

PLEA BARGAINING -- PROBLEMS AND PITFALLS

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GUIDING YOU THROUGH THE PROCESS

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AGENDA

- The penalties for VTL § 1192 offenses
- 20-day Order
- The Drinking Driver Program
- Ignition Interlock Device
- Suspension pending prosecution



THE FIRST OFFENDER

- Assuming fairly low BAC and no aggravating factors -- DWAI
- 90 day suspension of driver's license (with certain exceptions)
- DDP/conditional license eligible
- Victim Impact Panel
- Alcohol screening/assessment
- \$300-\$500 fine + \$255/\$260 surcharge
- Driver responsibility assessment

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THE SECOND OFFENDER

- If the prior conviction is fairly recent, the prosecutor will likely offer a plea to DWI
- 6-month license *revocation* -- no full re-licensing until the expiration of statutory revocation period
- Eligibility for the DDP and a conditional license?
- Ignition Interlock Device



THE CLIENT WITH 3 OR MORE ALCOHOL-RELATED CONVICTIONS

- Lifetime driving record (Form MV-15F)
- Length of revocation likely impacted by the new DMV regulations
- Possible lifetime denial
- Revocation/suspension is critical



20-DAY ORDER

- Issued at sentencing by the Court
- Stays the suspension/revocation
- Ability to enroll in the DDP and obtain conditional license without losing driving privileges
- Generally, Courts will issue the 20-day Order if your client is eligible
 - Fine/surcharge

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New York State Department of Motor Vehicles
ORDER OF SUSPENSION OR REVOCATION

- Always give Part 1 to the motorist.
- Give Part 1 to the motorist ONLY if you are granting continuation of driving privileges.

PART 1 - CONTINUATION OF DRIVING PRIVILEGES

Motorist Name (Last, First, MI) _____ Date of Birth _____ Year License Expires _____ License Class _____ Restrictions _____

According to Section 1193 of the Vehicle and Traffic Law, your driver license will be suspended revoked on _____ / _____ / _____

This order will allow you to drive, with the same limitations as your driver license, until your suspension/revocation starts. You must have both parts of this order with you when you drive. If you do not have both parts of this order with you, you may be charged with a violation of the Vehicle and Traffic Law. When the suspension/revocation starts, you do not have the right to drive unless you receive a conditional license. This order must be turned in before a conditional license can be issued to you.

MV-1192 (4/11) _____ (Signature of Judge or Clerk of Court)

New York State Department of Motor Vehicles
ORDER OF SUSPENSION OR REVOCATION

PART 2

Motorist Name (Last, First, MI) _____ Date of Birth _____ Male Female

Number and Street Address _____ Apt. # _____ Ticket Number (if available, enter Dealer Number) _____

City _____ State _____ Zip Code _____ Driver License # _____

COURT/VIOLATION (Certificate of Conviction must be attached)

Judge Name _____ Violation Date _____ Conviction Date _____ Check if Youthful Offender

Court Code _____ Vehicle Class (definitions are listed on the back of this form) _____ Commercial Motor Vehicle (CMV) Special Vehicle All Others

SUSPENSION/REVOCATION

According to Section 1193-2 of the Vehicle and Traffic Law, your driver license/privilege is:

Suspended for 90 days (conviction of 1192-1 first offense only if not operating a CMV or Special Vehicle).

Revoked for at least _____ Duration (Enter ONLY one of the options listed on the back of this form) _____ because of your conviction of a violation of Subdivision _____ of Section 1192 of the Vehicle and Traffic Law.

PROBATION/CONDITIONAL DISCHARGE

A person convicted of a violation of VTL 1192(2-a)(6) or (b) committed on or after 12/18/09 must be sentenced to a conditional discharge or probation and the installation and use of the interlock device.

A person convicted of a violation of VTL 1192(2) or (3) committed on or after 11/18/09 and who is sentenced on or after 8/16/10 must be sentenced to a conditional discharge or probation and the installation and use of the interlock device.

Is motorist sentenced to: Probation - If sentenced to probation, how long is the sentence? 3 years 5 years

Conditional Discharge - If sentenced to conditional discharge, how long is the sentence? 1 year 3 years

Must the motorist obtain permission before applying for a license? Only applies if motorist is sentenced to probation. Yes No

If yes, do they need permission from: Court Probation Department Both

Must the motorist install an Ignition Interlock Device? Yes No

LICENSE SURRENDER - Has the motorist surrendered his/her license

Yes No - If you have not turned in your driver license to the court, you must turn it in to the Department of Motor Vehicles. If you turn in a temporary license, you must also turn in your photo license when you receive it.

