY TREMORS, DISORI-ENTED, LACK OF DIVIDED ATTENTION | ONSET: MINUTES<br>PEAK: 20-30 MINS<br>HALF-LIFE: 1-3 HRS<br>NORMALCY: VARIED DUE TO FAT SOLUBILITY | SMOKING ORAL | FATIGUE PARANOIA PSYCHOSIS |
| HALLUCINOGENS | GENERALLY NOT PRESENT DEPENDS ON SUBSTANCE | | | UP | DILATION / SLOWED | TREMORS, HALLUCI-NATIONS, POOR TIME DISTANCE PERCEPT, SYNESTHESIA, FLASHBACKS, PILOERECTION (LSD) | VARIABLE (DEPENDS ON SUBSTANCE) | ORAL SMOKED INHALED INJECTION ABSORBED | LONGER, MORE INTENSE TRIPS, PSYCHOSIS, DEATH |
| NARCOTIC ANALGESICS | NO | NO | NO | DOWN | CONSTRICTION / LITTLE OR NO VISIBLE REACTION | PTOSIS, MUSCLE RELAXATION, COOL TO TOUCH, ITCHING, DRY MOUTH, EUPHORIA, FRW OVER VEIN, CONSTIPATION | HEROIN: 4-6 HRS<br>DEMEROL: 3-4 HRS<br>CODEINE: 3-4 HRS<br>DARVON: 6-12 HRS<br>FENTANYL: 5-21 MINS<br>METHADONE: 22-25 HRS | INJECTION ORAL SNORTING SMOKING | SHALLOW BREATHING, COLD/CLAMMY SKIN, RAPID/WEAK PULSE, RESPIRATORY DEPRESSION, DEATH |
| STIMULANTS | NO | NO | NO | UP | DILATION / SLOWED | RESTLESS, TALKATIVE HYPERFLEXIA, DRY MOUTH, BRUXISM, BODY TREMORS, LOSS OF APPETITE, PARANOIA | COCAINE: 15-90 MINS (DEPENDS ON INGESTION METHOD)<br>METHAMPHETAMINE: 4-8 HRS | ORAL SMOKING SNORTING INJECTION | AGITATION, PARANOIA, CONVULSIONS, PSYCHOSIS, |

# APPENDIX 7

# A Guide to Direct Examination of a Drug Recognition Expert

## A GUIDE TO THE DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT*

By Peter Gerstenzang, Esq.

41 State Street

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*Table of Contents*



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## A GUIDE TO THE DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT

### *Introduction*

In October of 1989, the New York City Department of Transportation STOP-DWI Program sponsored and funded a two-day workshop, the purpose of which was to design a prosecution for the crime of driving while under the influence of drugs. Dr. Ilona Lubman and Linda Irengreene, Esq. of the Department of Transportation organized this program. The workshop was held under the supervision of the Kings County District Attorney's Office and was conducted by six senior prosecutors: Barry Aaron, Esq., Criminal Court, Bureau Chief; Dana Paisinelli, Esq., Supervising Assistant District Attorney, Criminal Court Bureau; Don Berke, Esq., Supervising Assistant District Attorney, Criminal Court Bureau; Mark Schindelheim, Esq., Transit and Auto Crimes Bureau Chief, Joe Petrosino, Esq., Transit and Auto Crimes Deputy Bureau Chief, and Jane Meyers, Esq., Director of Training.

Judge Cliff J. Vanell, who was then an Assistant District Attorney with the City of Phoenix, Arizona's Prosecutor's Office, was invited to attend as a consultant. Judge Vanell is a national expert on the prosecution of driving while under the influence of drugs and has completed the NHTSA curriculum for the Drug Evaluation and Classification Program. He wrote a programmed workbook to guide prosecutors through the Drug Influence Evaluation used by drug recognition experts. In addition to his contributions to the workshop, Judge Vanell designed the format of this trial guide and assisted in the development of its content.

Former Inspector Terrence Randell and Lieutenant Ernest Gormley of the New York City Police Department contributed time, personnel and expertise to this project. Both Inspector

Randell and Lieutenant Gormley had been involved with the drug recognition program since its inception and were directly responsible for the development of this program in New York City.

Six drug recognition experts from the New York City Police Department provided technical advice and assistance. My thanks to Sergeant Joseph Ficarola, Officer John Itzhaki, Officer Michael Pisano, Officer Steve Placido, Officer Steven Stasinski, and Officer Eugene Venezia.

I would also like to acknowledge the contributions of Dr. William J. Closson, Director of Clinical Chemistry and Toxicology, the Brunswick Hospital Center, Inc.; and Henry Boland of the New York State Bureau for Municipal Police who reviewed the guide prior to its publication.

The trial guide that follows is designed to elicit detailed testimony from a drug recognition expert regarding the procedure followed in evaluating a defendant. The guide does not attempt to establish a foundation for obtaining the expert's opinion as to the category of drug the expert concludes has been used by the defendant. Until both the evaluation process and the training given the DREs has been granted judicial recognition in New York State, it is going to be very difficult to qualify a DRE as an expert for the purpose of obtaining his or her opinion. Absent such recognition, a physiologist or some other recognized expert should be called for the purpose of providing an opinion as to the classification of drugs which would produce the symptoms observed by the DRE. The observations of the arresting officer and the Drug Recognition Expert combined with the opinion of an expert witness, and the testimony of the toxicologist as to the specific drug found in the defendant's blood, constitute the People's case.

## DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT

By PETER GERSTENZANG, ESQ.



Q. Would you state your name, rank, shield number and command for the record?

A.

Q. How long have you been employed as a police officer?

A.

Q. I direct your attention to (date of arrest) and ask you if you were working on that date?

A.

Q. What hours were you working?

A.

Q. Who, if anyone, were you working with?

A.

Q. What were the nature of your duties that date?

A.

Q. I direct your attention to the hour of (time officer arrived at the Intoxicated Driver Testing Unit) and ask you to tell the Court where you were?

A. I was at the Intoxicated Driver Testing Unit.

Q. What was your purpose for being there?

A. I am a drug recognition expert and I was there for the purpose of conducting an evaluation.

Q. Who was the subject of that evaluation?

A. (Defendant's name.)

Q. Do you see the individual that was the subject of this evaluation in the courtroom?

A. Yes.

Q. Would you point him out please?

Let the record reflect that the witness has identified the defendant (name).

*DRE DEFINED*

Q. What is a Drug Recognition Expert?

A. A DRE is a person who has been trained in a standardized method of determining whether observable physical impairment and behavior is the result of the use of drugs. If drug use is suspected, the method provides procedures for determining whether the observable impairment is the result of alcohol alone, or whether it is a result of other drugs. The method also provides procedures for determining the category of drugs which is causing the impairment. (Obtained and modified from Phoenix, Arizona Prosecutor's Guide, page 5.)

*DRE TRAINING*

Q. What did the training consist of?

A. The training consisted of 56 hours of classroom training and hands on evaluation of defendants. This was followed by 40 hours of supervised certification training. I was required to conduct and write 15 evaluations under the supervision of a certified drug recognition instructor and I had to correctly evaluate a minimum of four categories of drugs, which were verified by Toxicology. (Phoenix, Arizona Prosecutor's Guide,

page 6)*

Q. What was covered in your classroom training?

A. We were trained to distinguish between seven broad categories of drug groups based on shared symptomatology. We were also trained to do a standard evaluation sequence and to record and document the results of our evaluation on a standardized form which also serves as a checklist for the procedure. Finally, we were trained in how to interpret the results obtained from the evaluation.

Q. What is the basis for grouping drugs into seven categories?

A. We were trained that drugs could be grouped based upon common or shared symptoms.

Q. What are these seven groups?

A.

1) Central nervous system depressants.
2) Central nervous system stimulants.
3) Hallucinogens.
4) Phencyclidine.
5) Narcotic Analgesics.
6) Inhalants.
7) Cannabis.

Q. Were you tested in regard to your qualifications?

A. Yes. I was given a qualifying exam as well as oral and written certification tests. Finally, I was observed by (number of instructors, must be at least 2) instructors who recommended me for certification.

Q. What was the result of that testing?

A. I qualified as a DRE.

Q. Upon being qualified, were you issued any form of certification?

A. Yes.

Q. I show you People's _____ for identification and ask you to tell the court what it is.

A. This is my certification as a Drug Recognition Expert issued by the International Association of Chiefs of Police.

(At this time, I offer People's _____ for identification into evidence.)

Q. How long have you been a Drug Recognition Expert?

A. (Number of years as DRE.)

Q. How many people have you tested using these techniques?

---

*Current minimum requirements are in flux. These were the NYPD standards as of June 1989. The International Association of Chiefs of Police (IACP), the National Certifiers of DRE's have adopted minimum standards which require 12 evaluations in three categories. Each police agency is encouraged to exceed the minimum standards.

A. (Number of people tested.)

Q. Did you perform a drug evaluation of the defendant?

A. Yes I did.

Q. How many different parts are there to the evaluation of a person to determine whether they are under the influence of a drug?

A. There are 8 basic parts of the examination.

Q. What are the evaluation procedures?

A.

(1) Breath alcohol test.
(2) Interview of the arresting officer.
(3) Preliminary assessment of a person's speech, breath, appearance, demeanor, behavior.
(4) A two part eye examination, the first part consisting of examining the subject's eyes for jerking movement, tracking ability, and ability to converge; the second part consisting of examining the subject's eyes for pupil size and the effect of light on the pupils.
(5) Psycho-physical evaluation of the subject based on divided attention tests.
(6) Examination of the subject's vital signs (blood pressure, pulse rate and temperature).
(7) Examination of the subject for drug administration sites. This consists of an inspection of the subject's nose and mouth for signs of drug ingestion; and examination of the subject's arms and neck for signs of drug ingestion and muscle tension.
(8) Obtaining urine sample.

*DRUG EVALUATION PROCEDURE*

1. Breath Alcohol Test

Q. What was the first part of that evaluation?

A. The first is a breath alcohol test to determine whether alcohol is the cause or contributing factor for the physical impairment of the defendant.

Q. What type of breath alcohol test was performed?

A. (Possible answers: Alco-Sensor, Breathalyzer, Intoxilyzer or Intoximeter 3000) [Foundation may or may not be required where evidence indicates that alcohol was not a cause or contributing factor to the impairment of the defendant]. Before eliciting testimony as to negative Alco-Sensor test *at trial*, see *People v. Thomas*, 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dept., 1986), aff'd 70 N.Y.2d 823, 523 N.Y.S.2d 437, 517 N.E.2d 1323 (1987); also see *People v. Salino*, 139 Misc.2d 386, 527 N.Y.S.2d 169 (1988) where New York City Criminal Court holds that negative breath alcohol test neither relevant nor admissible.

Q. What if anything did the breath alcohol test indicate as to

whether alcohol was the cause or contributing factor to the physical impairment of the defendant?

A. The test indicated that alcohol was/was not a cause or contributing factor to the physical impairment of the defendant.

2. Interview of Arresting Officer

Q. What was the second component of the test you performed on the defendant?

A. The second component was an interview of the arresting officer as to his observations of the defendant.

Q. Was this done?

A. Yes.

Q. Did you obtain the officer's observations?

A. Yes. (Elicit fact that you obtained his observations, i.e., something that you did; not something that the arresting officer said which is hearsay. Alternatively, argue that you are not offering the contents of the officer's observations, merely proof that the officer's observations were obtained as part of the procedures. Hopefully, arresting officer will have already testified as to his observations.)

3. Preliminary Questioning

Q. What was the third part of the test?

A. The third part consists of preliminary questioning. These are questions asked of the defendant and observations made of the defendant as he answers these questions.

Q. What questions did you ask him?

A. I don't recall them verbatim as I sit here. I followed our drug evaluation form which contains the questions.

Q. Would it refresh your recollection of the questions to refer to the drug evaluation form?

A. Yes it would. (Your Honor, I request that the witness be allowed to refresh his recollection by referring to the drug evaluation form. Mark form for identification.)

Q. I show you People's _____ for identification and ask if this is the drug evaluation form you are referring to?

A. Yes.

Q. Officer, would you please refer to People's _____ for identification and tell us the questions you asked the defendant and the defendant's answers.

A.

(1) What time is it now?
Defendant's answer: _____

(2) When did you sleep last?
Defendant's answer: _____

(3) How long?
Defendant's answer: _____
(4) Do you take insulin?
Defendant's answer: _____
(5) Are you taking any medication or drugs?
Defendant's answer: _____
(6) What have you eaten today?
Defendant's answer: _____
(7) When did you eat?
Defendant's answer: _____
(8) Are you sick or injured?
Defendant's answer: _____
(9) Do you have any physical defects?
Defendant's answer: _____
(10) What have you been drinking?
Defendant's answer: _____
(11) How much have you been drinking?
Defendant's answer: _____
(12) Are you a diabetic or epileptic?
Defendant's answer: _____
(13) Are you under the care of a doctor or dentist?
Defendant's answer: _____

Q. What if any observations did you make of the defendant while he was speaking?

(1) Speech?
(2) Breath odor?
(3) Face?

### 4. Eye Examinations

#### A. Eye Movements

Q. What was the fourth test that you performed?

A. The next portion of the test is observing how the defendant's eyes move. (Avoid use of technical terminology such as "horizontal gaze nystagmus.")

Q. How is this performed?

A. This test is performed by having the defendant follow a moving object with his eyes for the purpose of seeing whether the eyes move smoothly or with a jerking motion?

##### i. Smooth Pursuit

Q. How is this test performed?

A. There are five parts to this test. The first part is simply moving an object, usually a pen, from a point near the person's nose outwards towards the side of his face so that the eyeball follows it from one side of the eye to the other. (Have witness demonstrate various motions with pen throughout testimony.)

Q. Did you perform this part of the test on the defendant?

A. Yes I did.

Q. Which eye did you do first?

A. I did the left eye.

Q. What if any observations did you make of the left eye in the performance of this test?

A. As I moved the pen from one side of his left eye to the other, his eye moved in a jerky (or smooth motion).

Q. Did you perform this part of the test on the defendant's right eye?

A. Yes I did.

Q. What if any observations did you make of the right eye?

A. As I moved the pen from one side of his right eye to the other, his eye moved in a jerky (or smooth motion).

ii. Maximum Deviation

Q. What is the second part of this test?

A. The second part of this test is to get the defendant to follow the pen so that his left eyeball moves to the outer corner of his eye. You hold the pen steady and see if the left eye jerks while it is at that position.

Q. Did you perform this portion of the test on the defendant?

A. Yes I did.

Q. How long did you have him hold his eye at the outer corner?

A. About four seconds.

Q. What did you observe?

A.

Q. Did you perform this part of the test on the defendant's right eye?

A. Yes I did.

Q. What did you observe?

A.

iii. Onset of Jerking

Q. What is the third part of this test?

A. The third part is checking to see *if* and at what angle with the nose the eye starts to jerk.

Q. How is this portion of the test performed?

A. This is done by placing the pen about 15 inches from the defendant's nose and slowly moving the pen toward the outer corner of his eye. I start with the left eye and watch it closely for the first sign of jerking. If I see any jerking, I stop moving the pen and hold it steady. I make sure that the eye really is jerking. If it is not, the procedure is to start moving the pen

further towards the outer portion of the eye and watch for jerking. If there is jerking, I locate the point at which the jerking begins and estimate the angle of this point with the defendant's nose.

Q. Did you perform this portion of the test in regard to the defendant's left eye?

A. Yes I did.

Q. What did you observe?

A.

Q. Did you perform this portion of the test in regard to the defendant's right eye?

A. Yes I did.

Q. What did you observe?

A.

iv. Vertical Movement

Q. What was the fourth eye test you performed?

A. This test involves having the defendant move his eyes up and down while holding his head still. Instead of holding the pen up and down in front of his eyes, I held the pen sideways and asked him to look at the middle ring that divides the top of the pen from the bottom of the pen. I then moved the pen straight up and then down and watched how his eyes followed the pen. I looked to see if there was any jerkiness in his eyes as he followed the pen.

Q. Did you perform this test upon the defendant?

A. Yes I did.

Q. What did you observe?

A.

B. Eye Convergence

Q. What is the fifth part of the eye test?

A. The fifth part of the eye test was done by holding the pen about 15 inches in front of the defendant's face with the tip of it pointing at his nose. The defendant was asked to hold his head still and follow the pen with his eyes. Keeping the pen about 15 inches from the defendant's nose, I moved the pen in a slow circle. Once I determined that the defendant was following the pen as I moved it, I brought it slowly and steadily in towards the bridge of his nose. I did this to see whether or not both eyes would move together and converge at the bridge of his nose.

Q. What were the results of this test?

A. (Answer).

C. Pupil Size*

Q. What was the next part of the test?

A. Observing whether the defendant's pupils were of equal size.

Q. How did you determine this?

A. I estimated the defendant's pupil size using an eye gauge that has different sizes of pupils. (Identify and offer the gauge into evidence.)

Q. How does the eye gauge work?

A. The eye gauge has a series of dark circles, with diameters ranging from 1.0 mm to 9.0 mm, in half millimeter increments. The eye gauge is held up along side the defendant's eye and the gauge is moved up or down until I located the circle closest in size to the defendant's pupil.

