HANDLING THE DWI CASE

PRACTICAL ASPECTS

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PART XII

PENALTIES AND CONSEQUENCES

CHAPTER 45

SUSPENSION PENDING PROSECUTION

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§ 45:1 In general

A defendant charged with DWI must be aware of several statutes

which, if applicable, call for the mandatory and/or permissive suspension of his or her driver's license pending prosecution. The first statute is VTL § 1193(2)(e)(7) -- the so-called "prompt suspension law" -- which is generally applicable to a defendant who is charged with DWI *and* who is alleged to have had a BAC of .08% or more at the time of his or her arrest. The second statute, VTL § 1193(2)(e)(1), is applicable to a defendant who is charged with DWI, Aggravated DWI, DWAI Drugs *or* DWAI Combined Influence *and* who either (a) has been convicted of any violation of VTL § 1192 within the preceding 5 years, or (b) is charged with Vehicular Assault or Vehicular Homicide in connection with the current incident. A third statute, VTL § 1194(2)(b)(3), is applicable to a defendant who is charged with a violation of VTL § 1192 *and* who is alleged to have refused to submit to a chemical test.

Prior to the enactment of the prompt suspension law, VTL § 510(3-a) had occasionally been used to suspend DWI defendants' driver's licenses pending prosecution. However, in light of VTL §§ 1193(2)(e)(1) and (7), as well as the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), continued reliance upon VTL § 510(3-a) in this regard would appear to be unwarranted. See Matter of King v. Kay, 39 Misc. 3d 995, 963 N.Y.S.2d 537 (Suffolk Co. Sup. Ct. 2013).

§ 45:2 VTL § 1193(2)(e)(7) -- The prompt suspension law

A defendant who is charged with DWI, Aggravated DWI or DWAI Combined Influence *and* who is alleged to have had a BAC of .08% or more at the time of his or her arrest is subject to the prompt suspension law. This law provides, in pertinent part:

> (7) Suspension pending prosecution; excessive blood alcohol content. a. Except as provided in clause a-1 of this subparagraph, a court shall suspend a driver's license, pending prosecution, of any person charged with a violation of [VTL § 1192(2), (2-a), (3) or (4-a)] who, at the time of arrest, is alleged to have had .08 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to [VTL § 1194(2) or (3)].

VTL § 1193(2)(e)(7)(a).

Notably, the prompt suspension law, by its express terms, only applies under certain circumstances. For example, the prompt suspension law only applies where the defendant is charged with VTL § 1192(2), (2-a), (3) or (4-a); it does not apply where the defendant is charged with VTL § 1192(1) (*i.e.*, DWAI) or (4) (*i.e.*,

DWAI Drugs). In addition, the prompt suspension law only applies where a chemical test result is obtained; it does not apply where the defendant is alleged to have refused to submit to a chemical test. See Appendix 61.

Furthermore, the prompt suspension law only applies where the defendant's BAC is .08% or more; it does not apply where the defendant's BAC is below .08%, even if he or she is charged with VTL § 1192(3). Moreover, the prompt suspension law only applies where a prosecution is pending. Accordingly, a defendant who enters a plea of guilty *and is sentenced* at arraignment is not subject to the prompt suspension law. On the other hand, a defendant who enters a plea of guilty at arraignment, but whose sentencing is adjourned, is subject to the prompt suspension law (because the prosecution does not terminate until the imposition of sentence).

§ 45:3 VTL § 1193(2)(e)(7) -- Suspension procedure

Pursuant to the express language of the prompt suspension law, in order to impose a suspension thereunder 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 . . . that . . . 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]." VTL § 1193(2)(e)(7)(b).

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).

The Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), added in several prerequisites to suspension under the prompt suspension law that do not appear in the statute itself. For example, Pringle adds numerous procedural due process requirements into the prompt suspension law which must be complied with before a suspension pending prosecution thereunder can be imposed; and adds the threshold requirements that a "*court may not order suspension of the license unless it has in its possession the results of the chemical test, and, as the Commissioner concedes, these results must be presented to the court in certified, documented form* (see, CPLR 4518[c])." Id. at 432, 646 N.Y.S.2d at 85-86 (emphasis added). See also People v. DeRojas, 180 Misc. 2d 690, ___, 693 N.Y.S.2d 404, 405 (App. Term, 2d Dep't 1999).