Motorist Signature _____ Signature of Judge or Clerk of Court _____

MV-1192 (4/11) Copy 1: Motorist

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ELIGIBILITY FOR A 20-DAY ORDER

- If eligible for the DDP and a conditional/restricted = 20-day stay
- Irrelevant if suspended/revoked
- A defendant convicted of a felony may still be eligible
- VTL § 1193(2)(d)(2) -- not eligible if:
 - (1) charged with vehicular manslaughter/homicide, or
 - (2) prior conviction within past 5 years

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CHEMICAL TEST REFUSALS AND 20-DAY ORDERS

- Facts:
 - Your client is charged with DWI and he is alleged to have refused the chemical test. He enters a plea to DWAI at the arraignment. Is he eligible for the 20-day Order?
 - Yes, however, he is unable to drive while there is a temporary suspension.

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20-DAY ORDERS CONT'D

- If you appear at the refusal hearing and the officer(s) no-show, the temporary suspension is lifted = 20-day Order becomes effective
- If your client is revoked at the refusal hearing, the 20-day Order is a nullity

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THE DRINKING DRIVER PROGRAM ("DDP")

- What is the DDP?
 - 7 week course, 16 hours total
 - Helps participants examine the arrest experience and make more appropriate choices in the future
 - \$225 to enroll in the course

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ELIGIBILITY FOR THE DDP

- Conviction of an alcohol or drug-related driving violation
- Cannot participate in the DDP if you have within past 5 years
- The 5-year window runs from the *completion* date
- Prior conviction within 5 = ineligible (cannot bank the DDP)

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WHEN TO ENROLL IN THE DDP

- 15-18 days from sentencing
- May be times when you advise your client to enroll sooner
- Failing to enroll in the DDP within 20 days and continuing to drive = AUO 2nd
- \$75 due immediately at the DMV, \$225 is payable to the program

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CONDITIONAL LICENSE

- Upon enrolling in the DDP, your client *may* be eligible for a conditional license
- For example, a person who has 3 convictions within 25 years is not eligible
- Upon completion of the DDP, your client *may* be able to obtain full license

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SCOPE OF CONDITIONAL LICENSE

- Employment
- Alcohol treatment
- School (not high school)
- Court ordered probation activities
- DMV
- 3 hours
- Medical
- Child care

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REFERRAL FOR ADDITIONAL TREATMENT

- Preliminary screening part of the course
- If your client is referred for an evaluation, person must go to an approved provider under OASAS -- <http://www.oasas.ny.gov>
- Advise your clients about the possible referral

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IGNITION INTERLOCK DEVICE

- Definition
 - BAC measuring device connected to a motor vehicle and prevents vehicle from starting without first determining that the BAC level does not exceed calibrated setting
 - .025% BAC



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WHO IS REQUIRED TO INSTALL AND MAINTAIN AN IID?

- Misdemeanor DWI -- VTL §§ 1192(2)/(2-a)/(3);
- Y/O adjudication for DWI (11/01/13);
- Felony DWI; or
- Any other crime in either the VTL or Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element

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WHO MAY NOT BE REQUIRED TO INSTALL AN IID?

- DWAI -- VTL § 1192(1);
- DWAI Drugs -- VTL § 1192(4); or
- DWAI Combined Influence -- VTL § 1192(4-a)
- People v. Levy, 91 A.D.3d 793, 938 N.Y.S.2d 315 (2d Dep't 2012)

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WHAT IF YOUR CLIENT OWNS A VEHICLE BUT CANNOT DRIVE?

- Condition imposed on any vehicle(s) you own or operate -- not access
- Imposed *regardless* if your client can operate a vehicle
- If your client is sentenced to probation, they may want to sell the vehicle(s) prior to being sentenced

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HOW LONG DOES YOUR CLIENT HAVE TO INSTALL THE IID?

- 10 business days from sentencing
- Cannot drive during those 10 days without an IID
- Must provide proof to the monitor within 3 business days of installation

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HOW LONG IS THE IID CONDITION IMPOSED?

- Effective November 1, 2013, the IID is imposed for no less than 12 months
- However, IID restriction **shall terminate upon proof of installation for at least 6 months**
- Unless the court ordered such person to install the IID for a longer period
 - Probation term

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WHEN SHOULD THE IID BE INSTALLED?

- Have your client install the IID prior to sentencing
 - Allows the client to drive away from Court
 - Minimizes potential violations
- Make sure your client contacts the monitor

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HOW MUCH DOES THE IID COST?

- Approximately \$100-\$125 installation and \$100-\$120 per month
 - Maximum Fee Schedule
- Financial disclosure form -- must be done prior to sentencing
 - DPCA-500IID-FDR
 - 9 NYCRR § 358.8
 - Submit 3 copies

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BLOWING INTO THE IID

- Start-up test
- Rolling test within 5-15 minutes
- Subsequent rolling tests not to exceed 30 minutes



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WHAT HAPPENS IF YOU TEST POSITIVE OR MISS A TEST?

