

**Garden State CLE Presents:**

**N.J. Driver – N.Y. DWI**



**Instructors:**



**Rachel Kugel, Esq.  
N.J. and N.Y. DWI Defense Attorney**



**Robert Ramsey**

**Lesson Plan**

## **Part I – New York Post-Conviction advice you should provide your N.J. client**

- 1.) The N.Y. conviction will count for sentence enhancement purposes on a subsequent N.J. offense. *State v. Cromwell*, 194 N.J.Super. 519 (App. Div. 1984); *State v. Regan*, 209 N.J.Super. 596 (App. Div. 1986);**
- 2.) A N.Y. DWI conviction is entered under a statute that is substantially similar to the N.J. DWI statute in that our law penalizes driving while under the influence of alcohol, regardless of the BAC. *State v. Zeikel*, 423 N.J.Super. 34 (App. Div. 2011); *DMV v. Lawrence*, 194 N.J. Super. 1 (App. Div. 1983);**
- 3.) In conformity with the Interstate Driver License Compact (the Compact), *N.J.S.A. 39:5D-1*, the N.J. MVC will impose an administrative suspension pegged to the offense level as opposed to the suspension that was imposed in N.Y. *State v. Egan*, 103 N.J. 350, 355-56 (1986) See also *N.J.A.C. 13:19-11.1(a)*. In such circumstances, defendant's suspension is explicitly authorized by *N.J.S.A. 39:5D-4(a)(2)*. *In re Johnson*, 226 N.J. Super. 1 (App. Div. 1988); *DMV v. Pepe*, 379 N.J.Super. 411 (App. Div. 2005); *Boyd, v. DMV*, 307 N.J.Super. 356 (App. Div. 1998);**
- 4.) The N.Y. conviction will trigger a \$3000 MVC surcharge against the N.J. resident driver;**
- 5.) A conviction for driving while intoxicated (DWI) in N.Y. (or another state) qualifies as a predicate conviction that can support an in-state conviction for driving during a second license suspension for DWI. *N.J.S.A. 2C:40-26(b)*;**

## **Part II – Elements of the New York DWI offenses**

- 1.) NY DWI Types (everyone charges must have an Office of Alcoholism and Substance Abuse Services assessment (OASAS));**
- 2.) Prosecution at trial - Extrapolation evidence is allowed as defense proof.**

## **Part III - Levels of DWI offenses**

- a.) [Vehicle and Traffic Law § 1192.1](#) DWAI (Driving while ability impaired") is a non-criminal offense and requires as an element a BAC ranging from .05 to .07. The sanction for this offense includes a license suspension of 90 days and up to 15 days jail;
- b.) [Vehicle and Traffic Law § 1192.2](#) is the per se violation triggered by a BAC of .08 or more. Sanctions include a d/l loss of 6 months, one-year ignition interlock device and up to one-year in jail;
- c.) [Vehicle and Traffic Law § 1192.2a](#) is deemed to be an aggravated DWI. It is triggered by a BAC of .18% or higher. It carries a one-year d/l loss, one-year ignition interlock and up to one-year in jail;
- d.) [Vehicle and Traffic Law § 1192.3](#) relies upon common law observations to establish intoxication by alcohol;
- e.) [Vehicle and Traffic Law § 1192.4](#) is reserved for operating under the influence of intoxicating drugs - Interestingly while DRE is certainly preferred it is not necessarily required but one does have to prove the precise substance that was impairing the individual. At trial, this can be proven through the testimony of a forensic toxicologist or other type of expert who didn't examine the client;
- f.) [Vehicle and Traffic Law § 1192.4\(a\)](#) relates to the synergistic effects of combined drugs and alcohol. Sentence requires a six-month d/l loss, one-year ignition interlock device and up to one-year in jail.

