

# EFFECTIVE CLIENT REPRESENTATION IN CRIMINAL AND VTL MATTERS



By: Joseph Gerstenzang  
Gerstenzang, Sills, Cohn  
& Gerstenzang

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Should I take the  
test?



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## The late night phone call

- Do not ask the person open-ended questions
  - How much have you had to drink?
- Ask very specific questions
  - I want you to answer all my questions with a "yes" or a "no"
  - Do you have any priors?
  - Was there an accident?



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## License consequences for 1st offense refusal versus DWAI

### Refusal

- 1-year revocation
  - No conditional license unless it matches up with an alcohol conviction
  - May be forced into pleading guilty to drive

### DWAI

- 90-day suspension (may be eligible to get their full license in about 2 months)
- DDP and conditional license eligible

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## Should a person refuse

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- Accident involving serious physical injury
- Felony DWI
- Commercial driver's license
- Plea bargaining policy

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## Arraignment

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- At the arraignment in a refusal case, the court is required to temporarily suspend your client's license or privilege to drive
- Provided with a "Notice of Temporary Suspension and Notice of Hearing" form
- Court is going to schedule the refusal hearing for the next available date

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## Temporary suspension

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- The temporary suspension lasts until:
  - The refusal hearing is held, or
  - 15 days
- Whichever is *earlier*
- If the refusal hearing is scheduled beyond 15 days from the arraignment, the temporary suspension is lifted

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## Should you contest the refusal?

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- I often hear attorneys advise their clients not to appear at the refusal hearing because they are likely going to lose
- I completely disagree with this advice with a few exceptions
  - Pled at the arraignment and needs conditional license
  - Pled guilty to DWI

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## Attending the refusal

- Felony cases
  - Most defendants accept a negotiated plea bargain prior to being indicted
  - A refusal hearing is your best opportunity to get discovery and see if there are any issues in the case
- Negotiating a better deal



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## Attending cont'd

- Police officers do not always prepare for the hearings
  - They don't always bring their paperwork with them
  - No refusal warning card
- Great opportunity to lock in testimony for the criminal case
  - FOIL the refusal hearing CD

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## Issues to be determined at the Refusal Hearing

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- Reasonable grounds to believe that such person had been driving in violation of VTL § 1192
- Lawful arrest
- Was the person read the refusal warning
- Did the person refuse

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## Can you win?

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- Officer fails to appear
- Invalid basis for the stop
- Requested an attorney
- Refusal by conduct
- Was the warning read in "clear or unequivocal language"

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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, the defendant is 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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## Driving While Ability Impaired ("DWAI")

- Under our law, no person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol
- When that person's consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver
- Criminal Jury Instructions

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## DWAI consequences

- 90-day suspension of driver's license (with certain exceptions)
- Impaired Driver Program ("IDP")/conditional license eligible
- Victim Impact Panel
- Alcohol screening/assessment
- \$300-\$500 fine + \$255/\$260 surcharge
- Driver responsibility assessment

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## Driving While Intoxicated ("DWI")

- A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is *incapable*, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver
- CJI

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## DWI consequences

- 6-month license *revocation* -- no full re-licensing until the expiration of statutory revocation period
- Eligibility for the IDP and a conditional license?
- Ignition Interlock Device

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## 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



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## The Impaired Driver Program ("IDP")

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- What is the IDP?
  - 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 IDP

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

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## When to enroll in the IDP

- 15-18 days from sentencing
- May be times when you advise your client to enroll sooner
- Failing to enroll in the IDP 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 IDP, 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 IDP, 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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## 20-day Order

- Issued at the time of sentencing by the Court
- Stays the suspension/revocation
- Ability to enroll in the IDP 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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## Eligibility for a 20-day Order

- If eligible for the IDP 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

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- 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

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- If you appear at the refusal hearing and the officer fails to appear, 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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## Underage offender

- Zero tolerance --  
VTL § 1192-a
- Youthful offender
- DWAI



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## Zero tolerance


- 6-month suspension of driver's license
- Civil penalty of \$125
- Likely eligible for the IDP and a conditional license
- No plea in criminal court
- Sealing of records after 3 years or 21, whichever period of time is greater