Q. What was the result of this test?

A. (Result of this test.)

D. Pupil Reaction

Q. What was the next part of the examination?

A. The next part is called the dark room examination.

Q. What is the dark room examination?

A. These are observations of the size of the defendant's pupils at various levels of light.

Q. What were the different levels of light that you used?

A. We estimated the pupil size at room light, near total dark, indirect light, and direct light.

i. Room Light

Q. How was the room light portion of this test performed?

A. The test was performed by determining the size of the defendant's pupils in room light.

Q. What were the results of the room light portion of the evaluation?

A. (Detail results.)

ii. Darkness

Q. How was the near total darkness portion of the evaluation conducted?

A. The defendant was taken into a room which was almost completely dark. There was a waiting period of 90 seconds to allow both the defendant's and my eyes to adapt to the dark. Then the defendant's eyes were examined by use of a penlight. I covered the tip of the penlight with my finger and thumb so that only a reddish glow and no white light

*Usually performed during the preliminary examination.

emerged. Holding the glowing tip of the penlight, I moved the light up towards the defendant's left eye until I could see the pupil, separate and apart, from the colored portion of the eye or the iris. I held the tip of the penlight, brought the eye gauge up alongside the defendant's left eye and located the circle that was closest in size to the pupil as it appeared in the dark room. I then repeated this procedure on the defendant's right eye.

Q. What were the results of this portion of the examination?

A. (Detail results of evaluation.)

iii. Indirect

Q. How was the indirect light portion of the evaluation conducted.

A. Upon completion of the near total darkness portion of the exam, I uncovered the tip of the penlight and shone it across the defendant's left eye so that the light just barely eliminated the shadow from the ridge of his nose. I made sure that the light did not shine directly into the defendant's eye, but rather across it. I held the penlight in that position and brought the eye gauge up alongside the defendant's left eye. I located the circle that came closest to the size of the defendant's pupil and repeated the process on the defendant's right eye.

Q. What were the results of this portion of the evaluation?

A. (Detail results of evaluation.)

iv. Direct

Q. How was the direct light portion of the evaluation conducted?

A. For the direct light portion of the examination, I left the tip of the penlight uncovered and brought it from the side of the defendant's face and shone it directly into the defendant's left eye. I held the penlight in that position and brought the eye gauge up alongside the left eye and found the circle closest in size to the pupil. I then repeated that procedure for the defendant's right eye. The results of all four examinations were recorded.

Q. What were the results of this portion of the evaluation?

A. (Detail results of evaluation.)

5. Psycho-physical Tests

Q. What is the fifth part of the DRE examination?

A. The fifth part is the divided attention or psycho-physical tests.

Q. How many parts are there to this part of the examination?

A. There are four psycho-physical tests.

Q. Are these psycho-physical tests used exclusively for drug rec-

ognition evaluations?

A. No.

Q. Under what other circumstances are they used?

A. They are standardized field sobriety tests which are used in cases involving alcohol as well as drugs.

Q. In addition to the drug recognition evaluation and training, have you received any other training concerning these psycho-physical tests?

A. Yes, (detail training you received.)

A. Romberg Balance Test

Q. What was the first psycho-physical test that was performed upon the defendant?

A. The first was the Romberg Balance test.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?

A. Yes.

Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated it for the defendant on the date of arrest?

A. The defendant was asked to stand straight with his feet together and his arms down at his sides. He was told to stay in this position while he was being given the instructions. Part of the test is to see if he would follow that instruction and not try to start the test until told to begin. The defendant was then asked if he understood the instructions. The defendant was then instructed that when told to "begin" he was to tilt his head back slightly and close his eyes. Once he had done this, he was told that he must keep his head tilted back with his eyes closed until *he thought* 30 seconds had gone by.

Q. What is the purpose of this?

A. The purpose is to observe his balance and his perception of time. The defendant was told that when he thought 30 seconds had gone by, he was to immediately put his head forward and open his eyes. The defendant was once again asked if he understood and then he was told to begin.

*ROMBERG BALANCE TEST CRITERIA*

Q. What did you look for when the defendant was performing this test?

A. I looked to see if he was standing still with his feet together.
—I looked for body tremors.
—I looked to see if there were eyelid tremors.
—I looked for swaying and whether the swaying was from front to back, side to side, and how many inches from the center he was swaying.
—I looked for muscle tension, whether his muscles were rigid

or relaxed.

—I also looked for any statements or sounds that he made while he was performing this test.

—Finally, I recorded the number of seconds that he stood with his head tilted back and his eyes closed and compared that with the 30 seconds that he was told to stand there.

Q. How did the defendant perform this test?

A. (Answer).

B. Walk and Turn Test

Q. What was the next psycho-physical test?

A. The next psycho-physical test was the walk and turn test.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test for the defendant?

A. Yes.

Q. Would you please explain and demonstrate the test for the court and jury in the same manner that you did for the defendant on the date of arrest?

A. This test was performed by the defendant being first given specific instructions in regard to walking a line. He was told to place his right foot on the line ahead of his left foot with the heel of the right foot against the toe of the left foot.

— He was told to put his arms down against his sides and keep them there throughout the test.

— He was told to hold this position until he was given the instructions for the performance of the test. I emphasized to the defendant that he should not start walking until I told him to "*begin*."

— At this time, I asked the defendant if he understood my instructions.

— He indicated that he did.

*WALK* — I instructed him that when I told him to "*begin*," he was to take nine heel to toe steps down the line and turn around and take nine heel to toe steps back on the line.

— He was told that every time he took a step, he was to place his heel against the toe of the other foot. (Have witness demonstrate this test.)

*TURN* — He was told that when the ninth step had been taken, he was to leave his front foot on the line and turn around taking a series of small steps with the other foot. (Have witness demonstrate a proper turn.)

*WALK* — He was reminded that after turning, he was to take another nine heel to toe steps back up the line.

*COUNT*— Finally, he was told to watch his feet as he walked and to count off the steps out loud: 1-9.

— His final instruction was that once he started walking, he was to keep walking until the test had been completed.
— Again, before I told him to begin, I asked him if he understood these instructions and he indicated that he did.

Q. Did he perform this test?

A. Yes he did.

*WALK AND TURN TEST CRITERIA*

Q. As he performed this test, what did you look for?

A. There were eleven basic things that I looked for:

(1) Whether he kept his balance during the instructions.
(2) Whether he started walking too soon.
(3) Whether he stepped off the line while he was walking.
(4) Whether he raised his arms while he was walking.
(5) Whether he missed walking heel-to-toe.
(6) Whether he stopped walking.
(7) Whether he took the wrong number of steps.
(8) Whether he turned improperly.
(9) Whether he had body tremors.
(10) Whether his muscle tension was rigid, relaxed, or normal.
(11) Any statements or sounds he made while he performed the test.

Q. What were your observations of the defendant in the performance of this test?

A. (Answer).

C. One Leg Stand Test

Q. What was the third psycho-physical test that you performed?

A. The third test was the one-leg stand.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?

A. Yes.

Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated for the defendant on the date of arrest?

A. In this test, the defendant was asked to stand straight with his feet together and his arms down at his sides. Again, he was told to maintain this position while he was given the instructions and it was emphasized that he was not to start the test until he was told to "*begin*."

—At this point, he was asked if he understood?
—Then he was told that when he was instructed to "*begin*," he was to raise his right foot in a stiff leg manner and hold the

foot about six inches off the ground with the toes pointed out. (Have witness demonstrate proper stance.)
—The defendant was told that he must keep his arms at his sides and must keep looking directly at his elevated foot while counting out 30 seconds as follows:
"one-thousand-and-one, one-thousand-and-two, etc.
—He was again asked if he understood and was told to *"begin."*
—After he completed the test, he was told to perform it again while standing on his right foot.

*ONE LEG STAND TEST CRITERIA*

Q. What did you look for when the defendant performed this test?

A. There were eight things I looked for:

1) The first was whether or not he raised his arms.
2) Whether he swayed.
3) Whether there was any hopping on one foot.
4) Whether he put the foot that he had raised down.
5) I looked to see if he was standing still and straight during the instructions.
6) I looked to see if there were any body tremors.
7) Whether the defendant's muscles were more rigid or more relaxed.
8) Finally I noted any statements or sounds that the defendant made while performing the test.

*DEFENDANT'S PERFORMANCE*

Q. What observations did you make of the defendant as he performed this test?

A.

D. Finger to Nose Test

Q. What was the fourth psycho-physical test that was performed?

A. The fourth psycho-physical test performed was the finger to nose test.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?

A. Yes.

Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated it for the defendant on the date of arrest?

A.

—In this test, the defendant was told to place his feet together and stand straight.
—He was then told to extend his arms straight towards me and to make a fist with each hand. (Officer should be on his feet demonstrating this.)

—The defendant was then told to extend the index finger from each hand. He was then told to put his arms down at his sides with the index fingers extended.
—The defendant was then told that when he was told to *"begin,"* he was to tilt his head back slightly and close his eyes.
—He was then told that when he was instructed to *"begin,"* he was to bring the tip of the index finger up to the tip of his nose. (Demonstrate it while it is being explained.)
—The defendant was further told that as soon as he touched the tip of his nose, he was to return his arm to his side.
—The defendant was told that when he was told *"RIGHT,"* he was to move the right-hand index finger to his nose; when he was told *"LEFT,"* he was to move the left-hand index finger to his nose.
—At this point, the defendant was asked if he understood the instructions.
—The defendant was then told to tilt his head back and close his eyes and to keep them closed until he was told to open them.
—The defendant was then told the following sequence: "LEFT . . . RIGHT . . . LEFT . . . RIGHT . . . RIGHT . . . LEFT."

*FINGER TO NOSE TEST CRITERIA*

Q. What did you look for when the defendant performed this test?

A.

—Whether the defendant's fingertips touched his nose or other parts of his face.
—Whether his body swayed.
—Whether there were any body tremors.
—Whether there were eyelid tremors.
—The defendant's muscle tension.
—Any statements or sounds made by the defendant while performing the test.

Q. Did you make a record of the defendant's performance of this test?

A. Yes. I noted on the evaluation form exactly where each fingertip touched the defendant's face. I also indicated on the form which finger was actually used by the defendant each time.

Q. What were your observations of the defendant in the performance of this test?

A. Detail to the jury the manner in which the defendant performed the test.

E. Videotape

The New York City Police Department as well as some other law enforcement agencies videotape the performance of the psycho-physical tests. If a videotape exists, it may be offered into evidence as a fair and accurate representation of the defendant's

performance at the time and date in issue.

Q. Officer, was the defendant's performance of the four physical tests recorded on videotape.

A. Yes.

Q. I show you People's _____ for identification and ask you to tell the Court what it is.

A. This is the videotape of the defendant's performance of the physical tests.

Q. Prior to your taking the stand, did you view this videotape?

A. Yes.

Q. Does the videotape fairly and accurately depict the defendant's performance of the physical tests on (date of arrest)?

A. Yes.

At this time, I offer People's _____ for identification into evidence and request that the jury be allowed to view the videotape.

6. Vital Signs

Q. What is the sixth part of the examination?

A. The sixth part of the examination is called the vital signs.

Q. What were the vital signs that you checked?

A. I checked pulse rate, blood pressure and temperature.

A. Pulse

Q. How did you check the pulse rate?

A. I checked the pulse by placing my fingers on the defendant's skin next to an artery, pressed down, and felt the artery expand as the blood surged through. Each surge was a pulse and I counted the pulses that occurred in one minute and that gave me the pulse rate.

Q. How did you know that you were feeling an artery rather than a vein?

A. I knew because we were trained that you can't feel the surge or pulse in the vein.

Q. How often did you take the defendant's pulse?

A. I took his pulse three times. I took it during the preliminary examination. I took it following the finger to nose test, and I took it at the time that I checked the blood pressure and temperature.

B. Blood Pressure

Q. What was the next test?

A. The next test was blood pressure.

Q. What is blood pressure?

A. Blood pressure is the force that the circulating blood exerts on the walls of the arteries.

Q. What, if anything, did you use to measure blood pressure?

A. I used an instrument called a sphygmomanometer.

Q. What, if any, training have you had in the use of this instrument?

A. (Detail training.)

Q. How did you use this device to determine the defendant's blood pressure?

A. This device has a special cuff that was wrapped around the defendant's arm and inflated with air. As the air was pumped in, the cuff squeezed tightly on the arm. When the pressure got high enough, it squeezed the artery completely shut so that no blood flowed through it. The next thing I did was to slowly release the air in the cuff so that the pressure on the arm and on the artery started to drop. The pressure continued to drop until blood once again started to flow through the artery. Blood starts to flow once the pressure inside the artery overcomes the pressure outside the artery. At this point, blood will spurt through the artery each time the heart contracts. This is called the systolic level and the pressure at which this occurs is called systolic pressure. I continued to relax the air pressure in the cuff until it dropped down to the point where the blood started to flow continuously through the artery. This level is called the diastolic level and the pressure reading at this point is called diastolic pressure.

Q. How did you know when the blood started to spurt, as opposed to when it was flowing?

A. I listened to the spurting blood using a stethoscope. When there is no blood flowing, you hear nothing through the stethoscope. When you release the air from the cuff slowly, you will hear a spurting sound when the blood starts to spurt through the artery. As you continue to allow the air pressure to drop, the surges of blood become steadily longer. When you reach the diastolic pressure, the blood flows steadily and all sounds cease.

Q. What did you determine the defendant's blood pressure to be when you performed this test?

A. Defendant's blood pressure was _____.

C. Temperature

Q. What was the final test?

A. The final test was temperature. I took the defendant's temperature using an electronic thermometer. Each time we test someone, we use a fresh disposable mouthpiece.

Q. What did you determine the defendant's temperature to be?

A.

7. Drug Administration Sites

A. Nasal and Oral Examination

Q. Prior to leaving the dark room, what if any other examina-

tion did you do?

A. I checked the defendant's nose and mouth.

Q. What did you look for?

A. I looked for signs that the defendant had been using drugs.

Q. What kinds of things did you look for?

A. Different categories of drugs will have different effects. For example, certain kinds of drugs will irritate the inside of the nose and/or leave residue around, and in the mouth and nose. Some drugs will cause the nose to run and some substances will leave a distinctive odor on the defendant's breath and around the nasal area. On the other hand, the absence of any such signs can, also, be helpful in doing an evaluation.

Q. What if any observations did you make of the defendant's mouth and nose?

A. (Answer.)

B. Arm and Neck Examination

Q. What is the next part of the examination?

A. This was a check of the defendant's arms and neck to see if he had needle marks and to determine whether his muscles were rigid, normal or relaxed.

Q. Did you do that in this case?

A. Yes I did.

Q. What did you do?

A. I ran my hands over the defendant's arms and neck feeling for bumps which would indicate needle marks. I have an instrument which is basically a lighted magnifying glass which I use to examine any bumps that I find. The instrument helps me to determine whether or not the bump is a needle mark.

Q. How do you tell whether bumps are the results of the use of a needle or the result of some other cause?

A. (Detail training in this regard.)

Q. What were the results of this part of the examination?

A.

8. Urine Sample

Q. What is the tenth part of the evaluation?

A. The tenth part of the evaluation consists of obtaining a urine sample from the defendant for submission to a laboratory.

Q. Did you obtain a urine sample from the defendant?

A. Yes I did.

Q. How was this done?

A. The defendant was taken into the bathroom and a urine sample was obtained by having the defendant urinate into a

container which is used for this purpose.

Q. Did you witness the taking of the sample?

A. Yes I did.

Q. What did you do with the urine sample after you obtained it?

A. The plastic containers of urine were sealed with tape and my initials as well as the job number were placed on it. The containers were placed in an envelope and taken to headquarters where they were placed in a refrigerator.

Q. What happened to the urine sample after it was logged in at your headquarters?

A. It was transported to the laboratory for analysis.

Q. Who transported it?

A. Officer Jones, bonded courier, etc.

Q. Did this complete your evaluation of the defendant?

A. Yes it did.

Q. During the course of this evaluation, did you have any conversation with the defendant?

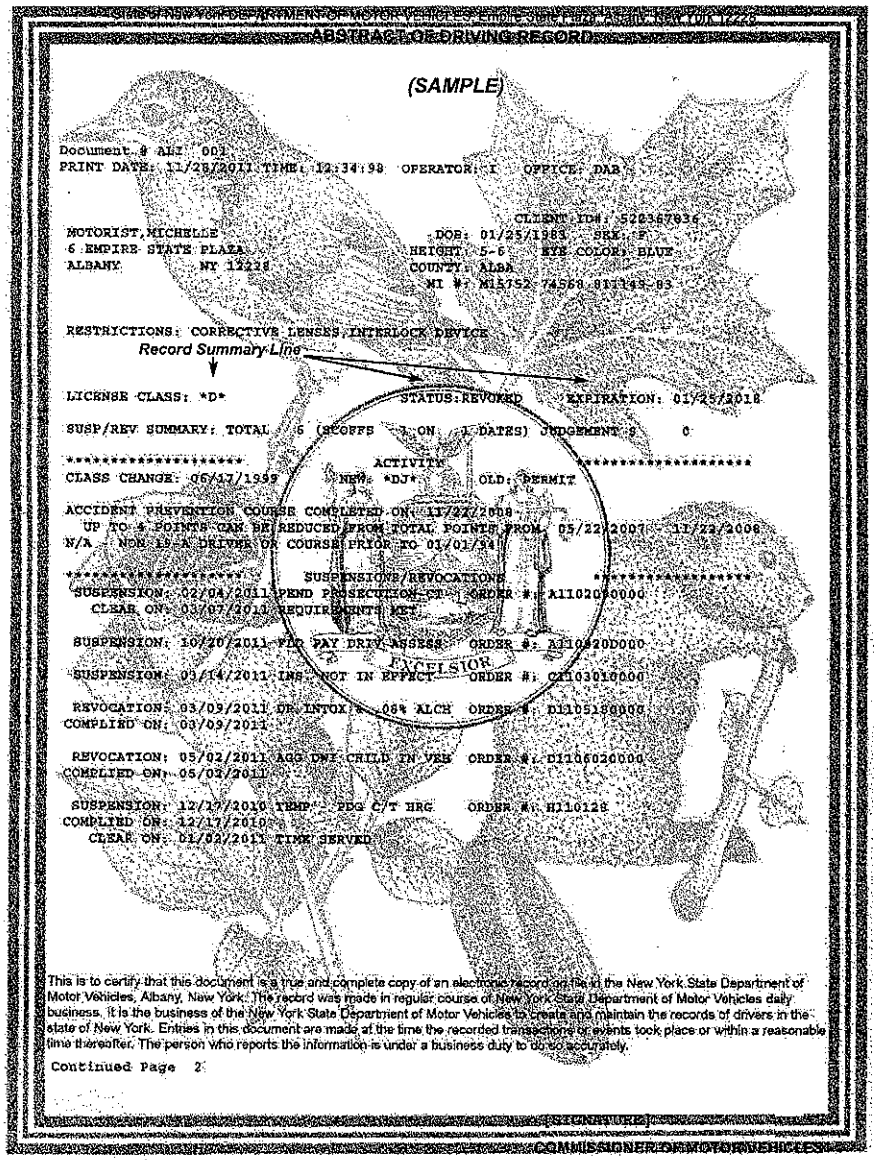
A. Yes I did.