## **Part IV – Trial and sentencing**

- a.) As of 2006, a prior conviction in New Jersey can be used to enhance to a NY DWI to a felony, but as a practical matter, this rarely done in practical reality);
- b.) A first DWI is considered to be a misdemeanor;
- c.) Felony - A second offense within 10 years is felony. Time of offense is considered to run at the time of the incident, not the date of conviction. This quirk in the law is particularly important if you have client in third offense NJ

**territory; there can be strategic timing used to end open cases if person has more than one;**

**d.) Felony - DWI even first offense with child 15 or under in the vehicle;**

**e.) Jury trial – Your client is entitled to a jury trial in NY for every criminal charge. Thus, anything other than a driving while ability impaired gets a jury of 6 people for a misdemeanor and 12 people for felony;**

**f.) Step-down - NY has ten-year look back period, not step downs, or time between like NJ.**

## **Part V – Refusal offenses**

**a.) A refusal is handled administratively in New York. The defendant is entitled to a separate refusal hearing before an administrative law judge. There is a minimum one-year d/l loss if there is a guilty finding. The administrative hearing permits relaxed rules of evidence, meaning that the complaining officer need not appear to testify;**

**b.) If the defendant is alleged to have refused, he will lose his license at his arraignment. Thereafter, he must be provided a refusal hearing within 14 days or his license must be returned pending the hearing;**

**Practice tip - There is a weird interplay in NY between refusal and DWI and licensing strategy. You need a DWI /DWAI to get a conditional license. So if you lose the refusal you will need the DWI/DWAI conviction to get driving again or else be revoked for the whole year. If you lose the refusal and win the DWI the client is worse off from a driving standpoint than if they had lost both. So before you win that DWI you need to make sure that is what the client wants.**

## **Part VI – Conditional and hardship licenses**

- a.) New York has both pre-conviction and post conviction conditional licenses;**
- b.) Under the New York "prompt suspension law" the defendant will be suspended at time of his arraignment if the State can show a certified copy of a reading of .08 or more. Such a defendant can get a conditional from DMV 30 days from the date of arraignment;**
- c.) The defendant can also petition the court for a hardship privilege to cover him for that first 30 days until he can get conditional;**
- d.) A hardship license is completely discretionary from the court, and, if granted, will be limited to driving only to and from work;**
- e.) A pre-conviction conditional license, issued as a matter of right by the NY DMV is valid for all work purposes, school, court appearances, and a certain amount of hours a week for shopping etc;**
- f.) A post-conviction defendant will have to obtain a new conditional license. The defendant can obtain it as soon as DMV can see the conviction, which can take a couple of weeks. Accordingly, New York procedure allows a discretionary "20-day-stay" at time of sentence where the defendant gets full privileges back until conditional has been issued. The defendant must take the Intoxicated Driver Program class through DMV to get a conditional.**

## **Part VII – New York driver charged with DWI in New Jersey**

**If the conviction is reported to New York, New York DMV will do the following:**

- a.) Will treat first out-of-state as a DWAI and suspend for 90 days;**
- b.) NY will not require a IID;**
- c.) NJ refusal will not transfer into NY.**

## **Part VIII – Collateral Consequences**

- a.) Immigration since these are potential criminal convictions there is heightened concern;**
- b.) NY has civil forfeiture rules wherein the county can try to take the defendant's car;**
- c.) NY DMV has repeat offender rules and if revoked and not a first offense, the defendant can face a longer term without their license, can risk 5 years or more without his license - even a lifetime ban in some cases!**

## **Part IX – Plea bargaining**

**NY has guidelines wherein guilty pleas are supposed to stay within the statute. By way of example, a plea agreement could call for an amendment and plea from 1192.2 (the per se violation) to 1192.1 (driving while ability impaired). Other deals can happen, but the judge will have to approve the agreement. Most local prosecutor's offices have plea bargaining guidelines internally that are just their policy - not codified in any way. These may include**

- a.) not making an offer if reading is over .13;**
- b.) allowing conditional pleas or re-pleaders if there are aggravating circumstances and requiring clients to jump through lots of hoops to earn the deal, like interim probation, treatment, IID, SCRAM monitoring;**
- c.) not making an offer where there is a refusal charge.**