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New York State Department of Motor Vehicles  
Traffic Hearings



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**WAIVER OF 1192-a HEARING IN SATISFACTION  
OF 1192(1) CHARGE**  
*(Person under 21)*

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To: Commissioner of Motor Vehicles

Motorist Name: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Client ID No. \_\_\_\_\_

Ticket No. \_\_\_\_\_

On \_\_\_\_\_, I was arrested in the city/town/village (*circle one*) of \_\_\_\_\_  
in the County of \_\_\_\_\_, New York by a member of \_\_\_\_\_  
(Police Agency)  
on a charge of driving while ability is impaired (a violation of subdivision one of Section 1192 of the New York State  
Vehicle and Traffic Law).

By signing this document in satisfaction of this charge, I agree to be subject to action by the Commissioner of Motor  
Vehicles pursuant to Section 1194-a of the Vehicle and Traffic Law, and I waive any right to a hearing under such section.  
I understand that this waiver has the same force and affect as being found guilty of a violation of Section 1192-a of the  
Vehicle and Traffic Law (operating a motor vehicle after having consumed alcohol).

I understand that my license will be suspended for six months (or revoked for at least one year if I have any prior alcohol-  
related offenses) and that I must pay the Commissioner of Motor Vehicles a civil penalty of \$125 and a suspension  
termination fee of \$100 before my license can be restored. I also understand that I will be subject to increased sanctions if  
I commit more violations of Section 1192 or Section 1192-a of the Vehicle and Traffic Law.

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## Underage offender

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- Convicted of alcohol offense or adjudicated youthful offender
- Driver's license *revoked* for at least 1 year
- Likely eligible for the IDP and a conditional license

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# Ignition interlock device ("IID")

- 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;
- 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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## 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 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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## 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?

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- IID condition lengthened
- Alcohol treatment
- Jail

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Handling traffic  
tickets -- what you  
need to know

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- Client's driving history -- possibly lifetime record (MV-15)
- Accident
- Alcohol involvement
- Office policies

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## Courts outside of the 5 boroughs and Rochester

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- Plea bargaining
- The goal is a non-moving, 0-point violation

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## Contacting the Court

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- Letter of representation
- Enter plea of "not guilty"
- Request supporting deposition
- Plea by mail/in person

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## Sample letter of representation

Dear Sir/Madam:

Please be advised that this office has been retained to represent ----- with regard to the above-referenced matter. In this regard, please accept this letter as an entry of a plea of "not guilty" on ----- behalf.

In addition, I am requesting that a copy of the ticket and supporting deposition be faxed to our office at the Court's earliest convenience.

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## Correspondence from the Court

- Notifies you of the next date
- Allows time to negotiate

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## Negotiating with the prosecutor by mail

- Copy of the ticket/supporting deposition
- Driver's abstract
- Proof of insurance, if accident
- Brief explanation

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## Sample letter to the prosecutor

Please be advised that this firm represents ---- with regard to the above-referenced matter. In this regard, enclosed please find:

- (a) a copy of ----- "clean" driving abstract;
- (b) a copy of the ticket and supporting deposition; and
- (c) a self-addressed, stamped envelope.

There was no accident or alcohol involvement in this case. Accordingly, would you please consider reducing the charge to a violation of VTL § 1201(a).

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## Negotiating in person

- Be prepared to provide the following:
  - Driver's abstract
  - Proof of insurance
  - Whether there was alcohol involvement
- Waiver of appearance (notarized)

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## Waiver of appearance

I, -----, the above-named defendant, whose address is -----, New York -----, do hereby waive my right to personally appear in Court on the charge of Speed in Zone, in violation of Vehicle and Traffic Law ("VTL") § 1180(d), currently pending against me. I authorize the law firm of Gerstenzang, Sills, Cohn & Gerstenzang, my attorneys, with offices at 210 Great Oaks Boulevard, Albany, New York 12203, to proceed on my behalf in this matter without my presence, to negotiate a plea bargain on my behalf, and to enter a plea in accordance therewith.

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## What is a supporting deposition?