In addition, Pringle created, and granted the defendant an absolute right to, a so-called "Pringle hearing." In this regard, the Pringle Court held that "[u]nder the prompt suspension law, the court *must* hold a suspension hearing before the conclusion of the proceedings required for arraignment and before the driver's license may be suspended." 88 N.Y.2d at 432, 646 N.Y.S.2d at 85 (emphasis added). At this hearing, "the court must first determine whether the accusatory instrument is sufficient on its face and next whether there exists reasonable cause to believe that the driver operated a motor vehicle while having a blood alcohol level in excess of [.08] of 1% as shown by a chemical test." Id. at 432, 646 N.Y.S.2d at 85. See also People v. Roach, 226 A.D.2d 55, ___, 649 N.Y.S.2d 607, 608-09 (4th Dep't 1996).

With regard to the opportunity to rebut, the Pringle Court held that it would be "meaningless" to allow the defendant "to 'rebut the court's findings' *after* the suspension is ordered." 88 N.Y.2d at 432, 646 N.Y.S.2d at 86. Accordingly, the Court interpreted the prompt suspension law to require both (a) that the defendant be "entitled to present evidence to rebut the court's tentative findings *before the court may order the license suspension*," id. at 432, 646 N.Y.S.2d at 86 (emphasis added), and (b) that it is "incumbent on the court to grant a driver's reasonable request for a short adjournment if necessary to marshal evidence to rebut the prima facie showing of 'reasonable cause.'" Id. at 433, 646 N.Y.S.2d at 86.

In People v. Roach, 226 A.D.2d 55, 649 N.Y.S.2d 607 (4th Dep't 1996), the Appellate Division, Fourth Department, both (a) stated that to invoke the prompt suspension law the Court must find, *inter alia*, that "there is reasonable cause to believe that the driver failed *a properly administered and reliable chemical sobriety test*," id. at ___, 649 N.Y.S.2d at 609 (emphasis added), and (b) made clear that the defendant's driver's license should not be suspended pending prosecution if the driver rebuts the *prima facie* showing. Id. at ___, 649 N.Y.S.2d at 609. See also People v. Boulton, 164 Misc. 2d 604, ___, 625 N.Y.S.2d 428, 430 (Troy City Ct. 1995) ("Vehicle and Traffic Law § 1193(2)(e)(7)(b) appears to mandate the return of the license to the defendant whenever evidence is presented tending to rebut the Court's findings. On close analysis this burden is neither onerous nor cumbersome").

Despite the fact that a lawful VTL § 1192 arrest is a prerequisite to a valid request to submit to a chemical test, 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) ("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"), and despite the fact that VTL § 1193(2)(e)(7) requires that the driver fail a chemical test *administered pursuant*

to VTL § 1194, neither VTL § 1193(2)(e)(7) nor Pringle appear to contemplate that the driver can challenge the lawfulness of his or her arrest at a Pringle hearing.

Regardless, the United States Court of Appeals for the Second Circuit recently held, in a similar DWI-related civil forfeiture case, that:

> [W]e find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure. * * *
>
> As a remedy, we order that claimants be given a prompt post-seizure retention hearing, with adequate notice, for motor vehicles seized as instrumentalities of crime pursuant to N.Y.C.Code § 14-140(b). * * *
>
> Although we decline to dictate a specific form for the prompt retention hearing, we hold that, at a minimum, the hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure. In the absence of either probable cause for the seizure or post-seizure evidence supporting the probable validity of continued deprivation, an owner's vehicle would have to be released during the pendency of the criminal and civil proceedings. * * *
>
> In conclusion, we hold that promptly after their vehicles are seized under N.Y.C.Code § 14-140 as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure.

Krimstock v. Kelly, 306 F.3d 40, 68, 68-69, 69, 70 (2d Cir. 2002) (footnote omitted). See also County of Nassau v. Canavan, 1 N.Y.3d 134, 144-45, 770 N.Y.S.2d 277, 286 (2003) (same).

The retention of a motor vehicle driven by an alleged drunken driver *pendente lite* pursuant to N.Y.C.Code § 14-140 is analogous to the suspension of the driver's license of an alleged drunken driver *pendente lite* pursuant to VTL § 1193(2)(e)(7). As such, since the Krimstock Court expressly rejected the New York State

Courts' assessment of the Constitutional due process requirements associated with the retention of a motor vehicle *pendente lite* pursuant to N.Y.C.Code § 14-140 -- Krimstock expressly rejected, and was critical of, the conclusions of Grinberg v. Safir, 181 Misc. 2d 444, 694 N.Y.S.2d 316 (N.Y. Co. Sup. Ct.), aff'd, 266 A.D.2d 43, 698 N.Y.S.2d 218 (1st Dep't 1999), see Krimstock, 306 F.3d at 53 -- it is reasonable to assume that the Second Circuit would also disagree with the Pringle Court's apparent conclusion that the driver need not be given an opportunity to test the lawfulness of his or her warrantless arrest in connection with a suspension *pendente lite* pursuant to VTL § 1193(2)(e)(7).