Q. Would you detail for the court and jury the contents of that conversation?

A. Admissions made by the defendant. (*Miranda* warnings are usually read by the arresting officer and evidence in that regard would normally be established prior to the DRE's testimony).

# APPENDIX 10

# Department of Motor Vehicles' Mock Abstract of Driving Record



State of New York DEPARTMENT OF MOTOR VEHICLES, 6 Empire State Plaza, Albany, NY 12228

ABSTRACT OF DRIVING RECORD

(SAMPLE)

Document # ALI: 001
PRINT DATE: 11/28/2011 TIME: 12:34:98 OPERATOR: 1 OFFICE: DAB

CLIENT ID#: 520367836

MOTORIST,MICHELLE DOB: 01/25/1963 SEX: F
6 EMPIRE STATE PLAZA HEIGHT: 5-6 EYE COLOR: BLUE
ALBANY NY 12228 COUNTY: ALBA
MI #: MI5752 74568 811143 03

RESTRICTIONS: CORRECTIVE LENSES,INTERLOCK DEVICE

Record Summary Line

LICENSE CLASS: *D* STATUS:REVOKED EXPIRATION: 01/25/2018

SUSP/REV SUMMARY: TOTAL 6 (SCOFFS 3 ON 1 DATES) JUDGEMENT 0 0

********** ACTIVITY **********
CLASS CHANGE: 06/17/1999 NEW: *DJ* OLD: PERMIT

ACCIDENT PREVENTION COURSE COMPLETED ON: 11/22/2008
UP TO 4 POINTS CAN BE REDUCED FROM TOTAL POINTS FROM: 05/22/2007 - 11/22/2008
N/A - NON-CDL DRIVER OR COURSE PRIOR TO 01/01/94

********** SUSPENSIONS/REVOCATIONS **********
SUSPENSION: 02/04/2011 PEND PROSECUTION-CT ORDER #: A1102040000
CLEAR ON: 03/07/2011 REQUIREMENTS MET

SUSPENSION: 10/20/2011 FTC PAY DRIV ASSESS ORDER #: A1104020D000

SUSPENSION: 03/14/2011 INS NOT IN EFFECT ORDER #: C1103010000

REVOCATION: 03/09/2011 DE INTOX/.08% ALCH ORDER #: D1105180000
COMPLIED ON: 03/09/2011

REVOCATION: 05/02/2011 AGG DWI CHILD IN VEH ORDER #: D1106020000
COMPLIED ON: 05/03/2011

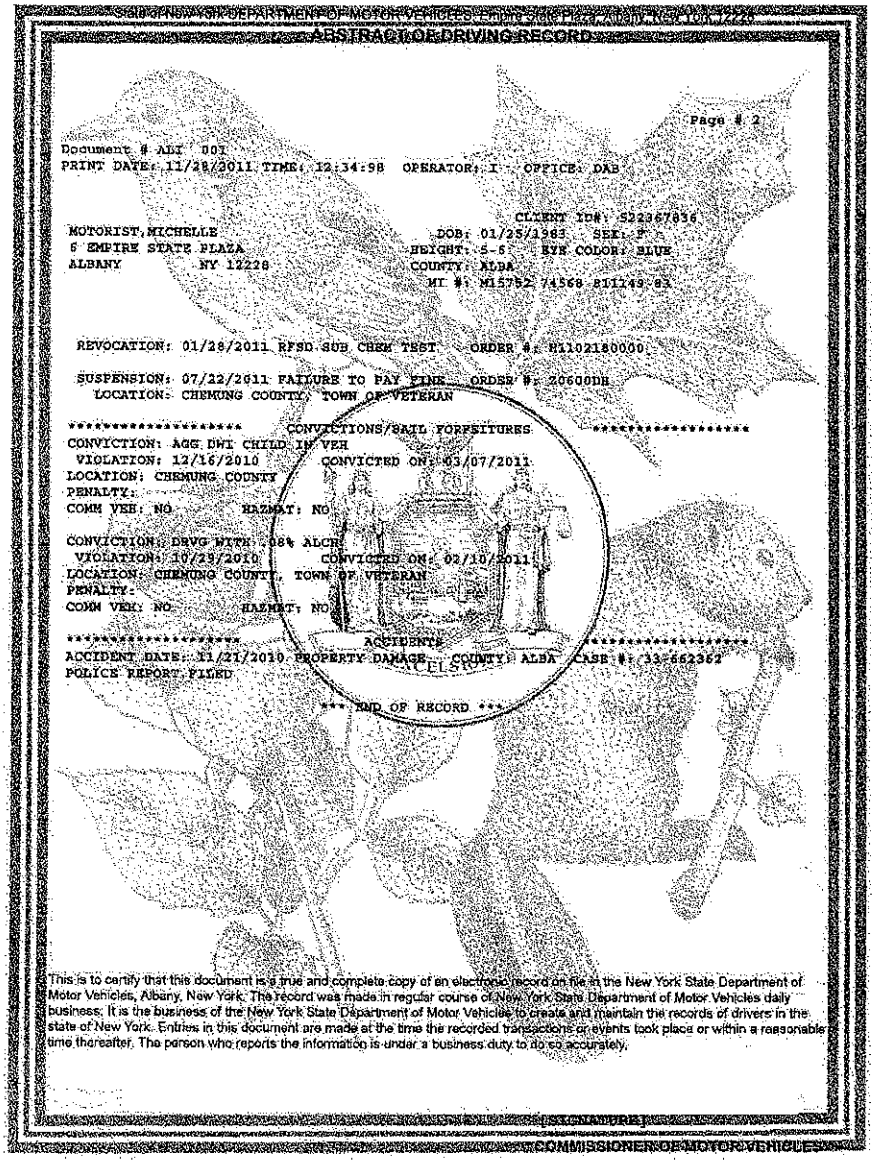
SUSPENSION: 12/17/2010 TEMP PDQ C/T HRG ORDER #: H110128
COMPLIED ON: 12/17/2010
CLEAR ON: 01/02/2011 TIME SERVED

EXCELSIOR

This is to certify that this document is a true and complete copy of an electronic record on file at the New York State Department of Motor Vehicles, Albany, New York. The record was made in regular course of New York State Department of Motor Vehicles daily business. It is the business of the New York State Department of Motor Vehicles to create and maintain the records of drivers in the state of New York. Entries in this document are made at the time the recorded transactions or events took place or within a reasonable time thereafter. The person who reports the information is under a business duty to do so accurately.

Continued Page 2

[SIGNATURE]
COMMISSIONER OF MOTOR VEHICLES



STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES Empire State Plaza, Albany, New York 12228

ABSTRACT OF DRIVING RECORD

Page # 2

Document # ADI 001
PRINT DATE: 11/28/2011 TIME: 12:34:58 OPERATOR: I OFFICE: DAS

CLIENT ID#: S22367836

MOTORIST,MICHELLE DOB: 01/25/1983 SEX: F
6 EMPIRE STATE PLAZA HEIGHT: 5-5 EYE COLOR: BLUE
ALBANY NY 12228 COUNTY: ALBA
MI #: M15752 74568 811149 83

REVOCATION: 01/28/2011 RFSD SUB CHEM TEST ORDER #: M1102180000

SUSPENSION: 07/22/2011 FAILURE TO PAY FINE ORDER #: 20600DB
LOCATION: CHEMUNG COUNTY, TOWN OF VETERAN

********** CONVICTIONS/BAIL FORFEITURES **********
CONVICTION: AGG DWI CHILD IN VEH
VIOLATION: 12/16/2010 CONVICTED ON: 03/07/2011
LOCATION: CHEMUNG COUNTY
PENALTY:
COMM VEH: NO HAZMAT: NO

CONVICTION: DRVG WITH .08% ALCBF
VIOLATION: 10/29/2010 CONVICTED ON: 02/10/2011
LOCATION: CHEMUNG COUNTY, TOWN OF VETERAN
PENALTY:
COMM VEH: NO HAZMAT: NO

********** ACCIDENTS **********
ACCIDENT DATE: 11/21/2010 PROPERTY DAMAGE COUNTY: ALBA CASE #: 13-662362
POLICE REPORT FILED

*** END OF RECORD ***

This is to certify that this document is a true and complete copy of an electronic record on file in the New York State Department of Motor Vehicles, Albany, New York. The record was made in regular course of New York State Department of Motor Vehicles daily business. It is the business of the New York State Department of Motor Vehicles to create and maintain the records of drivers in the state of New York. Entries in this document are made at the time the recorded transactions or events took place or within a reasonable time thereafter. The person who reports the information is under a business duty to do so accurately.

COMMISSIONER OF MOTOR VEHICLES

## DESCRIPTION OF ABSTRACT OF DRIVING RECORD

Form DS-242 (Abstract of Driving Record) shows basic licensing information. Most suspensions and revocations are displayed on an abstract while they are open and an additional four years from the date they are cleared. Suspensions for refusal to submit to a chemical test are displayed for five years from the date of suspension. Accidents are displayed for the remainder of the calendar year of the accident date, plus three years. Most traffic convictions will display for the remainder of the calendar year of the conviction date, plus three years. Convictions for operating a motor vehicle under the influence of alcohol or drugs are displayed for ten years from the conviction date. Some serious violations, such as vehicular homicide, are displayed permanently.

Each abstract identifies the motorist, gives the class of license, the current license status, the license expiration date and any restrictions and/or endorsements that limit or expand the driving privilege.

**THE RECORD SUMMARY LINE SHOULD ALWAYS BE USED TO DETERMINE THE CURRENT STATUS OF THE DRIVER'S LICENSE OR DRIVING PRIVILEGE.**

The **Record Summary Line** is printed just above the "Activity" section. It shows the class of license or permit that is held, and whether the status is Valid, Revoked, Suspended, Cancelled, Surrendered or Approved (for future license privileges after a revocation). It will also show the type of document the motorist has (a permit, a license, a conditional or restricted use license, or a non-driver ID card) and when the license/permit/ID card expires. If the individual has not had a NY driver license or non-driver ID, that information appears on the Record Summary Line as NO NY LICENSE. There will be more than one Record Summary Line if the motorist has a valid license in one class and a valid permit in another class. It is also possible to have a valid non-commercial license while the commercial privilege (CDL) is revoked or suspended (this is shown on more than one Record Summary Line).

Other license information is grouped in separate sections by action type. Each section is separated by a line of asterisks and a heading that identifies the information that is in each section. The **ACTIVITY** section is first, followed by **SUSPENSIONS/REVOCATIONS, CONVICTIONS/BAIL FORFEITURES** and **ACCIDENTS.**

The **ACTIVITY** section of the record shows: accident prevention course completion and the period of time for which the point reduction applies; "prohibits" (which prevent transactions from taking place until requirements are met); CDL history information; reciprocity information (a NY license issued on the basis of a valid license presented from another jurisdiction); information that the NY license was surrendered to another jurisdiction; special licenses or privileges (such as conditional or restricted use); and various notes such as stolen license information.

The **SUSPENSIONS/REVOCATIONS** section shows the type of action imposed (suspension or revocation) and the date it took effect, the reason for the suspension or revocation, and the Order number of the suspension or revocation. Suspensions/revocations for moving violations and all reasons other than scofflaws (failure to answer a traffic ticket or to pay a fine) are grouped together and listed in Order number sequence, so they are not always in chronological order. Suspensions for scofflaws are shown after the moving violations and are listed by the effective date of the suspension; the most recent appears first. Two additional fields may be shown: "Complied On" and "Clear On". "Complied On" refers to the date on which all license documents were surrendered. "Clear On" refers to the date on which the suspension/revocation was terminated; the date will be followed by the reason for the termination.

The **CONVICTIONS/BAIL FORFEITURES** section shows: the type of violation the driver was convicted of; the date of the violation; the date of the conviction; the location where the violation occurred; and the amount of the fine ("Penalty"). Additional information that may be shown includes sentence length in days, whether a commercial vehicle was involved and, depending on the violation, the number of points that accompany the violation.

The **ACCIDENTS** section shows: the date of the accident; whether there was a fatality, personal injury and/or property damage; the county where the accident occurred; whether a police and/or motorist report was filed; and, when appropriate, that the accident is excluded from DMV's program requiring a re-examination after a series of three accidents.

## EXPLANATION OF LICENSE STATUS ON "RECORD SUMMARY LINE"

| | |
|---|---|
| **VALID:** | Unless expired, full driving privileges are in effect for the class of license shown. |
| **SUSPENDED:** | Driving privilege is temporarily withdrawn for class of license shown. |
| **REVOKED:** | Driving privilege is withdrawn for class of license shown. |
| **CANCELLED:** | Driving privilege in all classes has been cancelled. |
| **SURRENDERED:** | The driver has voluntarily given up his/her driving privilege in all classes. |
| **APPROVED:** | Driver is authorized to have driving privileges returned after revocation, but has not yet obtained a license or learner permit. |

A license with any status shown above may also be expired.

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## NEW YORK STATE DRIVER LICENSE CLASSES

License class codes are used by every state as a national standard. Commercial driver licenses (CDLs) will appear on the Record Summary Line as license class CDL A, B or C. A driver who has one class of license, and who obtains a motorcycle license or a learner permit for another class, will have more than one Record Summary Line to show the status of each license class. A driver with only a Class M or MJ license is limited to motorcycle operation.

### CLASS CDL A

Valid for operation of a tractor-trailer combination, truck-trailer combination, tractor, truck, taxicab, passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile.

### CLASS CDL B

Valid for operation of a heavy single-unit vehicle (such as a truck or bus) with a Gross Vehicle Weight Rating (GVWR) of more than 26,000 pounds, or for the tractor portion of a tractor-trailer. Also valid for the operation of a taxicab, passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile.

### CLASS CDL C

Valid for operation of a single-unit vehicle (such as a truck or bus) with a GVWR of 26,000 pounds or less that transports 15 or more passengers, or that transports passengers under Article 19-A of the Vehicle & Traffic Law, or that carries hazardous materials. Also valid for the operation of a taxicab, passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile.

### CLASS Non-CDL C

This class is in the process of being eliminated and is only issued when a Farm (F)(G) and/or Tow Truck (W) endorsement is applied for. Valid for operation of a single-unit vehicle (such as medium trucks, farm vehicles and some heavy recreational vehicles) with a GVWR of 26,000 pounds or less that does not require a CDL endorsement. Also valid for the operation of a passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile.

### CLASS D

Valid for operation of a single-unit vehicle or recreational vehicle with a GVWR of 26,000 pounds or less, a passenger vehicle, Class B or Class C Limited Use Motorcycle, a Limited Use Automobile.

### CLASS DJ

Valid for operation of a single-unit vehicle with a GVWR of 10,000 pounds or less, a passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile. Issued only to drivers younger than 18 years of age; automatically becomes a Class D license on the individual's 18th birthday.

### CLASS E

Valid for operation of a single-unit vehicle with a GVWR of 26,000 pounds or less used to transport up to 14 passengers for hire, that does not fall under Article 19-A. Also valid for the operation of a taxicab, passenger vehicle, Class B or Class C Limited Use Motorcycle, or Limited Use Automobile.

### CLASS M

Valid for operation of a motorcycle (including Limited Use Motorcycle).

### CLASS MJ

Valid for operation of a motorcycle (including Limited Use Motorcycle). Issued only to drivers younger than 18 years of age; automatically becomes a Class M license on the individual's 18th birthday.

**NOTE:** If the motorist does not have a NY license or learner permit, the Record Summary Line will read NO NY LICENSE.
If the motorist has only a non-driver identification card, the Record Summary Line will read ID ONLY.

## NEW YORK STATE LIMITED DRIVING PRIVILEGES

When appropriate, the type of limited driving privilege will follow the license class on the Record Summary Line.

**CONDITIONAL:** A limited driving privilege granted to NYS licensed drivers who are suspended/revoked for alcohol or drug-related convictions.

**CONDITIONAL PRIVILEGE:** A limited driving privilege granted to drivers licensed in other states who are suspended/revoked in NYS for alcohol or drug-related convictions.

**PRE-CONVICTION CONDITIONAL LICENSE:** A limited driving privilege granted to NYS licensed drivers who have been suspended in NYS for alcohol or drug-related violations (not yet convicted).

**PRE-CONVICTION CONDITIONAL PRIVILEGE:** A limited driving privilege granted to drivers licensed in other states who are suspended in NYS for alcohol or drug-related violations (not yet convicted).

**RESTRICTED USE:** A limited driving privilege granted to NYS licensed drivers who are suspended/revoked for reasons other than alcohol/drug-related convictions.