- Start-up retest is required within 5-15 minutes of missed/failed start-up test
- Rolling retest within 1-3 minutes after missed/failing rolling test

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LOCKOUT MODE

- Failed start-up retest
- Missed start-up retest
- Failed rolling retest
- Missed rolling retest
- Missed service visit



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DUTY OF IID MONITOR TO REPORT DEFENDANT TO COURT AND DA

- Failed to have IID installed
- Failed to comply with service visits
- Tampering/circumventing
- Lockout mode
- Positive test of .05% BAC or higher
(Conditional Discharge/Probation)

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WHAT HAPPENS WHEN THE COURT IS NOTIFIED OF AN ALLEGED VIOLATION?

- Re-sentenced
- IID condition lengthened
- Fine
- Alcohol treatment

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SUSPENSION PENDING PROSECUTION

- Charged with DWI and alleged to have a BAC of .08% or more at the time of the arrest
- Does not apply to refusals or where the BAC is $< .08$
- Does not apply to a person who accepts a plea at the arraignment and is sentenced

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SUSPENSION PROCEDURE

- Court must make initial findings
 1. The accusatory instruments are sufficient on their face
 2. Reasonable cause to believe the person operated with a BAC of .08% or more as shown by the chemical test printout

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EVIDENCE *TENDING* TO REBUT

- If the Court makes the initial findings, your entitled to an adjournment in order to present evidence tending to rebut at a Pringle hearing
- Common problems:
 - Times
 - Dates
 - Chemical test -- not properly certified

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CONTACT INFORMATION

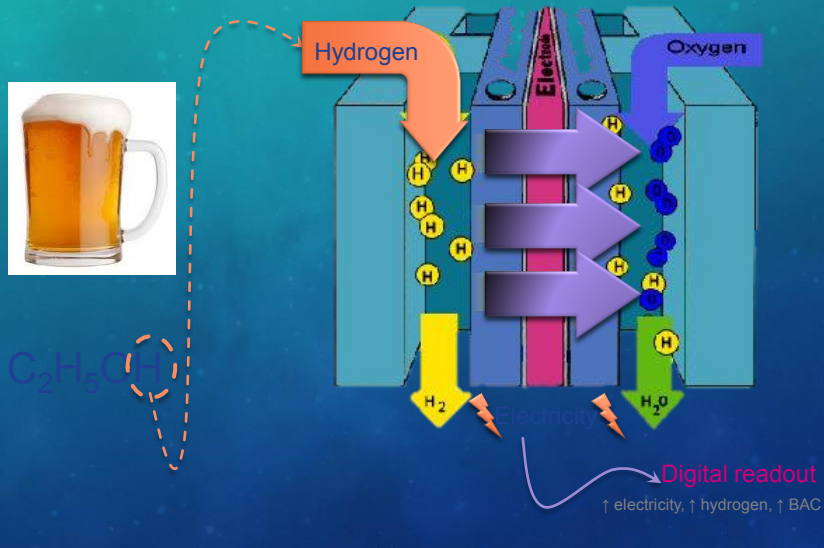
- Jonathan Cohn
- (518) 456-6456 (o)
- (518) 779-5857 (c)
- jcohn@gosglaw.com

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EXTRA SLIDES

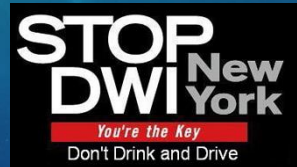
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HOW THE IID WORKS



WHO MONITORS YOUR CLIENT?

- Probation Department
- STOP-DWI
- District Attorney's Office



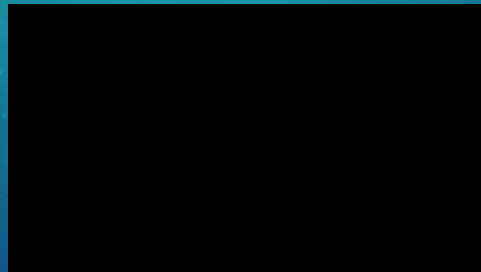
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SERVICE VISITS

- Operator must go back to the installer every 30 calendar days for collection of data and/or for inspection, maintenance and recalibration
- If the device automatically transmits data directly to monitor then 60 calendar days

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VIOLATIONS



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CIRCUMVENTION OF IID

- Defendant asks someone or allows someone to blow into device for purpose of providing the defendant with an operable vehicle
 - Crime for both defendant and other person
- Tamper/circumvent the IID
- Operate without the IID

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REMOVAL OF THE INTERLOCK

- Have the client contact their monitor
- Installer requires the certificate of completion from the monitor
- Confirm that the IID condition removed from driver's license

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FAILED TEST



RETEST 13:09:15 BAC: 0.036 12/14/2011

12/14/2011 12:56:35 PM engine on
12/14/2011 12:56:37 PM BAC Pass
12/14/2011 1:08:36 PM retest
requested
12/14/2011 1:09:15 PM BrAC
Reading 0.036
12/14/2011 1:09:23 PM BrAC
FAILED
12/14/2011 1:09:41 PM louder
test tone
12/14/2011 1:10:52 PM retest
requested

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