Nonetheless, in Matter of Vanderminden v. Tarantino, 60 A.D.3d 55, ___-___, 871 N.Y.S.2d 760, 763-64 (3d Dep't 2009), the Appellate Division, Third Department, without addressing Krimstock (or other Due Process cases), had the following to say about the scope of a Pringle hearing:

> As relevant to petitioner's remaining arguments, which pertain to the scope and conduct of his Pringle hearing, we begin by noting that the prompt suspension law provides that, in order for the court to issue a suspension order, it must find that (1) the accusatory instrument conforms with CPL 100.40, and (2) reasonable cause exists to believe that the driver operated a motor vehicle with ".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" (Vehicle and Traffic Law § 1193[2] [e][7][b]). Where such an initial determination is made, Vehicle and Traffic Law § 1193(2)(e)(7) further provides that the driver "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" (Vehicle and Traffic Law § 1193[2][e][7][b]). In this case, respondent determined that the simplified information complied with CPL 100.40 and that, based upon the certified breath test results, as well as the arresting officer's supporting deposition, there was reasonable cause to believe that petitioner had a BAC of .08% or more while operating a motor vehicle. Therefore, respondent made the necessary preliminary findings to issue a suspension order.
>
> In rebuttal, petitioner called three police witnesses and attempted to question them

> regarding the calibration of the breath test device, the administration of the test, and matters relating to probable cause for petitioner's arrest. Respondent precluded any questioning relating to the calibration and maintenance of the breath device as well as to probable cause for the arrest, concluding that such matters were outside the scope of a Pringle hearing.
>
> We are not persuaded by petitioner's contention that his due process rights were violated by respondent's rulings. While issues pertaining to the lawfulness of the police stop, probable cause for arrest, and whether the breath test device was working properly at the time of the test are relevant to the admissibility of breath test results at a criminal trial, and may ultimately bear on the determination of criminal culpability, they are beyond the scope of a Pringle hearing. Significantly, a Pringle hearing is a civil administrative proceeding which runs parallel to the criminal proceedings. It is not a plenary hearing requiring the same level of due process protection as a criminal trial, nor is it "an opportunity for free-wheeling discovery regarding the criminal matter." Indeed, as the Court of Appeals has observed, to "convert the license suspension proceeding into a trial on the merits of the underlying criminal charge . . . would be prohibitively expensive and cumbersome, and would subvert the State's compelling interest in promoting highway safety." For these reasons, we agree with Supreme Court that respondent appropriately limited petitioner's inquiry.

(Citations omitted).

Courts will have to reconcile Vanderminden with the Court of Appeals' holding in Pringle that "the minimal risk of an erroneous suspension is further diminished by the driver's right to a *meaningful presuspension opportunity to rebut the chemical test results*." Pringle v. Wolfe, 88 N.Y.2d 426, 434, 646 N.Y.S.2d 82, 87 (1996) (emphasis added).

§ 45:4 VTL § 1193(2)(e)(7) -- Applicability to certain underage drivers

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-1. 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), (2-a) 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), (2-a) 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 clause a-1 of this subparagraph 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:

> [T]here 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, *supra*.

§ 45:5 What if defendant appears for arraignment without counsel?

Perhaps the most disturbing aspect of the prompt suspension law is the way in which it is administered by many Courts where the defendant appears for arraignment without counsel. In this regard, many defendants who appear for arraignment without counsel in DWI cases have their driver's licenses summarily suspended by the Court. No findings are made; no Pringle hearing is held; no opportunity to make a statement or present evidence is offered, etc.

Simply stated, such Courts are both (a) flagrantly disregarding the requirements of the statute, and (b) flagrantly disobeying the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996). As such, they are flagrantly disregarding defendants' Constitutional right to Due Process.

But that is not all. Such Courts are also violating one of the most cherished Constitutional rights of all -- the right to counsel -- which right has been zealously protected by the Court of Appeals, and has been codified in CPL § 170.10. In this regard, the Court of Appeals has made clear that:

> The State constitutional right to counsel is a "cherished principle" worthy of the "highest degree of [judicial] vigilance." Our decisional law has advanced this principle by

> holding that the State constitutional right to counsel attaches indelibly in two situations. First, it arises when formal judicial proceedings begin, whether or not the defendant has actually retained or requested a lawyer. . . . Although these principles are similar to those developed under the Fifth and Sixth Amendments to the Federal Constitution, New York's constitutional right to counsel jurisprudence developed "independent of its Federal counterpart" and offers broader protections.