**RESTRICTED USE PRIVILEGE:** A limited driving privilege granted to drivers licensed in other states who are suspended/revoked in NYS for reasons other than alcohol/drug-related convictions.

**POST REVOCATION CONDITIONAL LICENSE:** A limited driving privilege granted to NYS licensed drivers who have ignition interlock devices as a probation condition, and who have completed the minimum revocation period required after an alcohol or drug-related conviction.

**LIMITED USE ENDING DATE MM/DD/YYYY:** A limited driving privilege granted to junior drivers who pass their road test within 6 months of receiving a learner permit. After the ending date, full driving privileges are granted.

## EXAMPLES OF VIOLATION MESSAGES

| | |
|---|---|
| **AGG UNL OP MISD** | Aggravated unlicensed operation, a second degree misdemeanor |
| **CL/RL-CONV TRAF INF** | Traffic infraction occurring during conditional/restricted license program |
| **CONSUME ALC UNDER 21** | Operation of a motor vehicle after consuming alcohol while under 21 years of age |
| **DISOBEYED TRAF DEV** | Disobeyed traffic device |
| **DRIVING WHILE INTOX** | Driving while intoxicated |
| **DRVG WHILE IMPAIRED** | Driving while ability impaired by alcohol |
| **FAC AGG UNL OP INF** | Facilitating aggravated unlicensed operation of a motor vehicle |
| **FLD ANSWER SUMMONS** | Failed to answer a traffic ticket |
| **FLD PAY CHILD SUPP** | Failed to pay child support |
| **FLD PAY DRIV ASSESS** | Failed to pay driver responsibility assessment |
| **LEAV SCENE INC - PD** | Leaving the scene of a property damage incident without reporting |
| **NO INSP OVER 60 DAYS** | No inspection - Over 60 days |
| **OP MV - MOBILE PHONE** | Operation of a motor vehicle while using a hand held mobile phone |
| **OPER OUT OF REST-INF** | Operating in violation of a driver license restriction – an infraction |
| **OPER W/O INS – INF** | Operating without insurance – an infraction |
| **PEND PROS-CT BAC** | Pending prosecution by court for blood alcohol content |
| **PEND PROSECUTION-CT** | Pending prosecution by court |
| **PNG SUBMSN TO CRT-OS** | Pending submission to out-of-state court |
| **RFSD SUB CHEM TEST** | Refused to submit to a chemical test |
| **SPD NOT REAS/PRUDENT** | Speed not reasonable and prudent |
| **SUSP BY COURT 510** | Suspended by court under Section 510 of the Vehicle and Traffic Law |
| **TEMP - PDG C/T HRG** | Suspension pending chemical test hearing |
| **UNREG MOT VEH - INF** | Unregistered motor vehicle – an infraction |
| **3 SPEED/MISDEM 18 MO** | Three speeding violations or misdemeanors within 18 months |

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# APPENDIX 15

# New York Department of Motor Vehicles' Licensing or Relicensing After Revocation Action (15 NYCRR PART 136)

## Part 136 LICENSING OR RELICENSING AFTER REVOCATION ACTION

Sec.



### Section 136.1. Introduction

(a) *Intent.* Section 510 of the Vehicle and Traffic Law provides that a license may be issued after revocation in the discretion of the commissioner. In exercising such discretion and in keeping with his responsibility to provide meaningful safeguards for the general public who are users of the highways, it is the purpose of the commissioner to utilize departmental driver improvement programs in order to rehabilitate problem drivers through the use of education and explanation. It is the further purpose of the commissioner to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers, where the Department's review indicates that such action is necessary for the protection of the applicant and the public alike. This Part is intended to implement such purposes by establishing criteria to identify individual problem drivers, the application of which shall result in a presumption, in certain cases, that the involved driver would present a potential danger to himself or other users of the highway if allowed to be licensed or relicensed.

(b) *Definitions.*

(1) Problem driver. A *problem driver* is an applicant for a driver's license or privilege who has had a series of convic-

tions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his or her designated agent, upon review of the applicant's entire driving history, establishes that the person would be an unusual and immediate risk upon the highways. The commissioner or his or her designated agent shall set forth in writing the basis for the determination that an applicant is a problem driver.

(2) Disability. A *disability* is any condition, whether mental, emotional or physiological, which is likely to diminish the ability of an individual to safely control or operate a motor vehicle.

(3) History of abuse of alcohol or drugs. A *history of abuse of alcohol or drugs* shall consist of a record of two or more incidents, within a 25 year period, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether such incident was committed within or outside of this state.

(4) Rehabilitative effort. *Rehabilitative effort* shall consist of referral of an individual with a history of abuse of alcohol or drugs to any agency certified by the Office of Alcoholism and Substance Abuse and/or agents authorized by professional license or professional certification, such as that granted by a board of examiners of the State Education Department, for evaluation of the extent of alcohol and/or drug use and satisfactory participation in any treatment recommended by such agency, and/or evidence of abstinence from, or controlled use of, alcohol and/ or drugs for a period of time sufficient to indicate that such person no longer constitutes a danger to other users of the highway.

(5) Safety factor. A *safety factor* is a conviction for, or a finding by a departmental hearing officer of, any violation of the Vehicle and Traffic Law or of any local law, ordinance, order, rule or regulation relating to traffic, except violations relating to parking, standing or stopping; an accident with conviction involvement; an accident where a finding of gross negligence in the operation of a motor vehicle or operating a motor vehicle in a manner showing a reckless disregard for the life or property of others is made by a departmental hearing officer; and a finding of a chemical test refusal. A bail forfeiture shall be considered a conviction for purposes of this Part.

**Historical Note**

Sec. filed Jan. 15, 1980; amds. filed: Nov. 12, 1982; Feb. 17, 1983; April 25, 1984 eff. April 25, 1984; amds. filed Feb. 8, 2011 eff. Feb. 23, 2011; amd. filed Apr. 15, 2013 eff. May 1, 2013.

**Section 136.2. Approval of application.**

Except as provided in sections 136.3, 136.4 and 136.5 of this Part, an application for a driver's license shall be approved.

In addition, an application for re-licensure shall be waived under the following circumstances:

(a) If the licensee holds a commercial driver's license and a conviction results in the revocation of both the commercial and non-commercial portion of his or her driver's license, the commercial portion of the driver's license shall be automatically restored after the minimum one-year revocation period is served, if the non-commercial portion of the license has been restored as the result of either completion of the alcohol and drug rehabilitation program or approval for re-licensure pursuant to this Part.

(b) If the licensee holds a commercial driver's license and such license is revoked as the result of a conviction that results solely in the revocation of the commercial portion of such license, then such license shall be automatically restored after the one-year minimum revocation period is served.

(c) Subdivisions (a) and (b) shall not be applicable to a person whose license is suspended or revoked for an independent violation or violations at the time at which such person would be eligible for restoration of the commercial portion of his or her license pursuant to such subdivisions.

**Historical Note**

Sec. filed Jan. 15, 1980; amd. filed Aug. 25, 2006 eff. Sept. 13, 2006.

**Section 136.3. Grounds for immediate denial of application.**

An application for a driver's license shall be denied without further review if:

(a) the minimum waiting period provided by statute has not expired; and/or

(b) there is evidence of an open suspension or suspensions which have not been fully complied with; and/or

(c) the applicant fails to furnish any requested document or information required by the commissioner as part of the record review.

**Historical Note**

Sec. filed Jan. 15, 1980 eff. March 1, 1980.

**Section 136.4. Denial of application following record review**

(a) An application for a driver's license shall be denied if:

(1) a disability, as defined in section 136.1(b)(2) of this Part, is found, unless evidence shall be presented to satisfy the commissioner, that such individual may safely operate a motor vehicle; and/or

(2) there is a history of abuse of alcohol or drugs, as defined in section 136.1(b)(3) of this Part, with insufficient evidence of rehabilitative effort; and/or

(3) there is a combination of safety factors, as defined in section 136.1(b)(6) of this Part, resulting in 25 or more negative units, as set forth in section 136.6(a) of this Part.

(b)

(1) An application for a driver's license may be denied if a review of the entire driving history provides evidence that the applicant constitutes a problem driver, as defined in section 136.1(b)(1) of this Part. If an application is denied pursuant to this paragraph, no application shall be considered for a minimum of one year from the date of denial. In lieu of such denial, the applicant may be issued a license or permit with a problem driver restriction, as set forth in section 3.2(c)(4) of this Chapter and paragraph (2) of this subdivision.

(2) Upon the approval of an application for relicensing of a person who is deemed a problem driver under this subdivision, the Commissioner may impose a problem driver restriction on such person's license or permit, as set forth in section 3.2(c)(4) of this Title. As a component of this restriction, the Commissioner may require such person to install an ignition interlock device in any motor vehicle owned or operated by such person. The ignition interlock requirement will be noted on the attachment to the driver license or permit held by such person. Such attachment must be carried at all times with the driver license or permit.

(3) Revocation of license or permit with problem driver restriction. A license or permit that contains a problem driver restriction shall be revoked:

(i) upon the holder's conviction of a traffic violation or combination of violations, committed while such restriction is in effect, which the Commissioner deems serious in nature; or

(ii) for the holder's failure to install and maintain an ignition interlock device in motor vehicles owned or operated by the holder, when required to do so under such restriction.

The attachment, provided for in paragraph (2) of this subdivision, shall set forth the violation or violations that will result in such a revocation. A revocation for any of the above reasons shall be issued without a hearing based upon receipt of a certificate or certificates of conviction. The Commissioner may also revoke a license or permit with a problem driver restriction, without a hearing, upon receipt of a certificate of conviction that indicates that the applicant has driven in violation of the conditions of such restriction.

(4) Employer vehicle. A person required to operate a motor vehicle owned by such person's employer in the course and scope of his or her employment may operate that vehicle without installation of an ignition interlock device only in the course and scope of such employment and only if such

person carries in the motor vehicle written documentation indicating the employer has knowledge of the restriction imposed and has granted permission for the person to operate the employer's vehicle without the device only for business purposes. Such documentation shall display the employer's letterhead and have an authorized signature of the employer. A motor vehicle owned by a business entity that is wholly or partly owned or controlled by a person subject to the problem driver restriction is not a motor vehicle owned by the employer for purposes of the exemption provided in this paragraph and shall be deemed to be owned by the person subject to the problem driver restriction.

(b-1) An application for a driver's license may be denied if the applicant has been convicted of a violation of section 125.10, 125.12, 125.13, 125.14, 125.15, 125.20, 125.22, 125.25, 125.26 or 125.27 of the Penal Law arising out of the operation of a motor vehicle, or if the applicant has been convicted of a violation of section 1192 of the Vehicle and Traffic Law where death or serious physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense.

(c) In any situation in which the commissioner would propose to deny an application pursuant to the provisions of this section, the grounds for the proposed denial shall be sent to the applicant, who shall be provided with an opportunity to respond. The applicant's response shall be considered before a determination is made. Failure to respond within the period specified by the commissioner shall result in denial of the application.

(d) While it is the Commissioner's general policy to deny an application based on those elements cited in subdivision (a) and (b) of this section, the commissioner shall not be foreclosed from consideration of unusual, extenuating or compelling circumstances which may be presented for review, which form a valid basis to deviate from the general policy, as set forth above, in the exercise of the discretionary authority granted to him under section 510 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be stated in writing and recorded.

**Historical Note**

Sec. filed Jan. 15, 1980; amd. filed April 25, 1984 eff. April 25, 1984. Amended (a)(1) and (b); amds. filed Feb. 8, 2011 eff. Feb. 23, 2011; amd. filed Apr. 15, 2013 eff. May 1, 2013.

## Section 136.5. Special rules for applicants with multiple alcohol- or drug-related driving convictions or incidents

(a) For the purposes of this section:

(1) **Alcohol- or drug-related driving conviction or incident** means any of the following, not arising out of the same incident:

(i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs;

(ii) a finding of a violation of section 1192-a of the Vehicle and Traffic Law; provided, however, that no such finding shall be considered after the expiration of the retention period contained in paragraph (k) of subdivision 1 of section 201 of the Vehicle and Traffic Law;

(iii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element; or

(iv) a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law.

(2) **Serious driving offense** means:

(i) a fatal accident;

(ii) a driving-related Penal Law conviction;

(iii) conviction of two or more violations for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter; or

(iv) 20 or more points from any violations.

(3) **25 year look back period** means the period commencing upon the date that is 25 years before the date of the revocable offense and ending on and including the date of the revocable offense.

(4) **Revocable offense** means the violation, incident or accident that results in the revocation of the person's drivers license and which is the basis of the application for relicensing. Upon reviewing an application for relicensing, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if it had been committed immediately prior to the date of the revocable offense. For purposes of this section, **date of the revocable offense** means the date of the earliest revocable offense that resulted in a license revocation for which the revocation has not been terminated by the Commissioner's subsequent approval of an application for relicensing.

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:

(1) the person has five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.

(2) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.

(3)

(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period; and

(ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(4)

(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period; and

(ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least two years, after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of two years. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(5) the person has two alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period, then the Commissioner may in his or her discretion approve the application after the minimum statutory revocation period is served.

(6) the person has been twice convicted of a violation of subdivision three, four or four-a of section 1192 of the Vehicle and Traffic Law or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driv-

ing while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense in each instance, then the Commissioner shall deny the application.

(c) The grounds for any denial shall be set forth in writing and a copy shall be made available to the person making the application for relicensing.

(d) While it is the Commissioner's general policy to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded.

(e) If, after an application for relicensing is approved, the Commissioner receives information that indicates that such application should have been denied, the Commissioner shall rescind such approval and the license granted shall be revoked.

**Historical Note**

Sec. filed Jan. 15, 1980; amds. filed: Feb. 2, 1983; April 25, 1984 eff. April 25, 1984; amds. filed Feb. 8, 2011 eff. Feb. 23, 2011; amd. filed Apr. 15, 2013 eff. May 1, 2013.

**Section 136.6. Weighing of safety factors.**

(a) There shall be assigned to each safety factor a negative unit as follows:

| Safety Factor | Assigned Negative Units | |
|---|---|---|
| | Over one year to three years of application | Within one year of application |
| | | |
| (1) for each reportable accident of record with a finding by the referee of gross negligence in the operation of a motor vehicle in a manner showing a reckless disregard for the life and property of others. | -5 | -8 |
| | | |
| (2) for each reportable accident of record with conviction involvement or with a finding by the referee of a violation of the Vehicle and Traffic Law | -3 | -4 |
| | | |
| (3) for the first and second speeding conviction of record* | -3 | -4 |

| | | |
|---|---|---|
| (4) for the third and subsequent speeding conviction* | -5 | -8 |
| | | |
| (5) for reckless driving, speed contest or passing a stopped school bus | -5 | -8 |
| | | |
| (6) for each conviction of record for leaving the scene of a personal injury accident of record | -8 | -11 |
| | | |
| (7) for each alcohol related offense of record as follows: | | |
| | | |
| (i) conviction for violation of subdivision (1) of Section 1192 of the Vehicle and Traffic Law:<br>first offense<br>second offense<br>third offense | <br>-5<br>-8<br>-11 | <br>-8<br>-11<br>-14 |
| | | |
| (ii) conviction for violation of subdivision (2), (2-a), (3), (4), or (4-a) of section 1192 of the Vehicle and Traffic Law:<br>first offense<br>second or subsequent offense | <br>-8<br>-11 | <br>-11<br>-14 |
| | | |
| (iii) chemical test refusal | -6 | -11 |
| | | |
| (8) for each conviction of homicide, criminally negligent homicide, or assault arising out of the operation of a motor vehicle | -11 | -14 |
| | | |
| (9)(i) for each incident of driving during a period of alcohol-related license suspension or revocation | -10 | -12 |
| | | |
| (ii) for each other incident of driving during a period of license suspension or revocation | -8 | -10 |
| | | |

| | | |
|---|---|---|
| (10) for each conviction or finding by the Commissioner's referee of a violation of section 392 of the Vehicle and Traffic Law | -3 | -4 |
| | | |
| (11) for each other conviction of record for a moving violation | -2 | -3 |
| | | |
| *For each speeding violation of 25 miles per hour or more over the posted speed limit, add one point. | | |

(b) The point reduction program shall not apply to any of the negative units listed in subdivision (a) of this section.

(c) For the purpose of this Part, the time periods for the computation of safety factors shall commence as of the date on which the incident occurred.

(d) In any case where two or more safety factors which are not independent of each other arise out of a single incident, only one of these safety factors shall be taken into consideration. The safety factor which shall be taken into consideration in these cases shall be the safety factor having the greater weight, except that where two safety factors are of equal weight, either one may be taken into consideration.

*Examples:*

(1) Where an accident and a conviction for reckless driving arise out of the same incident, only the reckless driving conviction, which is the safety factor having the greater weight, is considered, because these safety factors are not independent of each other.

(2) Where a conviction of any subdivision of Section 1192 of the Vehicle and Traffic Law and a finding of a chemical test refusal arise out of the same incident, only one of these two safety factors having equal weight is considered, because these safety factors are not independent of each other.

(3) Where a person is convicted of reckless driving and the incident occurred during a period of license revocation, both of these safety factors shall be taken into consideration because these safety factors are independent of each other.

(e) Where a person is convicted of or adjudicated for an offense committed outside of this state, and where such offense has been made part of the person's New York State driving record, such offense shall carry the equivalent safety factor assigned under subdivision (a) of this section, as if the offense was committed in this state.

**Historical Note**

Sec. filed Jan. 15, 1980; amds. filed: Feb. 2, 1983; May 21, 2002; Nov. 1, 2006 as emergency measure; Jan. 30, 2007 as emergency measure; April 30, 2007 as emergency measure; June 19, 2007 eff. July 3, 2007. Amended (a), (d); amds. filed Feb. 8, 2011 eff. Feb. 23, 2011.