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- Supplements the ticket
- Supports or tends to support the charge

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## Should you request a supporting deposition?

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- Must request within 30 days after the defendant is directed to appear
- Officer must serve the supporting deposition within 30 days of request to Court
- Officer must file proof with the Court

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COUNTY OF \_\_\_\_\_ LOCAL CRIMINAL COURT  
STATE OF NEW YORK  
THE PEOPLE OF THE STATE OF NEW YORK  
VS

UTT NUMBER \_\_\_\_\_  
Officer \_\_\_\_\_ of the NEW YORK STATE POLICE  
a Police Officer and the Complainant alleges that the Defendant committed a violation of:

1. VTL Section \_\_\_\_\_ Description \_\_\_\_\_  
2. Date \_\_\_\_\_ Time \_\_\_\_\_ C/T/V of \_\_\_\_\_  
3. Vehicle Year \_\_\_\_\_ Make \_\_\_\_\_ Color \_\_\_\_\_  
License Plate No. \_\_\_\_\_ State NY  
4. General Direction of Travel by Defendant \_\_\_\_\_  
5. Highway (Type/Name) \_\_\_\_\_  
6. Defendant's Speed: \_\_\_\_\_ MPH in a \_\_\_\_\_ MPH Zone  
7. Charge based on Officer's \_\_\_\_\_  
8. Speed Verified By \_\_\_\_\_ Model \_\_\_\_\_  
9. Additional Information: \_\_\_\_\_

**TO THE ABOVE NAMED DEFENDANT:**  
PLEASE TAKE NOTICE THAT PURSUANT TO SECTION 710.30(1)(A) OF THE CRIMINAL PROCEDURE LAW, THE PEOPLE  
INTEND TO OFFER AT A TRIAL OF THE ABOVE ENTITLED ACTION EVIDENCE OF A STATEMENT MADE BY YOU  
on \_\_\_\_\_ at \_\_\_\_\_ at \_\_\_\_\_ To \_\_\_\_\_  
a public servant,  
IN WHICH YOU SUBSTANTIALLY STATED AS FOLLOWS:

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A  
MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW OF THE  
STATE OF NEW YORK  
Affirmed Under Penalty of Perjury

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# Move to dismiss

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- Failure to provide a timely supporting deposition
- Facially insufficient

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## The DMV Point System

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- There are 2 important rules you **must** remember
  - 11 points is too many
  - Avoid 3 speeding tickets in 18 months

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## How the DMV calculates points

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- Violation date -- not conviction date
- Last 18 months

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imagination at work

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## What happens if your client has 11 or more points in 18 months?

- Persistent violator = suspension
- DMV offers plea bargain
- 31-day suspension



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## Why 31 days?

- Eligibility for restricted use license
- Plea bargain with the DMV

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## Point & Insurance Reduction Program

- Eligible for the course every 18 months
- Up to 4 points in the last 18 months
- Reduces insurance premiums by a minimum of 10% of base rate for 3 years
- Convictions are not removed

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## When should your client take the course?

- Within 18-months of the *violation* date
- You can take it prior to the conviction being entered

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## Driver Responsibility Assessment

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- 6 points in any 18-month period
- \$100 each year for the next 3 years
- \$25 for each additional point
- Completion of course will not reduce the calculation of points

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## 3 speeds within 18 months

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- 6-month license *revocation*
- Likely eligible for a restricted use license

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## Restricted use license

- Employment
- Accredited school, university or state approved institution (not high school)
- DMV
- Medical examination or treatment (for self and members of household)
- Child care

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## Traffic Violations Bureau ("TVB")

- Non-criminal traffic cases handled administratively by the Department of Motor Vehicles
- New York City and Rochester
- TVB Ticket Management for Attorneys

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## Plea bargaining at the TVB?

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- Very different system from upstate system
- No plea bargaining
- Similar to a chemical test refusal hearing

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## How long do most convictions stay on the driving record?

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- Calendar year plus 3
- Alcohol convictions remain on driving record for at least 10 years

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# Contact information

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Joseph Gerstenzang

Gerstenzang, Sills, Cohn

& Gerstenzang

(518) 456-6456 (o)

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