People v. Ramos, 99 N.Y.2d 27, 32-33, 750 N.Y.S.2d 821, 824 (2002) (citations and footnote omitted). See also People v. West, 81 N.Y.2d 370, 373, 599 N.Y.S.2d 484, 486 (1993); People v. Ross, 67 N.Y.2d 321, 502 N.Y.S.2d 693 (1986); People v. Cunningham, 49 N.Y.2d 203, 207-08, 424 N.Y.S.2d 421, 423-24 (1980).

> *This "indelible" right to counsel . . . attaches* upon defendant's request for an attorney, *at arraignment* or upon the filing of an accusatory instrument. Underlying the rule is the concept that a criminal defendant confronted by the awesome prosecutorial machinery of the State is entitled, at a bare minimum, to the advice of counsel when he is considering surrender of his valuable legal rights.

People v. Grimaldi, 52 N.Y.2d 611, 616, 439 N.Y.S.2d 833, 835 (1981) (emphases added) (citations omitted).

In addition, CPL § 170.10(3) provides:

> 3. *The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears upon such arraignment without counsel, he has the following rights*:
>
> (a) *To an adjournment for the purpose of obtaining counsel*; and
>
> (b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and
>
> (c) To have counsel assigned by the court if he is financially unable to obtain the

> same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

(Emphases added).

Furthermore, CPL § 170.10(4) mandates that the Court "must inform the defendant":

> (a) Of his rights as prescribed in subdivision three; *and the court must not only accord him opportunity to exercise such rights but must itself take such affirmative action as is necessary to effectuate them*.

(Emphasis added).

Numerous Court of Appeals decisions clearly establish that, for a waiver of the fundamental Constitutional right to counsel to be valid, the Court must conduct a "*searching inquiry*," on the record, into whether the waiver is knowing, voluntary, intelligent and unequivocal. In People v. Smith, 92 N.Y.2d 516, 683 N.Y.S.2d 164 (1998), the Court of Appeals reiterated that:

> This Court has recognized that defendants may insist on foregoing the benefits associated with the right to counsel and proceeding on a *pro se* basis. We have consistently also cautioned, however, that the waiver of this fundamental right to counsel requires that a trial court must be satisfied that a defendant's waiver is unequivocal, voluntary and intelligent; otherwise the waiver will not be recognized as effective.
>
> To ascertain whether a waiver meets these appropriately *rigorous requirements*, the trial courts "should undertake a sufficiently '*searching inquiry*'" in order to be "reasonably certain" that a defendant appreciates the "'*dangers and disadvantages*' of giving up the *fundamental right to counsel*." Governing principles demand that *appropriate record exploration* between the trial court and defendant be conducted, both to test an accused's understanding of the waiver and to provide a reliable basis for appellate review.

> *When a record lacks the requisite "searching inquiry" or fails to measure up to the prescribed standards, a waiver of the right to counsel will be deemed ineffective.* To pass muster, a "*searching inquiry*" must reflect *record evidence* that defendant's know what they are doing and that choices are exercised "with eyes open."
>
> This Court has also signified that these *record exchanges* should *affirmatively disclose* that a trial court has *delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors* bearing on a competent, intelligent, voluntary waiver.

Id. at 520, 683 N.Y.S.2d at 166-67 (emphases added) (citations omitted). See also People v. Arroyo, 98 N.Y.2d 101, 103-04, 745 N.Y.S.2d 796, 798 (2002) (same); People v. Slaughter, 78 N.Y.2d 485, 491-92, 577 N.Y.S.2d 206, 210-11 (1991) (same); People v. Sawyer, 57 N.Y.2d 12, 21, 453 N.Y.S.2d 418, 423 (1982) (same).

In this regard, the United States Supreme Court has made clear that "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver." Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890 (1963). See generally People v. Nixon, 21 N.Y.2d 338, 355, 287 N.Y.S.2d 659, 672 (1967) ("In cases involving defendants without lawyers . . . particular pains must be taken. . . . In such cases inquiry, well beyond the standards thus far propounded, is indicated").

The requirement of a valid waiver of the right to counsel is also codified in CPL § 170.10(6). CPL § 170.10(6) provides, in pertinent part, that except where the only charges are traffic infractions:

> If a defendant . . . desires to proceed without the aid of counsel, . . . the court must permit the defendant to proceed without the aid of counsel if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment.

Finally, the official Practice Commentaries to CPL § 170.10 provide, in pertinent part, that:

The statutory procedure as outlined, however, omits an essential first step that should be the responsibility of the court whenever the defendant appears without counsel and there has been no warrant of arrest. This is scrutiny of the accusatory instrument for legal sufficiency. The reason for immediate initial appraisal of that instrument is of course that it is the basis of the court's jurisdiction; and, accordingly, if the instrument is not legally sufficient, the court has no authority at all to proceed with the arraignment. It must dismiss the instrument and discharge the defendant.