**Section 136.7. Licenses from other jurisdictions.**

Notwithstanding any other provision of this Part, whenever a license has been revoked after a determination that such license was irregularly obtained based upon submission of a driver's license from another jurisdiction, which license was not valid at the time of submission, such revocation shall not be terminated, and no new license issued:

(a) if the license from the other jurisdiction was revoked at the time of submission, until at least one year has elapsed from the date of the revocation issued by the other jurisdiction, or until such revocation is no longer in effect in the other jurisdiction, whichever occurs sooner; or

(b) if the license from the other jurisdiction was suspended at the time of submission, until such suspension period is terminated.

**Historical Note**

Sec. filed Jan. 15, 1980; renum. 136.8, new filed June 14, 1990 eff. July 3, 1990.

**Section 136.8. Effect of application denial.**

Denial of a application for license shall be appealable to the Administrative Appeals Board, except that the appeals board shall not consider any material which had not been previously submitted. In such a case, the applicant shall be required to submit any additional material in a new application.

**Historical Note**

Sec. filed Jan. 15, 1980; amd. filed April 25, 1984; renum. 136.9, new added by renum. 136.7, filed June 14, 1990 eff. July 3, 1990.

**Section 136.9. Effect of completion of the alcohol and drug rehabilitation program.**

The successful completion of the article 21 alcohol and drug rehabilitation program, where no intervening safety factors occurred between the date such person entered the program and the date the application for a license is made and with no subsequent incidents of operating a motor vehicle while under the influence of alcoholic beverages or drugs, shall be considered evidence of rehabilitative effort satisfactory for the purposes of this Part. Provided, however, if enrollment in the program based upon the plea bargaining provisions of Vehicle and Traffic Law, section 1192(10)(a)(ii) and (10)(d), and if such person would not otherwise have been eligible for enrollment in the program pursuant to section 1196(4) of such law, then completion of the program, may not, in the commissioner's discretion, be deemed evidence of rehabilitative effort.

**Historical Note**

Sec. added by renum. 136.8, filed June 14, 1990; amd. filed Nov. 1, 2006 as emergency measure; Jan. 30, 2007 as emergency measure eff. Jan. 30, 2007.

**Section 136.10. Application for relicensing**

(a) Application by the holder of a post-revocation conditional license. Upon the termination of the period of probation set by

the court, the holder of a post-revocation conditional license may apply to the Commissioner for restoration of a license or privilege to operate a motor vehicle. An application for licensure may be approved if the applicant demonstrates that he or she:

(1) has a valid post-revocation conditional license; and

(2) has demonstrated evidence of rehabilitation as required by this Part.

(b) Application after permanent revocation. The Commissioner may waive the permanent revocation of a driver's license, pursuant to Vehicle and Traffic Law section 1193(2)(b)(12)(b) and (e), only if the statutorily required waiting period of either five or eight years has expired since the imposition of the permanent revocation and, during such period, the applicant has not been found to have refused to submit to a chemical test pursuant to Vehicle and Traffic Law section 1194 and has not been convicted of any violation of section 1192 or section 511 of such law or a violation of the Penal Law for which a violation of any subdivision of such section 1192 is an essential element. In addition, the waiver shall be granted only if:

(1) The applicant presents proof of successful completion of a rehabilitation program approved by the Commissioner within one year prior to the date of the application for the waiver; provided, however, if the applicant completed such program before such time, the applicant must present proof of completion of an alcohol and drug dependency assessment within one year of the date of application for the waiver; and

(2) The applicant submits to the Commissioner a certificate of relief from civil disabilities or a certificate of good conduct pursuant to Article 23 of the Correction Law; and

(3) The application is not denied pursuant to section 136.4 or section 136.5 of this Part; and

(4) There are no incidents of driving during the period prior to the application for the waiver, as indicated by accidents, convictions or pending tickets. The consideration of an application for a waiver when the applicant has a pending ticket shall be held in abeyance until such ticket is disposed of by the court or tribunal.

**Historical Note**

Sec. filed Aug. 27, 1996 eff. Sept. 11, 1996; emergency rulemaking eff. Sept. 25, 2012, expired Dec. 23, 2012; amd. filed Apr. 15, 2013 eff. May 1, 2013.

# APPENDIX 16

# New York State Department of Motor Vehicles' Alcohol & Drug Abuse Rehabilitative Program Summary

New York State Department of Motor Vehicles

**ALCOHOL & DRUG ABUSE REHABILITATIVE PROGRAM SUMMARY**

**PART I — COMPREHENSIVE EVALUATION** — *(If the evaluation and treatment is conducted by different persons or agencies, the evaluation summary must be forwarded to the treatment provider.)*

| Last Name | First | M.I. | Date of Birth (Month/Day/Year) / / |
|---|---|---|---|
| Mailing Address (Street & No.) | City | State / Zip Code | Date(s) of Evaluation |

**REFERRAL INFORMATION** — *Indicate which of the following items formed the basis for referral to you for a treatment evaluation.*

- ☐ Referred by Drinking Driver Program (Identify) _____
- ☐ Referred directly by DMV
- ☐ DWI/DWAI conviction(s); Number of conviction(s) _____; Date(s) of conviction _____
- ☐ Blood Alcohol Content (BAC) at time of arrest _____
- ☐ Chemical Test Refused
- ☐ Driver's License revoked/suspended; ☐ Conditional License Issued

**COMPREHENSIVE EVALUATION** — *Indicate which of the following items were addressed during the evaluation process.*

| A. Alcohol/Drug Abuse History | Personal | Family/Friends |
|---|---|---|
| 1. Substances used | ☐ | ☐ |
| 2. Alcohol usage and pattern of abuse | ☐ | ☐ |
| 3. Drug usage and pattern of abuse | ☐ | ☐ |
| 4. Attempts to stop use/abuse of alcohol/drugs | ☐ | ☐ |
| 5. Other (specify) | ☐ | ☐ |

6. Prior treatment completed date: _____
Name of provider _____

**B. Psychosocial Assessment**

1. ☐ Marital history
2. ☐ Family background
3. ☐ Employment history
4. ☐ Legal history
5. ☐ Personal relationships
6. ☐ Other

**C. Health History**

1. ☐ General health
2. ☐ Health problems
3. ☐ Nutritional assessment
4. ☐ Date of last physical exam
5. ☐ Referred for physical exam
6. ☐ Referred for blood tests
7. ☐ Other

**DIAGNOSIS**

A. Problem(s)
1. ☐ Alcoholism
2. ☐ Alcohol Abuse
3. ☐ Drug Abuse (specify) _____
4. ☐ Other Problem (specify) _____
5. ☐ None

B. Primary Diagnosis _____

C. Secondary Diagnosis (if applicable) _____

**TREATMENT RECOMMENDATION**

1. Treatment for ☐ alcoholism ☐ alcohol abuse ☐ drug abuse — is ☐ Recommended; ☐ NOT recommended; at this time.

2. Motorist is referred for:
- ☐ Detoxification (NOT Treatment)
- ☐ Residential treatment
- ☐ Inpatient treatment
- ☐ Outpatient treatment

☐ Support Services (check one): ☐ Maintenance ☐ AA ☐ Other

☐ Other (specify) _____

3. Anticipated length of treatment: _____

**EVALUATOR—PART I** *(To be completed by person conducting the evaluation.)*

Name (Print/Type) _____

Agency _____ Phone Number ( ) _____

Signature _____ Date _____

# APPENDIX 17

# Screening Matrix Used by Drinking Driver Program

**DRINKING DRIVER PROGRAM**
**Screening Matrix**

| | CRITERION | OBJECTIVE STANDARD | RATIONALE |
|---|---|---|---|
| 1. | RIASI Score | 10 or higher score | Targets largest number of dependent people with smallest percentage of false +/-'s. Research on cutoff points. |
| 2. | Two or more alcohol/drug driving incidents within 10 years | 2 or more unrelated incidents within 10 years on NYS-DMV file. Incidents are NOT:<br>* info from class activities;<br>* hearsay from other sources;<br>* more than 10 years from current violation date. | Research shows repeaters are highly likely to recidivate, to be involved in crashes/fatal accidents and be diagnosed in need of treatment. Consistent with Part 136 of DMV regulations. |
| 3. | Self-disclosure | A. An unsolicited and direct admission by student that "I'm currently in treatment for alcohol/drug abuse or dependency." | A. No person can be legally kept in treatment without an abuse or dependency diagnosis being made. |
| | | B. A direct request from student to get help for his/her own substance abuse problem. | B. When people ask for help, they should get it. |
| | | NOTE: The DDP must get a signed statement from student affirming either of these situations. | |
| 4. | Attending class under influence of alcohol/drugs | A. Detectable odor of alcohol and confirmation of drinking after discussion with DDP staff. | A. DDP attendance rules inform students that drinking alcohol on class days will cause referral. |
| | | B. Aberrant, disruptive behavior during class and confirmation of substance abuse after discussions with DDP staff. | B. This act is likely to yield abuse/dependence diagnosis. |

| | CRITERION | OBJECTIVE STANDARD | RATIONALE |
|---|---|---|---|
| | | NOTE: The instructor must document standards in accord with DMV's policy on page 6.5, B.3.a. of the DDP Director's Guide. | C. People who drink, then go to class show lack of control and poor judgment. |
| 5. | Arrest for an alcohol/drug driving violation while enrolled in DDP | A. Student admits or volunteers this information.<br>B. Arrest reported in newspaper.<br>NOTE: DDP must get copy of ticket or of Court's Suspension Pending Prosecution order. | Supports Section 1193 of V & T Law: Suspension Pending Prosecution. |

# APPENDIX 39

# Department of Motor Vehicles' Counsel's Opinion Regarding VTL § 1194(A) Orders' Effect on Test Refusal

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

EMPIRE STATE PLAZA

ALBANY, NEW YORK 12228

JOHN A. PASSIDOMO
COMMISSIONER

STANLEY M. GRUSS
DEPUTY COMMISSIONER AND COUNSEL

May 15, 1985

Peter Gerstenzang, Esq.
Gerstenzang, Weiner & Gerstenzang
41 State Street
Albany, New York 12207

Dear Mr. Gerstenzang:

You have requested an opinion regarding the ramifications of a chemical test of blood, ordered pursuant to Section 1194-a of the Vehicle and Traffic Law, on a prior refusal to submit to a breath test, resulting in the issuance of such order.

The procedure which ultimately results in a Department of Motor Vehicles' chemical test refusal hearing is set forth in Section 1194-2 of the Vehicle and Traffic Law. That procedure is initiated by the police officer's submission to the court of a written report of refusal. Section 1194-2 provides that such report must state that no chemical test was administered pursuant to Section 1194-a of the Vehicle and Traffic Law.

This is consistent with the intent of Section 1194, which is designed to provide an equivalent penalty for those who frustrate prosecution under Section 1192 of the Vehicle and Traffic Law by virtue of refusal. Where evidence of blood alcohol content is obtained under Section 1194-a, prosecution is not frustrated.

It is, therefore, this Department's opinion that a test ordered pursuant to Section 1194-a vitiates a prior chemical test refusal, and no departmental chemical test refusal hearing should be held in any such case.

If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

STANLEY M. GRUSS
Deputy Commissioner and Counsel

SMG/dc

# APPENDIX 42

# New York State Department of Motor Vehicles' Commissioner's Memorandum Regarding the Introduction of Report of Refusal in Evidence Pursuant to CPLR § 4520

Re: Peter D. Perucki
Administrative Appeals Board
Docket No. 9492

COMMISSIONER'S MEMORANDUM

Appellant appeals from a determination, after a hearing, revoking his driver's license for refusal to submit to a chemical test of blood alcohol content.

The arresting police officer did not testify at the chemical test refusal hearing, but the officer's Report of Refusal was admitted into evidence by the Administrative Law Judge. In accordance with the statute (Vehicle and Traffic Law, Section 1194(2)), the report was duly verified, contained the Penal Law warning that false statements therin were punishable as a Class A misdemeanor, and was subscribed by the arresting officer.

Appellant objected to the introduciton of the Report of Refusal upon the gound that it denied him the opportunity to confront and cross-examine the arresting police officer. The objection was overruled and the report was admitted into evidence. Appellant did not testify nor offer any witnesses or evidence in his behalf.

The Report of Refusal indicated that appellant had been involved in an automobile accident and that he was arrested for driving while intoxicated after the responding officer observed a strong odor of alcoholic beverage on his breath. It also noted that appellant admitted he had been drinking beer. The Report of Refusal also contains the printed form statutory chemical test warning (Vehicle and Traffic Law, Section 1194(2))* which was checked to indicate that it had been recited to the appellant and further indicated that the time of arrest was 7:20 p.m. and the refusal occurred at 7:25 p.m.

*Section 1194(2) provides in pertinent part:

"2. If such person having been placed under arrest. . .and having therafter been requested to submit to such chemical test and having been informed that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test, whether or not he is found guilty of the charge for which he is arrested, refuses to submit to such test,. . .the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made."

Under CPLR 4520, the Report of Refusal is an official record admissible into evidence and constitutes prima facie evidence of the facts stated therein. (See People v. Hisonoff, 293 NY 597 [medical examiner's autopsy report]; Borselin v. Wickham Brothers, Inc., 6 AD 2d 784 [police accident report]; People v Hoats, 102 Misc. 2d 1004 [breathalyzer test results].) In conformity with the statute, it is made in the course of a police officer's official duty, is duly sworn to or certified and filed in a public office as required by statute (Vehicle and Traffic Law, Section 1194(2)).

Absent substantial evidence to the contrary, a properly admitted Report of Refusal may constitute substantial evidence of a refusal to submit to a chemical test of blood alcohol content. (CPLR 7803(4); see Richardson v. Perales, 402 US 389, 402; People ex rel. Vega v. Smith, 66 NY 2d 130, 139-140; See Richardson on Evidence, Section 58 [10th ed.].

Also, where a motorist has not exercised his or her right to subpoena the arresting officer, (State Administrative Procedure Act, Section 304(2)) there is no denial of due process where a refusal report is admitted into evidence prusuant to CPLR 4520 and findings are made thereon, despite the report's hearsay character and the absence of cross-examination. (See Richardson v. Perales, supra at 402).

In this case, based upon the contents of the Report of Refusal and absent any evidence to the contrary, the Administrative Law Judge was entitled to find as he did that (1) the police officer had reasonable grounds to believe that appellant was driving while under the influence of alcohol; (2) that a lawful arrest was made; (3) that appellant was sufficiently warned of the consequences of a test refusal; and (4) that appellant refused to submit to a chemical test.

Accordingly, the determination is affirmed.

Patricia B. Adducí
Commissioner

(Etc49)

Dated:

# APPENDIX 44

# Memorandum of Sidney W. Berke, DMV Administrative Adjudication Office Director, Regarding Introduction of Report of Refusal into Evidence

State of New York - Department of Motor Vehicles

MEMORANDUM

TO: All Safety Administrative Law Judges DATE: June 5, 1986

FROM: Sidney W. Berke OFFICE: Administrative Adjudication

SUBJECT: C.T. Refusal Report: Police Officer Absent Implementation Commissioner's memorandum # 9492

As previously discussed in Sid Firestone's memorandum of July 8, 1985, when a police officer has failed to appear on more than one occasion, the refusal report should be admitted into evidence. It can constitute substantial evidence of refusal.

Attached is a commissioner's memorandum approving its use as substantial evidence to support a finding of refusal in the face of an argument that cross-examination was denied (the motorist did not testify). The police officer is to be considered a public officer, thereby invoking CPLR 4520 (and the common law rule; copies attached).

As noted in both memoranda, the report may be overcome by contrary, substantial evidence of the motorist or others. This is primarily a credibility determination for the A.L.J. The motorist's demeanor and the content of his testimony may show his testimony to be incomplete, contradictory, evasive, or incredible, and therefore insufficient to overcome the refusal report.

The finding of contrary substantial evidence is to be supported by the testimony of the motorist and any other evidence. It is your obligation to obtain the facts. Please also bear in mind that the evidence offered by the respondent affects the <u>weight</u> to be given the Report of Refusal, not its admissibility.

In adjourned cases, a conviction may already exist on the alcohol charge underlying the refusal on which you are holding the hearing. If there has been a conviction or plea to 1192(2,3,4), then the issues of probable cause and lawful arrest are conclusively decided (collateral estoppel). If there has been a plea to 1192(1), it can be considered an admission against interest on these two issues, but is subject to attach and explanation by the motorist. If there has been an 1192(1) conviction after trial, then all issues must be established without reference to the conviction.

SIDNEY W. BERKE
Director

SWB:emb
Enc.

11/26/86
Particularly in the type of situation, where the officer is not present to testify, it is essential that the report state a valid reason for the initial stop. E.g. stopped for speeding, disobeying sign, crossing double yellow line etc.

# APPENDIX 45

# Letter from Joseph R. Donovan, DMV First Assistant Counsel, Regarding Removal of Dentures Prior to Breath Test

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

PATRICIA B. ADDUCI
COMMISSIONER

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

EMPIRE STATE PLAZA
ALBANY, NEW YORK 12228

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

Peter Gerstenzang, Esq.
41 State Street
Albany, New York 12207

Dear Mr. Gerstenzang:

In your telephone conversation of March 12, 1986, with Mrs. Scrodanus of this office, you requested the departmental position on the requirement of police enforcement agencies to remove dentures prior to the administration of a breathalyzer exam.

