

EFFECTIVE CLIENT REPRESENTATION IN CRIMINAL AND VTL MATTERS



By: Joseph Gerstenzang
Gerstenzang, Sills, Cohn
& Gerstenzang

1

Should I take the
test?



2
3/13/2019

2

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?



3
3/13/2019

3

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

4
3/13/2019

4

Should a person refuse

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

5
3/13/2019

5

Arraignment

- 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

6
3/13/2019

6

Temporary suspension

- 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

7
3/13/2019

7

Should you contest the refusal?

- 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

8
3/13/2019

8

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



9
3/13/2019

9

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

10
3/13/2019

10

Issues to be determined at the Refusal Hearing

- 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

11
3/13/2019

11

Can you win?

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

12
3/13/2019

12

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

13
3/13/2019

13

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

14
3/13/2019

14

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

15
3/13/2019

15

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

16
3/13/2019

16

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

17
3/13/2019

17

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

18
3/13/2019

18

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

19
3/13/2019

19

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
3/13/2019

20

The Impaired Driver Program ("IDP")

- 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

21
3/13/2019

21

Eligibility for the IDP

- 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)

22
3/13/2019

22

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

23
3/13/2019

23

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

24
3/13/2019

24

Scope of conditional license

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

25
3/13/2019

25

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

26
3/13/2019

26

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

27
3/13/2019

27

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

28
3/13/2019

28

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.

29
3/13/2019

29

20-day Orders cont'd

- 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

30
3/13/2019

30

Underage offender

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



31
3/13/2019

31

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

32
3/13/2019

32

New York State Department of Motor Vehicles
Traffic Hearings



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



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.

33

Underage offender

- 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

34
3/13/2019

34

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



35
3/13/2019

35

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

36
3/13/2019

36

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)

37
3/13/2019

37

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

38
3/13/2019

38

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

39
3/13/2019

39

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

40
3/13/2019

40

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

41
3/13/2019

41

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

42
3/13/2019

42

Blowing into the IID

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



43
3/13/2019

43

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

44
3/13/2019

44

Lockout mode

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



45
3/13/2019

45

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)

46
3/13/2019

46

What happens when the Court is notified of an alleged violation?

- IID condition lengthened
- Alcohol treatment
- Jail

47
3/13/2019

47

Handling traffic tickets -- what you need to know

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

48
3/13/2019

48

Courts outside of the 5 boroughs and Rochester

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

49
3/13/2019

49

Contacting the Court

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

50
3/13/2019

50

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.

51
3/13/2019

51

Correspondence from the Court

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

52
3/13/2019

52

Negotiating with the prosecutor by mail

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

53
3/13/2019

53

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).

54
3/13/2019

54

Negotiating in person

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

55
3/13/2019

55

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.

56
3/13/2019

56

What is a supporting deposition?

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

57
3/13/2019

57

Should you request a supporting deposition?

- 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

58
3/13/2019

58

LOCAL CRIMINAL COURT
STATE OF NEW YORK
THE PEOPLE OF THE STATE OF NEW YORK
VS

COUNTY OF _____

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

59

Move to dismiss

- Failure to provide a timely supporting deposition
- Facially insufficient

60
3/13/2019

60

The DMV Point System

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

61
3/13/2019

61

How the DMV calculates points

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

62
3/13/2019

62

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

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



63
3/13/2019

63

Why 31 days?

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

64
3/13/2019

64

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

65
3/13/2019

65

When should your client take the course?

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

66
3/13/2019

66

Driver Responsibility Assessment

- 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

67
3/13/2019

67

3 speeds within 18 months

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

68
3/13/2019

68

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

69
3/13/2019

69

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

70
3/13/2019

70

Plea bargaining at the TVB?

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

71
3/13/2019

71

How long do most convictions stay on the driving record?

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

72
3/13/2019

72

Contact information

Joseph Gerstenzang

Gerstenzang, Sills, Cohn

& Gerstenzang

(518) 456-6456 (o)

73
3/13/2019

73