If the court is satisfied that it has jurisdiction, the next step is to advise the defendant of his or her rights. In this respect the statute reflects New York's long-standing policy that every effort be made for certainty that the defendant is aware, and has reasonable opportunity to avail himself, of the right to representation by counsel. *Thus the court, in addition to advising an unrepresented defendant of the rights set forth in subdivision three, must not only accord the defendant an opportunity to exercise those rights, "but must itself take such affirmative action as is necessary to effectuate them*."

A defendant has the right to the aid of counsel at arraignment and at all subsequent stages of the proceedings, regardless of the gravity of the charge. Under New York statutory law this right is broader than the requirements of the Federal Constitution.
. . .

Note too, the clear statutory direction that, in cases other than a traffic infraction, the court must not permit defendant to proceed without the aid of counsel unless it is satisfied that the defendant made the choice to do so with knowledge of the value of counsel and risks inherent in self-representation. *This requires a "searching inquiry" as to defendant's appreciation of the "dangers and disadvantages" of attempting to cope with the legal proceedings -- e.g.*, various motions, jury selection, introduction of evidence, objections to same, etc. -- as

> distinguished from merely advising as to the seriousness of the charge and of the fact that the defendant could be sentenced to imprisonment. People v. Kaltenbach, 1983, 60 N.Y.2d 797, 469 N.Y.S.2d 685, 457 N.E.2d 791.

Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 170.10, at 12-13 (emphases added) (citations omitted).

Simply stated, an unfortunate byproduct of the prompt suspension law is that it puts local criminal courts, who are often under tremendous pressure from groups such as M.A.D.D., S.A.D.D. and R.I.D., in a position where they are forced to balance the fundamental need to impartially protect defendants' Constitutional rights with the perceived need to confiscate the driver's licenses of accused drunken drivers at any cost -- and, all too often, the latter concern prevails.

In People v. Rios, 9 Misc. 3d 1, 801 N.Y.S.2d 113 (App. Term, 9th and 10th Jud. Dist. 2005), the defendant's convictions of various traffic infractions were reversed for failure to properly advise the defendant of his right to counsel.

§ 45:6 Applying Pringle

After years without any appellate guidance in the area, the Appellate Division, Third Department, has recently issued several decisions addressing Pringle and the prompt suspension law. The leading case addressing the scope of a Pringle hearing is Matter of Vanderminden v. Tarantino, 60 A.D.3d 55, 871 N.Y.S.2d 760 (3d Dep't 2009), which is discussed at length in § 45:3, *supra*. See also Matter of Schermerhorn v. Becker, 64 A.D.3d 843, 883 N.Y.S.2d 325 (3d Dep't 2009); Matter of Schmitt v. Skovira, 53 A.D.3d 918, 862 N.Y.S.2d 167 (3d Dep't 2008).

One issue that is now well settled is that "a Pringle hearing is a civil administrative proceeding separate and apart from the underlying criminal prosecution, but which runs parallel thereto." Schermerhorn, 64 A.D.3d at ___, 883 N.Y.S.2d at 328. See also Vanderminden, 60 A.D.3d at ___, 871 N.Y.S.2d at 764; Schmitt, 53 A.D.3d at ___, 862 N.Y.S.2d at 170-71. As such, the results of a Pringle hearing can be challenged via a CPLR Article 78 proceeding. Schmitt, 53 A.D.3d at ___, 862 N.Y.S.2d at 172.

In addition, Schermerhorn addresses the People's role at a Pringle hearing. This issue is addressed in § 45:7, *infra*. Furthermore, Vanderminden addresses the applicability of the prompt suspension law to out-of-state licensees. This issue is addressed in § 45:9, *infra*.

§ 45:7 VTL § 1193(2)(e)(7) -- What role do the People play at a Pringle hearing?

In Matter of Schermerhorn v. Becker, 64 A.D.3d 843, 883 N.Y.S.2d 325 (3d Dep't 2009), the Appellate Division, Third Department, squarely addressed the issue of the People's role at a Pringle hearing. The Court held that "a district attorney clearly does not hold the status of a party in a Pringle hearing." Id. at ___, 883 N.Y.S.2d at 328-29. Nonetheless, if they so choose, the People can play a "limited role" at the hearing. Id. at ___, 883 N.Y.S.2d at 328. Specifically, the People can remind the Court of the prompt suspension law, offer to provide the Court with the defendant's chemical test result, and "comment in the event that defense counsel attempt[s] to markedly expand the narrow scope and purpose of the Pringle hearing." Id. at ___ & n.2, 883 N.Y.S.2d at 328 & n.2. See generally Matter of Broome County DA's Office v. Meagher, 8 A.D.3d 732, 777 N.Y.S.2d 567 (3d Dep't 2004); Czajka v. Breedlove, 200 A.D.2d 263, ___, 613 N.Y.S.2d 741, 742 (3d Dep't 1994) ("The position of District Attorney is a purely statutory office and, consequently, the only powers and duties which may be exercised by one acting in that post are those conferred by the Legislature, either expressly or by necessary implication").