The Department of Motor Vehicles will hold that a valid chemical test refusal finding has been made if an individual has refused to remove dentures prior to submitting to the breathalyzer examination. The finding of a chemical test refusal will be upheld by the department so long as:

1) the police enforcement personnel have advised the individual as to why the dentures must be removed and how such removal is necessary to the validity of the test, and

2) the police enforcement agency has incorporated the requirement for denture removal into its regulations for the administration of a breathalyzer exam.

I trust the above explanation shall prove both informative and helpful.

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel

JRD/pr

# APPENDIX 46

# Letter from Joseph R. Donovan, DMV First Assistant Counsel, Regarding Police Department Procedures on Test Refusals and Removal of Dentures

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

PATRICIA B. ADDUCI
COMMISSIONER

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

EMPIRE STATE PLAZA
ALBANY, NEW YORK 12228

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

January 13, 1987

Peter Gerstenzang
Gerstenzang, Weiner & Gerstenzang
Attorneys at Law
41 State Street
Albany, NY 12207-2835

Dear Peter:

Please excuse the delay in responding to your letter (and enclosures) of December 11, 1986, regarding police department regulations and procedures concerning denture removal and breath test administration.

If the procedures which you sent to me were followed, I am (virtually) certain that a chemical test refusal, based upon the failure to remove dentures, would be found. While I am not convinced that it is absolutely necessary that the requirement be incorporated into the police department regulations, it is clearly the safer course of action.

My opinion is that the procedure clearly overcomes the problem which gave rise to the reversal of the chemical test refusal finding in the Greenlee case.

Please do not hesitate to contact me if I may be of any further assistance.

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel

JRD/NWS/ms

# APPENDIX 47

# DMV Commissioner's Memorandum Regarding Test Refusals and the Right to Counsel

State of New York—Department of Motor Vehicles

MEMORANDUM

| | | | |
|---|---|---|---|
| TO: | All Safety ALJs | DATE: | May 8, 1990 |
| FROM: | George Christian | OFFICE: | Admin. Adjudication |
| SUBJECT: | Chemical Test Refusal | | |

(1) effect of DWI conviction
(2) refusal conduct—request for attorney

Questions regarding the above subjects were raised at regional peer review meetings.

(1) Sometimes a refusal hearing will follow a judgment of conviction for DWI. The judgment should be treated as conclusive proof of the underlying facts, and the respondent cannot contest probable cause or arrest legality at the hearing. (See *People v. Thomas*, 74 A.D.2d 317, 428 N.Y.S.2d 20, affd. 53 N.Y.2d 338, 441 N.Y.S.2d 650, 424 N.E.2d 537; *Matter of Levy*, 37 N.Y.2d 279, 372 N.Y.S.2d 41, 333 N.E.2d 350; *S.T. Grand Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105; *Matter of Arancia v. Ambach*, 76 A.D.2d 967, 429 N.Y.S.2d 67.)

If there has been a judgment of conviction of DWAI, a traffic infraction, as the result of a plea, it is an admission against interest but respondent may contest all issues (*Ando v. Woodberry*, 8 N.Y.2d 165, 203 N.Y.S.2d 74, 168 N.E.2d 520.) If the DWAI judgment was by verdict after trial, there is no admission against interest and all issues may be contested. (See *Montalvo v. Morales*, 18 A.D.2d 20, 239 N.Y.S.2d 72; *Augustine v. Village of Interlaken*, 68 A.D.2d 705, 418 N.Y.S.2d 683 (4th Dept.1979).)

(2) If a respondent is asked to take a chemical test, and responds by requesting the advice of an attorney, the police officer is not required, for Section 1194 purposes, to grant the request. However, if the officer does not inform the respondent that his request is denied and just records a refusal, there has not been a refusal. The respondent should be reasonably informed in some way (words, conduct, circumstances) that he is not going

to be given a chance to consult with an attorney before his insistence on speaking to one can be considered a refusal.
GC: pa

# APPENDIX 53

# Letter from Department of Motor Vehicles Regarding Multiple Offenders

PATRICIA B. ADDUCI
Commissioner

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA, ALBANY, NEW YORK 12228

January 7, 1986

Peter Gerstenzang
c/o Gerstenzang, Weiner & Gerstenzang
41 State Street
Albany, New York 12207-2835

Dear Mr. Gerstenzang:

This will confirm our telephone conversation concerning the Commissioner's policy on repeat drinking/driving offenders.

1. Second Conviction
   A. If ineligible for the drinking driver program we will approve at the end of the statutory revocation period.
   B. Evidence of alcohol evaluation and/or rehabilitation will be required.
2. Third Conviction
   A. Allowed to enroll in the drinking driver program if eligible but will not be granted a conditional license.
   B. If not eligible for the D.D.P., a minimum revocation period of eighteen months will be imposed.
   C. See 1B.
3. Fourth Conviction
   A. See 2A.
   B. If not eligible for the drinking driver program a minimum revocation period of twenty-four months will be imposed.
   C. See 1B.

4. Fifth Conviction
   A. See 2A.

   B. If not eligible for the drinking driver program a minimum revocation period of thirty months will be imposed.

   C. See 1B.

5. Sixth and Subsequent Convictions
   At the present time we will deny based on a history of alcohol related offenses. We will continue to deny until some Court tells us that we must approve. (Denials are, of course, appealable through the Administrative Appeals Board.)

If we have a change in policy in the future, I will advise you.

Very truly yours,

Alfred J. Frakes, Director
Driver Licensing Services

AJF:mj

# APPENDIX 56

# Department of Motor Vehicles' Alcohol and Drug Rehabilitation Program (Part 134)

## Part 134 ALCOHOL AND DRUG REHABILITATION PROGRAMS

(Statutory authority: VTL Sections 215, 521)

### Section 134.1. Introduction

(a) *Intent.* Article 21 of the Vehicle and Traffic Law as added by chapter 291 of the Laws of 1975, and recodified in article 31 by chapter 47 of the Laws of 1988, provides for the establishment of an alcohol and drug rehabilitation program for the purpose of providing rehabilitation to drivers convicted of alcohol or drug-related driving offenses or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses or persons found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of the Vehicle and Traffic Law to alleviate the threat to the lives and well-being of the citizens of this State posed by alcohol and drug-related driving. Although this article provides for the issuance of conditional licenses to persons enrolled in such program, this provision is incidental to the primary purpose of the legislation, highway safety. This Part is intended to implement the legislative intent by establishing criteria for eligibility of persons for entrance into such programs, issuance and use of conditional licenses, procedures to be followed by the courts, the Department of Motor Vehicles and motorists in conjunction with such programs, as well as the curricula to be used in such programs and the qualifications of persons who will be conducting such programs.

(b) *Definitions.*

(1) Program. As hereinafter used in this Part, the terms *program, alcohol* and *drug rehabilitation program, rehabilitation program,* or *course* shall mean a specific curriculum which must include training in a classroom setting, and may include instruction, discussion, testing, interviewing, counseling, referral for extended alcohol or drug rehabilitative activities and such rehabilitative activities, all of which have been approved by the commissioner and are administered by program administrators designated as such by the commissioner. Any extended alcohol or drug rehabilitative activities which occur after eight months following enrollment in the program must be recommended licensed providers of such services.

(2) Full period of suspension or revocation effectively served. A person will be deemed to have effectively served the full period of a suspension if he has received a suspension order, has surrendered his driver's license in response to such suspension order, has not been issued an unconditional license and has not operated a motor vehicle for the period of time for which his license has been suspended. A person will be deemed to have effectively served the full period of a revocation if he has received a revocation order, has surrendered his driver's license in response to such revocation order, has not been issued an unconditional license and has not operated a motor vehicle for a period of at least six months.

Sec. filed Sept. 26, 1975; amds. filed: May 27, 1997; June 21, 2005 eff. July 6, 2005. Amended (a).

### Section 134.2. Persons eligible for program

Any person who is convicted of a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, or is found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of this article, or of an alcohol or drug-related traffic offense in another state, shall be eligible for enrollment in an alcohol and drug rehabilitation program unless: such person has participated in a program established pursuant to article 31 of the Vehicle and Traffic Law within the five years immediately preceding the date of commission of the alcohol or drug-related offense or such person has been convicted of a violation of any subdivision of section 1192 of such law during the five years immediately preceding commission of an alcohol or drug-related offense; with respect to persons convicted of a violation of section 1192 of the Vehicle and Traffic Law, is prohibited from enrolling in a program by the judge who imposes sentence upon the conviction; or the commissioner is prohibited from issuing such new license to a person because of two convictions of a violation of section 1192 of the Vehicle and Traffic Law where physical injury, as defined in section 10 of the Penal Law, has resulted in both instances. Notwithstanding the provisions of this section, a person shall be eligible for enrollment in the alcohol and drug rehabilitation program if such person is sentenced pursuant to the plea bargaining provisions set forth in Vehicle and Traffic Law, section 1192(10)(a)(ii) and (10)(d).

Sec. filed Sept. 26, 1975; amds. filed: Feb. 4, 1980; Feb. 22, 1996; May 27, 1997; Nov. 1, 2006 as emergency measure; Jan. 30, 2007 as emergency measure; April 30, 2007 as emergency measure; June 19, 2007 eff. July 3, 2007.

### Section 134.3. Court action upon conviction of a violation of section 1192 of the Vehicle and Traffic Law

Article 21 of the Vehicle and Traffic Law permits a judge who imposes sentence upon a conviction of a violation of any subdivision of section 1192 of the Vehicle and Traffic Law to prohibit a defendant from enrolling in a rehabilitation program under article 21. It is recommended that the following procedures be followed:

(a) *Prohibition from enrollment by a judge.* If a judge wishes to prohibit the defendant from enrolling in a rehabilitation program, upon conviction the judge may impose any penalty provided by law and he should suspend or revoke the defendant's driver's license, whichever is appropriate, pick up such defendant's driver's license, and forward the driver's license and a certificate of conviction to the commissioner within 48 hours of conviction. A statement indicating that the judge is prohibiting the defendant from enrolling in a rehabilitation program must be prominently placed on the certificate of conviction or on an accompanying letter on court stationery.

(b) *No prohibition from enrollment by the judge.* If a judge does not wish to prohibit the defendant from enrolling in a rehabilitation program, upon conviction, it is recommended that the judge impose, in addition to any other sentence required or permitted by law, a sentence of conditional discharge or probation, the conditions of such discharge or probation being that the defendant enroll in and satisfactorily complete a rehabilitation program established pursuant to article 21 of the Vehicle and Traffic Law. The judge should suspend or revoke the defendant's driver's license as required by section 1193 of the Vehicle and Traffic Law. A certificate of conviction indicating the sentence of conditional discharge should be forwarded to the commissioner within 48 hours of conviction. All additional action in relation to enrollment in a rehabilitation program will be taken by the Department of Motor Vehicles.

Sec. filed Sept. 26, 1975; amd. filed May 27, 1997 eff. June 11, 1997. Amended (b).

## Section 134.4. Initial procedures by the Department of Motor Vehicles upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law

(a) *Certificate of conviction indicates prohibition from enrollment by the judge.* Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter indicates that the convicting judge has prohibited the defendant from entering a rehabilitation program, the department will issue a confirming revocation or suspension order when a revocation or suspension has been imposed by the court, or, will issue an appropriate suspension or revocation order when such action has not been taken by the court. No further action with respect to rehabilitation programs will be taken by the department.

(b) *Certificate of conviction does not indicate prohibition from enrollment by the judge.* Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter does not indicate a prohibition from enrollment by the judge, the department will make a review of the defendant's driving record.

(1) Unless such review indicates that the defendant is ineligible to enroll in a rehabilitation program based upon criteria set forth in section 134.2 of this Part, the department will issue the appropriate suspension or revocation order against the defendant's driver's license, if the court has not already done so and will notify the defendant that he is eligible for enrollment in a rehabilitation program. Such notification will include instructions for enrollment in a rehabilitation program. The suspension or revocation order will indicate the effective date of the order. Unless such review indicates that the defendant is ineligible to enroll in a rehabilitation program in accordance with the provisions set forth in section 134.2 of this Part, the department will also apply the criteria established in section 134.7 of this Part to determine whether the defendant is eligible for the issuance of a conditional license. Unless such review indicates that the defendant is ineligible for the issuance of a conditional license, the department will also notify the defendant that he may be eligible for such license. Such notification will include instructions for making application for the conditional license.

(2) If a review of the defendant's driving record indicates that the defendant is ineligible for enrollment in a rehabilitation program as set forth in section 134.2 of this Part, only the appropriate revocation or suspension order will be issued to the defendant. No further action with respect to rehabilitation programs will be taken by the department.

Sec. filed Sept. 26, 1975; amd. filed May 27, 1997 eff. June 11, 1997. Amended (b)(1).

### Section 134.5. Procedures to be followed by defendant who receives notification of eligibility for enrollment in a rehabilitation program

Upon receipt of notification from the department of eligibility for enrollment in a rehabilitation program, the defendant may apply for enrollment in such a program. To make application, the defendant shall submit a completed waiver form and other necessary forms, as directed on the notice. The commissioner or designated person shall apply the criteria set forth in section 134.2 of this Part to determine the applicant's final eligibility for enrollment in a program. If the applicant is found to be eligible for enrollment, and he has met all requirements for enrollment established by statute and this Part, the applicant shall be enrolled in a rehabilitation program. In addition, if the applicant is eligible for the issuance of a conditional license, in accordance with criteria established in section 134.7 of this Part, a conditional license will be issued to the applicant in accordance with this Part.

Sec. filed Sept. 26, 1975; amds. filed: June 24, 1980; May 27, 1997 eff. June 11, 1997.

**Section 134.6. Waiver required**

(a) Included in an application for enrollment in a rehabilitation program shall be a waiver by the applicant. Such waiver shall provide that the applicant agrees:

(1) to accept and abide by all conditions contained on the conditional license, if such a license is issued to him;

(2) to complete the rehabilitation program, including referrals for evaluation and treatment;

(3) to pay all fees required for the rehabilitation program;

(4) except as provided for in section 134.9(d)(2) of this Part, if for any reason any conditional license which is issued to him is revoked, or if he fails to satisfactorily complete the rehabilitation program, the suspension or revocation of his license resulting from the conviction for which he was enrolled in the program shall be reimposed for the full period of such suspension or revocation, unless such full period has already been effectively served; and

(5) before the issuance of a conditional license, if such a license is issued to him, and before the reinstatement or return of an unconditional driver's license is made to him, he must satisfy any outstanding administrative suspensions, notices or bars, such as suspensions or bars for failure to answer traffic summonses.

(b) No person shall be permitted to enroll in a rehabilitation program unless a waiver signed by the applicant is filed with the department.

Sec. filed Sept. 26, 1975; amds. filed: May 27, 1997; Dec. 23, 1999 eff. Jan. 12, 2000. Amended (a)(4).

**Section 134.7. Criteria for issuance of a conditional license**

(a) The issuance of a conditional license shall be denied to any person who enrolls in a program if a review of such person's driving record, or additional information secured by the department, indicates that any of the following conditions apply.

(1) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of operation of a motor vehicle.

(2) The conviction, adjudication or finding upon which eligibility for a rehabilitation program is based involved a fatal accident.

(3) The person does not have a currently valid New York State driver's license. This paragraph shall not apply to a person whose New York State driver's license has expired, but is still renewable, nor to a person who would have a currently valid New York State driver's license except for the revocation or suspension which resulted from the conviction, adjudication or finding upon which his eligibility for the rehabilitation program is based, nor to a person who would have a currently valid New York State driver's license except

for a suspension or revocation which resulted from a chemical test refusal arising out of the same incident as such conviction, adjudication or finding of a violation of section 1192-a of the Vehicle and Traffic Law section.

(4) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction, adjudication or finding which conviction would, aside from the alcohol-related conviction, adjudication or finding result in mandatory revocation or suspension of the person's driver's license.

(5) The person has had two or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for the rehabilitation program is based within the last three years. This subdivision shall not apply to suspensions which have been terminated by performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of section 1192 of the Vehicle and Traffic Law or found to be in violation of section 1192-a of such law arising out of the same incident.

(6) The person has been convicted more than once of reckless driving within the last three years.

(7) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his designated agent tends to establish that the person would be an unusual and immediate risk upon the highway.

(8) The person has been penalized under section 1193(1)(d) of the Vehicle and Traffic Law for any violation of subdivision 2, 2-a, 3, 4, or 4-a of section 1192 of such law.

(9) The person is reentering the rehabilitation program, as provided in section 134.10(c) of this Part, for a second or subsequent time.

(10) The person has been suspended under section 510(2)(b)(v) of the Vehicle and Traffic Law for a conviction of section 1192(4) of such law. Such person may be eligible for a restricted use license pursuant to Part 135 of this Title.

(11)

(i) The person has three or more alcohol- or drug-related driving convictions or incidents within the last 25 years. For the purposes of this paragraph, a conviction for a violation of section 1192 of the Vehicle and Traffic Law, and/or a finding of a violation of section 1192-a of such law and/or a finding of refusal to submit to a chemical test under section 1194 of such law arising out of the same incident shall only be counted as one conviction or incident. The date of the violation or incident resulting in a conviction or a finding as described herein shall be used to determine whether

three or more convictions or incidents occurred within a 25 year period.

(ii) For the purposes of this paragraph, when determining eligibility for a conditional license issued pending prosecution pursuant to section 134.18 of this Part, the term "incident" shall include the arrest that resulted in the issuance of the suspension pending prosecution.

(12) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the suspension or revocation.

(13) The person, during the five years preceding the commission of the alcohol or drug-related offense or a finding of a violation of section 1192-a of the Vehicle and Traffic Law, participated in the alcohol and drug rehabilitation program or has been convicted of a violation of any subdivision of section 1192 of such law.