## Part X – New York DWI Penalty Table

### Penalties for alcohol or drug-related violations

<b>Violation</b>	<b>Mandatory Fine</b>	<b>Maximum Jail Term</b>	<b>Mandatory Driver License Action</b>
Aggravated Driving While Intoxicated (AGG DWI)	\$1,000 - \$2,500	1 year	Revoked for at least one year
Second AGG DWI in 10 years (E felony)	\$1,000 - \$5,000	4 years	Revoked for at least 18 months
Third AGG DWI in 10 years (D felony)	\$2,000 - \$10,000	7 years	Revoked for at least 18 months
Driving While Intoxicated (DWI) or Driving While Impaired by a Drug (DWAI-Drug)	\$500 - \$1,000	1 year	Revoked for at least six months
Second DWI or DWAI-Drug violation in 10 years (E felony)	\$1,000 - \$5,000	4 years	Revoked for at least one year
Third DWI or DWAI-Drug violation in 10 years (D felony)	\$2,000 - \$10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by a Combination of Alcohol/Drugs (DWAI-Combination)	\$500 - \$1,000	1 year	Revoked for at least six months
Second DWAI-Combination in 10 years (E felony)	\$1,000 - \$5,000	4 years	Revoked for at least one year
Third DWAI-Combination in 10 years (D felony)	\$2,000 - \$10,000	7 years	Revoked for at least one year
Driving While Ability Impaired by Alcohol (DWAI)	\$300 - \$500	15 days	Suspended for 90 days
Second DWAI violation in 5 years	\$500 - \$750	30 days	Revoked for at least six months
Third or subsequent DWAI within 10 years (Misdemeanor)	\$750 - \$1,500	180 days	Revoked for at least six months

**Penalties for alcohol or drug-related violations**

<b>Violation</b>	<b>Mandatory Fine</b>	<b>Maximum Jail Term</b>	<b>Mandatory Driver License Action</b>
Zero Tolerance Law	\$125 civil penalty and \$100 fee to terminate suspension	None	Suspended for six months
Second Zero Tolerance Law	\$125 civil penalty and \$100 re-application fee	None	Revoked for one year or until age 21
Chemical Test Refusal	\$500 civil penalty (\$550 for commercial drivers)	None	Revoked for at least one year, 18 months for commercial drivers.
Chemical Test Refusal within five years of a previous DWI-related charge/Chemical Test Refusal	\$750 civil penalty	None	Revoked for at least 18 months, one-year or until age 21 for drivers under age 21, permanent CDL revocation for commercial drivers.
Chemical Test Refusal - Zero Tolerance Law	\$300 civil penalty and \$100 re-application fee	None	Revoked for at least one year.
Chemical Test Refusal - Second or subsequent Zero Tolerance Law	\$750 civil penalty and \$100 re-application fee	None	Revoked for at least one year.
Driving Under the Influence (Out-of-State)	N/A	N/A	Revoked for at least 90 days. If less than 21 years of age, revoked at least one year.
Driving Under the Influence (Out-of State) with any previous alcohol-drug violation	N/A	N/A	Revoked for at least 90 days (longer term with certain prior offenses). If less than 21 years of age, revoked at least one year or until age 21 (longest term).

## **Additional penalties**

- **greater penalties can also apply for multiple alcohol or drug violations within a 25-year period**
- **surcharges are added to alcohol-related misdemeanors (\$260) and felonies (generally \$400, but varies slightly depending on court of conviction)**
- **three or more alcohol or drug-related convictions or refusals within 10 years can result in permanent revocation, with a waiver request permitted after at least 5 years**
- **a driver with an Aggravated DWI violation conviction within the prior 10 years will receive a minimum 18-month revocation if convicted of DWI, DWAI/Drugs or DWAI/Combination. Also, a driver with a prior DWI, Aggravated DWI, DWAI/Drugs or DWAI/Combination with the prior 10 years will receive a minimum 18-month revocation**
- **a driver convicted of an Aggravated DWI, DWI, DWAI/Drug, DWAI/combination, vehicular assault and aggravated vehicular assault, or vehicular manslaughter and vehicular homicide three or more times in the preceding 15 year period is guilty of a Class D felony.**

<https://dmv.ny.gov/tickets/penalties-alcohol-or-drug-related-violations>

---