Notably, the Schermerhorn Court made clear that the People are not required to participate in Pringle hearings. 64 A.D.3d at ___ n.2, 883 N.Y.S.2d at 328 n.2 ("Nor do we suggest that a district attorney's presence at a Pringle hearing is required").

§ 45:8 VTL § 1193(2)(e)(7) -- Applicability to chemical test result of exactly .08%

The express language of the prompt suspension law states that it applies to a DWI defendant who "is alleged to have had *.08 of one percent or more* by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to [VTL § 1194(2) or (3)]." VTL § 1193(2)(e)(7)(a) (emphasis added). Nonetheless, this State's highest Court, in interpreting this law when the proscribed BAC was .10%, clearly and expressly held that:

> The court may not order suspension of the driver's license unless it has in its possession the documented results of a reliable chemical test showing that the driver's blood alcohol level was *in excess of* .10 of 1%.

Pringle v. Wolfe, 88 N.Y.2d 426, 434, 646 N.Y.S.2d 82, 87 (1996) (emphasis added). In this regard, the "*in excess of* .10 of 1%" language does not appear to be a typographical error; rather, it appears throughout the Pringle decision. See, e.g., id. at 432,

646 N.Y.S.2d at 85 ("At the suspension hearing, the court must first determine whether the accusatory instrument is sufficient on its face and next whether there exists reasonable cause to believe that the driver operated a motor vehicle while having a blood alcohol level *in excess of* .10 of 1% as shown by a chemical test") (emphasis added) (citation omitted); id. at 430, 646 N.Y.S.2d at 84; id. at 435, 646 N.Y.S.2d at 88.

This same rationale should apply to a chemical test result of exactly .08% now that the statute has been amended to reflect the change in VTL § 1192(2).

§ 45:9 VTL § 1193(2)(e)(7) -- Applicability to out-of-state licensees

In Matter of Vanderminden v. Tarantino, 60 A.D.3d 55, ___, 871 N.Y.S.2d 760, 762-63 (3d Dep't 2009), the Appellate Division, Third Department, held as follows:

> The threshold question is whether petitioner, as the holder of a Vermont license, was subject to the prompt suspension law. Petitioner contends that because the statute authorizes the suspension of a driver's *license* but does not specifically refer to an out-of-state licensee's *driving privileges*, the statute applies only to holders of New York licenses. We do not agree. As noted by the Court of Appeals, Vehicle and Traffic Law article 31, of which section 1193 is a part, is "a tightly and carefully integrated statute the sole purpose of which is to address drunk driving." Within the statutory scheme, section 1193 contains the exclusive criminal penalties and civil sanctions applicable to drunk driving offenses, including the prompt suspension provision that is intended to keep potentially dangerous drivers off New York's roadways while their criminal charges are adjudicated. The role of that provision would be undermined, and its application rendered arbitrary, if it is interpreted to allow the holder of an out-of-state license to continue driving in New York when, under the same circumstances, the holder of a New York license would be prohibited from driving. Given the comprehensive nature and remedial purpose of article 31, we do not believe the Legislature intended such an anomalous result. Accordingly, we construe Vehicle and Traffic Law § 1193(2)(e)(7) as authorizing a court to

> suspend the driving privileges of an out-of-state licensee under the same circumstances as would justify suspending a New York license.

(Citations and footnote omitted). See also People v. MacDougall, 165 Misc. 2d 991, ___, 630 N.Y.S.2d 853, 854 (Brighton Just. Ct. 1995) (same). Cf. People v. Nuchow, 164 Misc. 2d 24, ___, 623 N.Y.S.2d 1006, 1010 (Orangetown Just. Ct. 1995) (reaching opposite conclusion).

Where an out-of-state licensee's New York driving privileges are suspended pending prosecution, the Court has the power to issue him or her a hardship privilege. See People v. Reick, 33 Misc. 3d 774, 930 N.Y.S.2d 429 (N.Y. City Crim. Ct. 2011). See also next section. Similarly, DMV will issue the person a pre-conviction conditional license if he or she is otherwise eligible therefor.