(b) If after a person is enrolled in a rehabilitation program and has been issued a conditional license, but, prior to the reissuance of an unconditional license, information is received by the department which indicates that such person was not eligible for a conditional license his conditional license will be revoked.

Sec. filed Sept. 26, 1975; amds. filed: Jan. 2, 1981; July 13, 1987; Dec. 11, 1989; June 13, 1994; May 27, 1997; Dec. 23, 1999; May 18, 2004; June 21, 2005; Nov. 1, 2006 as emergency measure; Jan. 30, 2007 as emergency measure; April 30, 2007 as emergency measure; June 19, 2007 eff. July 3, 2007. Amended (a)(8), added (a)(13); amd. filed Aug. 2, 2011 eff. Aug. 17, 2011; emergency rulemaking eff. Sept. 25, 2012, expired Dec. 23, 2012; emergency rulemaking eff. Dec. 24, 2012, expired Feb. 21, 2013; emergency rulemaking eff. Feb. 22, 2013, expired; amd. filed Apr. 15, 2013 eff. May 1, 2013.

## Section 134.8. [Repealed]

Sec. filed Sept. 26, 1975; repealed, filed Jan. 2, 1981 eff. Jan. 2, 1981.

## Section 134.9. Conditional license

A conditional license will be issued only by the department which will establish the conditions applicable to each individual license based upon information submitted by the applicant.

(a) *Form of conditional license.* The conditional license will be a two-part form. One part shall be computer generated and will bear a notation indicating that it is a conditional license. The other part will be manually generated and will contain the specific conditions applicable to that particular conditional license. The holder of a conditional license, when required to display such license, must display both parts of such license.

(b) *Establishment of conditions.* Each conditional license shall contain the condition that such license shall be subject to revocation for operation outside of the limitations appearing on such license. Each conditional license will contain the limitations or use of such license as prescribed by the department, and as accepted by the holder. Such conditions shall be limited to operation: to and from the holder's place of

employment; during the course of employment, when required; to and from a class or an activity which is an authorized part of the rehabilitation program and at which the holder's attendance is required; enroute to and from a class or course at an accredited school or approved institute of vocational or technical training; enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner; during a three-hour consecutive daytime period as specified by the department on a day during which the holder is not engaged in his usual employment or vocation; to and from court-ordered probation activities; to and from a motor vehicle office for the transaction of business relating to such license or program; or enroute to and from a place, including a school, at which a child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a State-approved institution of vocational or technical training;

(c) A conditional license issued to a person convicted of, or adjudicated a youthful offender for, a violation of any subdivision of section 1192 of the Vehicle and Traffic Law or found to have violated section 1192-a of such law shall not be valid for the operation of commercial motor vehicles as defined in section 501-a of such law or taxicabs as defined in section 148-a of such law.

(d) *Revocation of conditional license.*

(1) A conditional license which has been issued shall be revoked upon: the holder's conviction of any traffic violation, other than parking, stopping, standing, equipment, inspection or other nonmoving violations where such violation occurred during the period of validity of the conditional license; or for the holder's failure to attend any portion or portions of the rehabilitation program in accordance with attendance rules established for the program. A revocation for any of the above reasons shall be issued without a hearing based upon receipt of a certificate of conviction, or in the case of failure to attend any portion or portions of the rehabilitation program upon certification of the person administering such program. In addition, the commissioner may revoke a conditional license after a hearing, based upon a finding that the holder has not satisfactorily participated in the rehabilitation program, or that the holder is not attempting in good faith to accept rehabilitation, or upon a complaint that the holder is operating or has operated a motor vehicle in violation of the conditions imposed on his conditional license. The commissioner may also revoke a conditional license without a hearing upon receipt of a certificate of conviction which indicates that

the applicant has driven in violation of the conditions of such license.

(2) Persons under 21 years of age. The provisions of this subdivision shall apply to any person under the age of 21 who enters a rehabilitation program and is issued a conditional license as a result of a conviction for a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, committed when such person was under the age of 21. Notwithstanding any other provisions of this Part, if any such person's conditional license is revoked and such person has completed a rehabilitation program as provided for in section 134.10 of this Part, time served shall be credited toward the remaining portion of the revocation period, calculated from the effective date of the order of revocation which resulted in the issuance of the conditional license, to the date of the violation which resulted in the revocation of the conditional license.

(e) *Extra-territorial effect of conditional license.* Whether a conditional license will be honored by other states will be dependent upon the laws of each such other state. This state will honor a similar type license issued by another state to a resident of the issuing state to the extent of the conditions imposed. The holder of a conditional license issued pursuant to article 31 should check with the appropriate motor vehicle authorities of any other state in such other state.

(f) *Period of validity of conditional license.* Unless otherwise revoked by the commissioner, a conditional license will be valid from the date of its issuance until the expiration date contained thereon or until the holder's unconditional license is returned to him, whichever occurs first.

Sec. filed Sept. 26, 1975; amds. filed: July 13, 1987; Feb. 15, 1991 as emergency measure; May 15, 1991 as emergency measure; July 9, 1991; July 12, 1991 as emergency measure; May 27, 1997; Dec. 23, 1999; June 21, 2005 eff. July 6, 2005. Amended (c).

**Section 134.10. Completion of a rehabilitation program**

(a) *Requirements for satisfactory completion of a rehabilitation program.* In order for a person to satisfactorily complete a rehabilitation program, he must have paid all necessary fees and have attended and actively participated in all segments of such rehabilitation program as required by the department, including completion of extended participation upon the recommendation of the appropriate officials.

(b) *Results of satisfactory completion of a rehabilitation program.* Upon satisfactory completion of a program, any unexpired suspension or revocation which was issued as a result of the conviction for which the person was eligible for enrollment in the program may be terminated by the commissioner unless the termination is prohibited under section 1193 of the Vehicle and Traffic Law or this Subchapter, or if the termination is based upon enrollment in the program pursuant to the plea bargaining provisions of Vehicle and Traffic Law section 1192(10)(a)(ii) and 1192(10)(d), or if such person would

not otherwise be eligible for enrollment in the program pursuant to section 1196(4) of such law, or if the person has two or more alcohol- or drug-related driving convictions or incidents within 25 years from the date of enrollment in the program.

(c) *Failure to satisfactorily complete a rehabilitation program.* If a person fails to satisfactorily complete a rehabilitation program, in addition to revocation of any conditional license which may be held by such person, the suspension or revocation of such person's unconditional driver's license will be reinstated for the full period of such suspension or revocation, unless such full period has already been effectively served. Such person may apply for reentry into the rehabilitation program. A conditional license may only be issued upon the first such reentry. Although second and subsequent reentries may be permitted, a conditional license will not be reissued in such cases.

(d) *Appeals.* Appeals from decisions of treatment or program personnel regarding an individual's participation or treatment shall be directed to the program director. If said director is unable to resolve the matter, such appeals shall be directed to the Division of Driver Licensing. If said division is unable to resolve the matter, such appeals shall be sent to the commissioner who shall make a determination. Prior to making a determination the commissioner may consult with experts in the field of alcoholism and rehabilitation and any other appropriate agencies.

Sec. filed Sept. 26, 1975; amds. filed: Feb. 4, 1980; Jan. 2, 1981; Dec. 9, 1982; Dec. 11, 1989; Aug. 27, 1996; May 27, 1997; Jan. 30, 2007 as emergency measure; April 30, 2007 as emergency measure; June 19, 2007 eff. July 3, 2007. Amended (b); emergency rulemaking eff. Sept. 25, 2012, expired Dec. 23, 2012; emergency rulemaking eff. Dec. 24, 2012, expired Feb. 21, 2013; emergency rulemaking eff. Feb. 22, 2013, expired; amd. filed Apr. 15, 2013 eff. May 1, 2013.

### Section 134.11. Issuance of unconditional driver's license

Satisfactory completion of a rehabilitation program or expiration of the term of suspension, whichever occurs first, will initiate the necessary action to provide for the termination of the suspension or revocation which was the basis for entry into the rehabilitation program, provided however, no such suspension or revocation shall be terminated prior to the expiration of the term of suspension or revocation if the applicant for the unconditional license has two or more alcohol- or drug-related driving convictions or incidents within the preceding 25 years. Upon a determination of satisfactory completion of the rehabilitation program or the term of suspension, and unless otherwise determined by the commissioner, as provided for in subdivision (b) of section 134.10 of this Part, a notice of termination of the suspension or revocation and an unconditional license will be issued. However, no such license will be issued until all civil penalties due the department are paid or if there are any outstanding suspensions, revocations, or bars against such license until such suspensions, revocations, or bars are

satisfactorily disposed of by the applicant. Any conditional license which is still valid will be terminated concurrently with the return of the unconditional driver's license and must be returned to the department. A conditional license shall not be renewed more than one year after the issuance of the conditional license if a revocation is issued for a chemical test refusal and the holder of the conditional license has not paid the civil penalty required by section 1194 of the Vehicle and Traffic Law.

Sec. filed Sept. 26, 1975; amds. filed: Jan. 2, 1981; May 27, 1997; Nov. 1, 2006 as emergency measure; Jan. 30, 2007 as emergency measure; April 30, 2007 as emergency measure; June 19, 2007 eff. July 3, 2007; emergency rulemaking eff. Sept. 25, 2012, expired Dec. 23, 2012; emergency rulemaking eff. Dec. 24, 2012, expired Feb. 21, 2013; emergency rulemaking eff. Feb. 22, 2013, expired; amd. filed Apr. 15, 2013 eff. May 1, 2013.

### Section 134.12. Notification to the court

In any case where the sentence upon conviction consists of a conditional discharge, the department will notify the convicting court of the final disposition of any action relating to any person who has not been prohibited from enrolling in a rehabilitation program by a judge. Notification of ineligibility for a rehabilitation program and failure to enroll in the program if eligible or failure to satisfactorily complete such a program will be sent to the court as expeditiously as possible, so that where appropriate the court may take the necessary steps to resentence the defendant for a failure to meet the conditions of any conditional discharge. Notification of satisfactory completion of a rehabilitation program will be sent to the appropriate court. Such notification will indicate compliance of the defendant with the conditions of the conditional discharge which may have been imposed by the court relating to enrollment and satisfactory completion of a rehabilitation program.

Sec. filed Sept. 26, 1975; amds. filed: April 1, 1976; May 27, 1997 eff. June 11, 1997.

### Section 134.13. Out-of-state convictions

All of the provisions of this Part shall be applicable to the holder of a New York State driver's license who has been convicted of an alcohol-or drug-related traffic offense in another state except that those provisions which relate to the actions of the convicting judge, the effect of satisfactory completion of a rehabilitation program upon a sentence of fine or imprisonment and notification to the court by the department shall not be applicable. In addition, if the driving privileges of a New York licensee convicted in another state are suspended or revoked by such other state, the conditional license issued by the commissioner will not permit the holder to operate in such other state during the term of suspension or revocation of his driving privileges within that state, unless specifically permitted by that state.

Sec. filed Sept. 26, 1975; amd. filed Feb. 4, 1980 eff. Feb. 4, 1980.

### Section 134.14. Fees

Article 21 provides for the establishment of a schedule of fees to be paid by or on behalf of each participant in the program, which fees shall defray the ongoing expenses of the program.

(a) This fee shall consist of two parts:

(1) that portion of the fee necessary to defray the administrative costs of the Department of Motor Vehicles in administering the program, which shall be paid by the applicant to the department at the time he makes application for acceptance in a rehabilitation program; and

(2) that portion of the fee required for enrollment in a program which shall be paid by the applicant prior to entry into the program to the entity authorized by the department to conduct a rehabilitation program. Such fee shall not be refundable unless the person is denied enrollment in the program upon his application. Moreover, no portion of the fee shall be refundable by reason of the participant's withdrawal or expulsion from the program.

(b) Except as provided in subdivisions (c) and (d) of this section, the total fee for a rehabilitation program shall not exceed $300. Seventy-five dollars of any such total fee shall represent the reimbursement of costs for administrative expenses incurred by the Department of Motor Vehicles and sentencing courts. A participant in the program shall not be required to pay the $75 fee to the department if such participant held a conditional license pending prosecution under section 134.18 of this Part, if such conditional license was not revoked, and such conditional license was issued as the result of the same violation on which participation in such program is based. The commissioner may require that up to $5 of the total fee for a rehabilitation program shall be used for reimbursement of costs for curriculum enhancements to be developed by the Department of Motor Vehicles and/or a third party authorized by the department. If the commissioner so requires, written notification of such requirement shall be sent to all rehabilitation programs, and such portion of the fee shall be paid by the program directly to such authorized third party.

(c) A participant in a program who transfers to another program shall pay to the new program a fee of $25, plus $10 for each session remaining to be completed in the new program.

(d) A participant who has previously withdrawn from a program and subsequently reenters such program shall pay a reenrollment fee of $50 to the program.

(e) Each program shall submit an annual fiscal report and an annual statistical report, on a form prescribed by the commissioner. Such reports shall be filed with the department no later than April 30th in the year following the calendar year to which it pertains.

(f) In addition to the fees established in the preceding subdivisions of this section, there may be an additional charge for extended alcohol or drug rehabilitative activities to which any defendant is referred by the program administrator as part of the rehabilitation program.

Sec. filed Sept. 26, 1975; amds. filed: Nov. 18, 1977; Sept. 25, 1980; June 1, 1987; July 13, 1989; March 27, 1990; Dec. 4, 1991; Oct. 28, 1993; Feb. 22, 1996; Nov. 14, 1996; May 11, 2004 eff. May 26, 2004. Amended (b).

### Section 134.15. Establishment of alcohol and drug rehabilitation programs

The department may enter into an agreement with a municipality, a department of a municipality, or other agency to provide that such municipality, department thereof, or other agency shall conduct a rehabilitation program. Any agreement shall provide that any such party shall conduct the program in accordance with a curriculum approved by the department, in a facility acceptable to the department, administered by and given by persons who are approved by and who meet qualifications established by the commissioner. Such party shall agree to abide by any class size limitation established by the department, to charge not more than the fee prescribed by the department and to cooperate fully with the department in the conduct and administration of any such program including the monitoring and evaluation of any phases of the program or its administration by persons designated by the commissioner. No program will be approved if any referral for extended rehabilitative activities is connected in any manner with the person making such referral so that financial or other benefits will result to such person as a result of such referral.

Sec. filed Sept. 26, 1975 eff. Sept. 29, 1975.

### Section 134.16. Confidentiality of records

Any record relating to a person enrolled in such a program generated by the agency which is conducting a rehabilitation program shall be confidential and shall not be disclosed other than in conjunction with the rehabilitation program to any person other than the person himself and, where appropriate, the Department of Motor Vehicles. This provision shall not apply to any notification of satisfactory completion of a program or notification that the person has failed or is failing to satisfactorily complete a program.

Sec. filed Sept. 26, 1975 eff. Sept. 29, 1975.

### Section 134.17. [Repealed]

Sec. filed Sept. 26, 1975; repealed, filed May 27, 1997 eff. June 11, 1997.

### Section 134.18. Conditional license issued pending prosecution

(a) When a driver's license is suspended pending prosecution pursuant to section 1193(2)(e)(7) of the Vehicle and Traffic Law, the holder of such license may be issued a conditional license, 30 days after such suspension takes effect, provided such person is eligible for such a license as set forth in section 134.7 of this Part and section 1196 of the Vehicle and Traffic Law. Such license shall not be valid for the operation of a commercial motor vehicle or a taxicab. The holder of such license shall not be required to and may not participate in the alcohol and drug rehabilitation program when issued a conditional license pursuant to this section.

(b) *Establishment of conditions.* Each conditional license is-

sued under this section shall be subject to the conditions set forth in section 134.9(b) of this Part and section 1196 of the Vehicle and Traffic Law.

(c) *Revocation of conditional license.* The provisions of section 134.9(d) of this Part shall be applicable to a conditional license issued under this section.

(d) *Period of validity.* A conditional license issued under this section shall be valid, unless otherwise revoked, suspended or expired, until the prosecution for the pending alcohol-related charge is terminated.

Sec. filed Feb. 22, 1996 eff. March 13, 1996; amd. filed June 3, 2008 eff. June 18, 2008.

# APPENDIX 57

## Notice of Completition of New York State Drinking Driver Program

SUTTON/BURGESS PRINTING ASSOCIATES INC PO BOX 587
COHOES N Y 12047-0587 (518) 237-7598

MV 2026 (9/87) New York State - Department of Motor Vehicles

**NOTICE OF COMPLETION OF NEW YORK STATE DRINKING DRIVER PROGRAM**

Name of Motorist _____
Last First M.I.

No. & Street _____

City _____ State _____ ZIP _____

Date of Birth _____ Sex _____ Completion Date _____

Entrance Date _____

Conviction was related to ☐ Alcohol - **CODE 0** or ☐ Drugs - **CODE 1**

Name of Drinking Driver Program _____ Location Code _____

No. & Street _____

City _____ State _____ ZIP _____

*If motorist was transferred from another Drinking Driver Program, check box* ☐
*Location code of program from which the motorist transferred* _____

I certify that the individual named has successfully completed all aspects of the Drinking Driver Program as designated by the Commissioner of Motor Vehicles.

Authorized Signature _____ **CODE 0** _____

1. TO MOTORIST - USE THIS COPY TO APPLY FOR UNCONDITIONAL LICENSE

# APPENDIX 60

# Letter from Department of Motor Vehicles Regarding Chemical Test Refusal

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
6 EMPIRE STATE PLAZA, ALBANY, NY 12228

RAYMOND P. MARTINEZ
Commissioner

JILL A. DUNN
Deputy Commissioner and Counsel

Legal Division
NEAL W. SCHOEN
Chief Counsel

January 4, 2002

Eric H. Sills, Esq.
Gerstenzang, O'Hern, Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203

Re: Chemical Test Refusal

Dear Mr. Sills:

Neal Schoen has asked that I respond to your letter of December 26, 2001 regarding chemical test refusals.