§ 45:10 VTL § 1193(2)(e)(7) -- Hardship privilege

VTL § 1193(2)(e)(7)(e) provides, in pertinent part, that "[i]f the court finds that the suspension imposed pursuant to this subparagraph will result in *extreme hardship*, the court must issue such suspension, but may grant a hardship privilege, which shall be issued on a form prescribed by the commissioner." (Emphasis added). The phrase "extreme hardship" as used in VTL § 1193(2)(e)(7)(e) does not take on its literal meaning. Rather, it is defined as follows:

> "[E]xtreme hardship" shall mean the inability to obtain alternative means of travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate.

Id.

In People v. Reick, 33 Misc. 3d 774, ___, 930 N.Y.S.2d 429, 430-31 (N.Y. City Crim. Ct. 2011), the Court held that a hardship privilege can be granted to an out-of-state licensee.

Where the defendant requests a so-called "hardship hearing," the statute makes clear that the hearing must be held within 3 business days. See VTL § 1193(2)(e)(7)(e) ("In no event shall arraignment be adjourned or otherwise delayed more than three business days *solely* for the purpose of allowing the licensee to

present evidence of extreme hardship") (emphasis added). Notably, this section merely prohibits the adjournment of the arraignment for more than 3 business days if the *sole* purpose for the adjournment is to allow the licensee to present evidence of extreme hardship; if an adjournment is granted for reasons other than, or in addition to, this purpose, the 3-day limitation does not appear to apply.

In terms of proving extreme hardship, the statute places the burden of proving extreme hardship on the licensee, "who may present material and relevant evidence." VTL § 1193(2)(e)(7)(e). However, "[a] finding of extreme hardship may not be based *solely upon the testimony of the licensee*." Id. (emphasis added). In this regard, the author advises clients to bring proof of where they live and proof of where they work, go to school, etc.; and, if possible, a friend or relative who can corroborate such information. For cases addressing factors to be considered in determining extreme hardship, see People v. Correa, 168 Misc. 2d 309, 643 N.Y.S.2d 310 (N.Y. City Crim. Ct. 1996), and People v. Bridgman, 163 Misc. 2d 818, 622 N.Y.S.2d 431 (Canandaigua City Ct. 1995). "The court shall set forth upon the record, or otherwise set forth in writing, the factual basis for such finding." VTL § 1193(2)(e)(7)(e).

If granted, VTL § 1193(2)(e)(7)(e) provides that a hardship privilege:

> [S]hall permit the operation of a vehicle only for travel *to or from the licensee's employment*, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate.

(Emphasis added).

Although the statutory language omits any reference to driving as part of (*i.e.*, during) the licensee's employment, an informal opinion from DMV Counsel's Office states that a person who needs to drive to and from various job sites may do so, but he or she may *not* drive for purposes such as running errands, picking up work materials, etc. See Appendix 62. Notably, however, a more recent informal opinion from DMV Counsel's Office states that DMV has "retreated" from this position. See Appendix 67.

§ 45:10A VTL § 1193(2)(e)(7) -- Hardship privilege cannot be used to operate commercial motor vehicle

"A hardship privilege shall not be valid for the operation of a commercial motor vehicle." VTL § 1193(2)(e)(7)(e).

§ 45:11 VTL § 1193(2)(e)(7) -- Pre-conviction conditional license

VTL § 1193(2)(e)(7)(d) provides, in pertinent part:

> [I]f any suspension occurring under [VTL § 1193(2)(e)(7)] has been in effect for a period of [30] days, the holder may be issued a conditional license, in accordance with [VTL § 1196], provided the holder of such license is otherwise eligible to receive such conditional license. . . . The commissioner shall prescribe by regulation the procedures for the issuance of such conditional license.

The relevant regulations are set forth at 15 NYCRR § 134.18, which provides as follows:

> 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 person 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 issued 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(c) 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.

Simply stated, a person whose driver's license is suspended pursuant to the prompt suspension law is eligible for a pre-conviction conditional license if he or she would be eligible for a conditional license if convicted of the underlying DWI charge, and *vice versa*.

§ 45:12 VTL § 1193(2)(e)(7) -- Applicability of pre-conviction conditional license to commercial and taxicab 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 or taxicab as defined in this chapter." (Emphasis added). Since a person whose driver's license is suspended pending prosecution pursuant to the prompt suspension law is not *convicted* of a VTL § 1192 violation, VTL § 1196(7)(g) was inapplicable to a pre-conviction conditional license issued to such person. Accordingly, a pre-conviction conditional license could be used to operate a commercial motor vehicle and/or a taxicab.

A 2007 amendment to VTL § 1193(2)(e)(7)(d) provides that "[a] conditional license issued pursuant to this subparagraph shall not be valid for the operation of a commercial motor vehicle."

On the other hand, DMV will still issue a pre-conviction conditional license valid for the operation of a taxicab.