You pose the following scenario: a motorist persistently refuses to submit to a properly requested chemical test. The motorist changes her mind and consents to take the test. The police allow her to take the test and a test result is obtained. Is this deemed a refusal?

Sanctions are imposed for those who refuse a chemical test because such refusal may frustrate the prosecution's case related to the underlying DWI charge. However, in the case you describe, the prosecution's case is not impaired because a test result is obtained. Thus, the Department would not deem this scenario to constitute a refusal.

Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Ida L. Traschen
Associate Counsel

ILT/mw
cc: Lucia Ferrara
Sandy Sussman

# APPENDIX 64

# DPCA Financial Disclosure Report

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

**FINANCIAL DISCLOSURE INSTRUCTIONS**

IN ORDER TO BE PROCESSED AS AN APPLICATION FOR JUDICIAL CONSIDERATION OF FINANCIAL AFFORDABILITY, ALL INFORMATION REQUESTED ON THIS REPORT MUST BE COMPLETELY, PROPERLY AND ACCURATELY PROVIDED. DATED SIGNATURE OF THE DEFENDANT IS ALSO REQUIRED.

**QUALIFYING INFORMATION SECTION ***

**DEFENDANT'S NAME** LAST, FIRST, MI (MIDDLE INITIAL): ENTER DEFENDANT'S NAME.

**ADDRESS:** ENTER DEFENDANT'S MAILING ADDRESS

**DEFENDANT'S LICENSE NUMBER:** ENTER DEFENDANT'S DRIVER LICENSE NUMBER.

**DATE OF BIRTH:** ENTER DEFENDANT'S BIRTHDATE

**LIVING ARRANGEMENTS AND LENGTH OF TIME IN CURRENT ARRANGEMENT:** DESCRIBE THE DEFENDANT'S PRESENT LIVING ARRANGEMENT AND THE LENGTH OF TIME IN THIS LIVING ARRANGEMENT (E.G. HOMELESS, MARRIED LIVING WITH SPOUSE AND/OR CHILD(REN), SINGLE/DIVORCED/WIDOWED LIVING ALONE, SINGLE/DIVORCED/WIDOWED LIVING WITH CHILD(REN), SINGLE/DIVORCED/WIDOWED LIVING WITH PARENTS WITH OR WITHOUT CHILD(REN), CO-HABITATING, LIVING WITH RELATIVE(S) OTHER THAN SPOUSE OR PARENT).

**LIST OTHER PEOPLE IN HOUSEHOLD:** LIST ANY OTHER PEOPLE WHO LIVE IN THE SAME HOUSEHOLD WITH THE DEFENDANT, INCLUDING SPOUSE AND ANY DEPENDENTS.

**EMPLOYMENT STATUS:** CHECK THE APPROPRIATE RESPONSE. IF EMPLOYED, PROVIDE ALL INFORMATION REQUESTED IN THE "EMPLOYED" SECTION ONLY AND PROCEED TO THE "FINANCIAL REPORTING SECTION". DOCUMENTS THAT CAN BE USED AS VERIFICATION OF EMPLOYMENT INCLUDE A RECENT PAY STUB OR A COMPANY OR EMPLOYER LETTER. IF UNEMPLOYED, PROVIDE ALL INFORMATION REQUESTED IN THE "UNEMPLOYED" SECTION AND PROCEED TO THE "FINANCIAL REPORTING SECTION". DOCUMENTS THAT CAN BE USED AS VERIFICATION OF UNEMPLOYMENT INCLUDE BENEFITS STATEMENT/CHECK STUB FOR UNEMPLOYMENT BENEFITS, EMPLOYER LETTER, OR DISABILITY VERIFICATION.

**FINANCIAL REPORTING SECTION ****

**DO NOT LEAVE ANY SPACES BLANK. PLACE A ZERO IN THE APPROPRIATE SPACE IF THE DEFENDANT HAS NO SUCH INCOME OR EXPENSES.**

**A - MONTHLY INCOME FROM WAGES:** ENTER **TOTAL GROSS** FOR **ALL** WAGES. THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: PAY CHECK STUB, W-2 FORM OR EMPLOYER STATEMENT.

B - MONTHLY INCOME FROM OTHER SOURCES: ENTER ALL INCOME RECEIVED FROM SOURCES OTHER THAN EMPLOYMENT. ("RENTAL INCOME" REFERS TO INCOME RECEIVED FROM RENTAL PROPERTY THAT IS OWNED BY THE DEFENDANT.) THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: PAYMENT STUB, MOST RECENT STATE OR FEDERAL TAX RETURN, BANK STATEMENT, COURT RECORDS, LETTERS FROM THE BENEFIT OFFICE REGARDING MONTHLY BENEFIT AMOUNT, ETC.

**C - MISCELLANEOUS INCOME DURING PAST 12 MONTHS:** SPECIFY **ALL** OTHER INCOME, REGARDLESS OF SOURCE.

**D - CURRENT BALANCES:** SPECIFY **ALL** TYPES AND AMOUNTS.

**E - PERSONAL PROPERTY:** LIST THE MARKET VALUE OF **ALL** PERSONAL PROPERTY OWNED.

**F - MONTHLY EXPENSES:** ENTER **ALL** MONTHLY EXPENSES AS APPROPRIATE. THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: EXPENSE RECEIPTS, PAYMENT BOOK, MOST RECENT BILL.

SUBMIT 3 COPIES OF THIS COMPLETED REPORT TO THE SENTENCING COURT

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

**QUALIFYING INFORMATION SECTION ***

DEFENDANT'S LAST NAME _____ FIRST NAME _____ MI _____

DEFENDANT'S LICENSE NUMBER _____ DATE OF BIRTH _____

HOME ADDRESS _____

CITY _____ STATE _____ ZIP

MAILING ADDRESS IF DIFFERENT _____

CITY _____ STATE _____ ZIP

PROVIDE INFORMATION FOR EACH VEHICLE OWNED

**IF MORE THAN 3 VEHICLES PLEASE ATTACH ADDITIONAL SHEET WITH REQUIRED INFORMATION*

| | YEAR | MAKE | MODEL | VALUE |
|---|---|---|---|---|
| VEHICLE ONE | | | | |
| VEHICLE TWO | | | | |
| VEHICLE THREE | | | | |

DESCRIBE LIVING ARRANGEMENTS _____

LENGTH OF TIME IN CURRENT ARRANGEMENT _____

**OTHER PEOPLE LIVING IN HOUSEHOLD:**

| NAME | AGE | RELATIONSHIP | NAME | AGE | RELATIONSHIP |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

**EMPLOYMENT STATUS (CHECK ONE)**

EMPLOYED ☐ UNEMPLOYED ☐

_____ PLACE OF EMPLOYMENT

_____ ADDRESS

_____

POSITION _____

LENGTH OF TIME _____

VERIFICATION DOCUMENT (SPECIFY & ATTACH)

_____

_____ LENGTH OF UNEMPLOYMENT

_____ LAST PLACE OF EMPLOYMENT

LAST EMPLOYMENT
FROM _____
TO _____

VERIFICATION DOCUMENT (SPECIFY & ATTACH)

_____

DPCA-500IID-FDR Available at http://www.dpca.state.ny.us *2 OF 5*

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

**FINANCIAL REPORTING SECTION ****

**A: MONTHLY INCOME FROM WAGES**

SELF $ _____
SPOUSE $ _____
OTHER HOUSEHOLD MEMBERS $ _____
$ _____
HOW OFTEN IS DEFENDANT PAID? _____
(WKLY, BI-WKLY, MNTHLY, BI-MNTHLY)

**B: MONTHLY INCOME FROM OTHER SOURCES**

PENSION INCOME $ _____
RENTAL INCOME $ _____
CERTIFICATES OF DEPOSIT $ _____
TRUSTS/STOCKS/BONDS $ _____
CHILD SUPPORT $ _____
SPOUSAL MAINTENANCE/ALIMONY $ _____
LEGAL SETTLEMENTS/AWARD $ _____
AFDC/FOOD STAMPS/RENTAL ASSISTANCE $ _____
WORKERS COMP $ _____
UNEMPLOYMENT COMP $ _____
COUNTY/CITY WELFARE $ _____
OTHER: _____ $ _____
_____ $ _____
_____ $ _____

**C: MISCELLANEOUS INCOME DURING PAST 12 MONTHS**

LOTTERY $ _____
SWEEPSTAKE(S) $ _____
DISABILITY INSURANCE $ _____
BONUS $ _____

WAGERING $ _____
LEGAL SETTLEMENT/AWARD $ _____
ANNUITY $ _____

| | SPECIFY | AMOUNTS |
|---|---|---|
| OTHER | | $ |
| | | $ |
| | | $ |

**D: CURRENT ACCOUNT BALANCES**

SAVINGS ACCOUNT $ _____
CHECKING ACCOUNT $ _____
INDIVIDUAL RETIREMENT ACCOUNT $ _____

DEFERRED COMPENSATION ACCOUNT $ _____
TRUST ACCOUNT $ _____
OTHER ACCOUNTS (SPECIFY & AMOUNT) $ _____

DPCA-500IID-FDR Available at http://www.dpca.state.ny.us *3 OF 5*

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

**E: PERSONAL PROPERTY**

DO YOU OWN:

REAL ESTATE
LOCATION _____ VALUE $ _____
LOCATION _____ VALUE $ _____
LOCATION _____ VALUE $ _____

REC VEHICLE/CAMPER
MAKE _____ VALUE $ _____

ATV 3/4 WHEEL
MAKE _____ VALUE $ _____

MOTORCYCLE
MAKE _____ VALUE $ _____

BOAT
MAKE _____ VALUE $ _____

MAKE _____ VALUE $ _____

PERSONAL PROPERTY (ELECTRONICS, ART, JEWELRY, FURNITURE, ETC.)

APPROXIMATE VALUE _____

**F: MONTHLY EXPENSES**

RENT/MORTGAGE $ _____
HOME ELECTRIC/GAS $ _____
TELEPHONE (LANDLINE) $ _____
HEALTH/LIFE INSURANCE $ _____
AUTOMOBILE INSURANCE(S) $ _____ SPECIFY NUMBER _____
AUTOMOBILE LOAN(S) $ _____ SPECIFY NUMBER _____
SPOUSAL MAINTENANCE/ALIMONY $ _____
INTERNET SERVICE $ _____
BEEPERS/PAGERS $ _____ SPECIFY NUMBER _____
WATER/SEWER $ _____
FOOD $ _____
TELEPHONE (CELL) $ _____
CHILD CARE $ _____
AUTOMOBILE FUEL/GAS $ _____
ALCOHOL $ _____
CIGARETTES/OTHER TOBACCO PRODUCTS $ _____
CABLE TELEVISION $ _____
SATELLITE TV/RADIO $ _____
MEDICAL PRESCRIPTIONS $ _____

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

**F: MONTHLY EXPENSES CONTINUED ***

| | SPECIFY BELOW: | AMOUNTS |
|---|---|---|
| CREDIT CARD CHARGE(S)/OTHER LOAN AMOUNT(S) | | $ |
| | | $ |
| | | $ |
| | | $ |
| | | $ |
| WORK RELATED TRAVEL | | $ |
| RECREATION | | $ |
| | | $ |
| | | $ |
| OTHER EXPENSES | | $ |
| | | $ |
| | | $ |

* ATTACH ADDITIONAL SHEET WITH REQUIRED INFORMATION IF MORE SPACE IS NECESSARY.

**THE INFORMATION PRESENTED HEREIN IS TRUTHFUL AND ACCURATE TO THE BEST OF MY KNOWLEDGE.**

DEFENDANT SIGNATURE _____ DATE _____

PRINT NAME _____

# APPENDIX 65

# Order of Suspension Pending Prosecution Hardship Privilege and Order of Suspension

New York- State Department of Motor Vehicles

**ORDER OF SUSPENSION PENDING PROSECUTION**
**HARDSHIP PRIVILEGE**

***Please*** Print

**PART 1 - HARDSHIP PRIVILEGE**

| Motorist Name | Date of Birth / / | Yr. Lic. Expires | Lic. Class | Restrictions |
|---|---|---|---|---|
| | | | | |

YOUR EMPLOYER AND/OR SCHOOL YOU ATTEND

| Name | Address (No. and Street, City or Town, State and ZIP Code) |
|---|---|
| Name | Address (No. and Street, City or Town, State and ZIP Code) |
| Name | Address (No. and Street, City or Town, State and ZIP Code) |

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately. This order will allow you to drive to or from work, to or from medical treatment (for yourself or a member of your immediate household), or if you are a student enrolled in a school, college or university, you may drive to and from school if such travel is necessary for the completion of your degree or certificate. You must have both parts of this order with you when you drive.

REASON FOR GRANTING HARDSHIP PRIVILEGE (this privilege is not valid unless this part is completed by the Court):

**This hardship privilege is not valid: if you are convicted; if you do not have a valid driver license; if your license is revoked or suspended after this order is issued; or if your license is expired more than two years.**

Date _____ _____
(Judge's Signature)

MV-1193 (10/02)

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New York State Department of Motor Vehicles

**ORDER OF SUSPENSION PENDING PROSECUTION.**

***Please*** Print

PART 2

| Motorist Name | | Date of Birth / / | ☐ Male ☐ Female |
|---|---|---|---|
| Address (Number & Street) | Apt. No. | TSLE&D Ticket Number (or Docket Number) | Violation Date / / |
| City | State | Zip Code | Police NCIC/ORI Number |

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately, pending prosecution for a charge of violating Section:
☐ 1192-1 ☐ 1192-2 ☐ 1192-3 ☐ 1192-4 of the New York State Vehicle and Traffic Law.

☐ You have been convicted of violating a subdivision of Section 1192 of the V&T Law within the past five years, or you are charged with a felony under Article 120 or 125 of the New York State Penal Law. **(You are not eligible for a hardship privilege or conditional license under these circumstances.)**

☐ You are alleged to have had . 08 of one percent or more by weight of alcohol in your blood, as shown by chemical analysis of blood, breath, urine or saliva according to Section 1194 of the V&T Law. **(If this box is checked, you may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility.)**

☐ You have a DJ/MJ license/permit and are charged with violating subdivisions 1, 2 or 3 of Section 11 92 of the Vehicle and Traffic Law. You may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility

| Court | Court Code | Effective Date of Suspension / / |
|---|---|---|
| Judge's Name | | Justice Code |

COMPLIANCE - Has motorist turned in photo license and any permits to the court?
☐ Yes - photo license attached ☐ No
☐ Yes - permit(s) attached

| Motorist Signature → | Signature of Judge or Clerk of Court → |
|---|---|

**Note to Court Clerk:** Send the "DMV" copy of this MV-1193 to your designated data entry site.

| DMV OFFICE USE ONLY | | | |
|---|---|---|---|
| LICENSE: ☐ Suspended | EFFECTIVE DATE: / / | HARDSHIP PRIVILEGE: ☐ Yes ☐ No | COMPLIANCE: ☐ Yes ☐ No |

MV-1193 (10102) **CUSTOMER**

# APPENDIX 68

# Department of Motor Vehicles' Counsel's Opinion Regarding Time Limitations for Chemical Test Refusals

**DEPARTMENT OF MOTOR VEHICLES**
**COUNSEL'S OFFICE**

**OPINION OF COUNSEL**
(#1-12)

**Subject:** Time Limitations for Chemical Test Refusals

**Date:** June 29, 2012

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**Question**

Is a motorist deemed to have refused a chemical test when the refusal occurs more than two hours after the arrest?

**Discussion**

It has been the long-standing position of the Department of Motor Vehicles that a motorist is deemed to have refused to submit to a chemical if the refusal occurs within two hours of the motorist's arrest. As you are aware, that position was based solely on statutory interpretation, since there are no Court of Appeals decisions that directly speak to the issue. Those Court of Appeals opinions that do exist speak only to the admissibility of evidence of a refusal, or blood alcohol content evidence obtained more than two hours after arrest, at a criminal trial.

However, evolving case law on the issue clearly indicates that the courts have taken a more expansive view. In People v. Atkins, 85 N.Y.2d 1007 (1995), the motorist consented to a blood test within two hours of his arrest, but it was not administered until after the two hours had expired. The Court of Appeals admitted the results of the test, holding that the two-hour rule has no application where the defendant expressly consents to the test. Relying on the holding in Atkins, the court in People v. Ward, 176 Misc. 2d 398 (Sup. Ct. Richmond Co. 1998), deciding whether to admit evidence of a refusal obtained more than two hours after arrest, held that

> if evidence of the results of a chemical test expressly consented to by a defendant and administered beyond the two-hour limit is competent, then evidence of a refusal to take such a test, obtained beyond the two-hour limit, must similarly be competent (see, People v. Morales, 161 Misc. 2d 128; contra, People v. Walsh, 139 Misc. 2d 161). A contrary conclusion would not only seem to defy reason, but would permit an operator of a motor vehicle to refuse a properly requested chemical test without consequence. 176 Misc. 2d at 403.

The Ward decision has been followed in several other cases, including People v. Elfe, 33 Misc. 3d 1221A (Sup. Ct. Bronx Co. 2011) and People v. Popko, 33 Misc. 3d 277 (Crim. Ct. Kings Co. 2011).

In light of these recent and well-reasoned holdings that the two-hour rule is inapplicable to refusals, it is the Department's view that a motorist who refuses to submit to a chemical test more than two hours after the time of arrest is deemed to have refused, assuming that the other statutory elements of a refusal (i.e., reasonable grounds, arrest, warning and refusal) are established at the hearing.