§ 45:13 VTL § 1193(2)(e)(7) -- Violation of pre-conviction conditional license is a traffic infraction; violation of hardship privilege constitutes AUO

VTL § 1196(7)(f) provides that using a pre-conviction conditional license "for any use other than those authorized pursuant to [VTL § 1196(7)(a)]" constitutes a traffic infraction. See also People v. Rivera, 16 N.Y.3d 654, 655-56, 926 N.Y.S.2d 16, 17 (2011) ("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").

By contrast, there is no comparable statute dealing with using a hardship privilege for a use other than those authorized pursuant to VTL § 1193(2)(e)(7)(e). As a result, a person caught violating

a hardship privilege can be charged with AUO. See also Chapter 13, *supra*.

§ 45:14 VTL § 1193(2)(e)(7) -- Prompt suspension law does not preclude Court from suspending defendant's driver's license under other laws

Finally, VTL § 1193(2)(e)(7)(c) expressly states that "[n]othing contained in this subparagraph shall be construed to prohibit or limit a court from imposing any other suspension pending prosecution required or permitted by law." This language presumably refers to suspensions pending prosecution pursuant to VTL § 1193(2)(e)(1), VTL § 1194(2)(b)(3) and VTL § 510(3-a), which are discussed in the sections that follow.

Our thanks to Neal W. Schoen, First Assistant Counsel, and Ida L. Traschen, Associate Counsel, of DMV Counsel's Office, for their advice and assistance with regard to the prompt suspension law.

§ 45:15 VTL § 1193(2)(e)(1) -- Suspension pending prosecution based upon prior conviction or vehicular crime

A defendant who is charged with DWI, Aggravated DWI, DWAI Drugs *or* DWAI Combined Influence *and* who either (a) has been convicted of any violation of VTL § 1192 within the preceding 5 years, or (b) is charged with Vehicular Assault or Vehicular Homicide in connection with the current incident, is also subject to the suspension of his or her driver's license pending prosecution. In this regard, VTL § 1193(2)(e)(1) provides, in pertinent part:

> (1) Suspension pending prosecution; procedure. a. Without notice, pending any prosecution, the court shall suspend such license, where the holder has been charged with a violation of [VTL § 1192(2), (2-a), (3), (4) or (4-a)] and either (i) a violation of a felony under [Penal Law Article 120 or 125] arising out of the same incident, or (ii) has been convicted of any violation under [VTL § 1192] within the preceding [5] years.

VTL § 1193(2)(e)(1)(a).

Notably, VTL § 1193(2)(e)(1), by its express terms, only applies under certain circumstances. For example, it only applies where the defendant is charged with VTL § 1192(2), (2-a), (3), (4) or (4-a); it does not apply where the defendant is charged with VTL § 1192(1) (*i.e.*, DWAI). In addition, VTL § 1193(2)(e)(1) only applies where the defendant either (a) has been convicted of any violation of VTL § 1192 within the preceding 5 years, or (b) is

charged with Vehicular Assault or Vehicular Homicide in connection with the current incident. Furthermore, unlike the prompt suspension law, no chemical test result is required; thus, VTL § 1193(2)(e)(1) can be applied to chemical test refusal cases.

Like the prompt suspension law, VTL § 1193(2)(e)(1) only applies where a prosecution is pending. Accordingly, a defendant who enters a plea of guilty *and is sentenced* at arraignment is not subject to VTL § 1193(2)(e)(1). On the other hand, a defendant who enters a plea of guilty at arraignment, but whose sentencing is adjourned, is subject thereto (because the prosecution does not terminate until the imposition of sentence).

§ 45:16 VTL § 1193(2)(e)(1) -- Suspension procedure

In order to impose a suspension under VTL § 1193(2)(e)(1), the Court must make three findings. First, the Court "must find that the accusatory instrument conforms to the requirements of [CPL §] 100.40." VTL § 1193(2)(e)(1)(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 that the holder operated a motor vehicle in violation of [VTL § 1192(2), (2-a), (3), (4) or (4-a)]." VTL § 1193(2)(e)(1)(b). Critically, this means that reasonable cause (*i.e.*, probable cause) to believe that the defendant is guilty of DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence -- and not merely of DWAI Alcohol -- is an element of a VTL § 1193(2)(e)(1) suspension. Third, the Court must find that "there exists reasonable cause to believe . . . either (i) the person had been convicted of any violation under [VTL § 1192] within the preceding [5] years; or (ii) that the holder committed a violation of a felony under [Penal Law Article 120 or 125]." VTL § 1193(2)(e)(1)(b).

If such *tentative* findings are made, the statute provides that "the holder shall be entitled to an opportunity to make a statement regarding the enumerated issues and to present evidence tending to rebut the court's findings." VTL § 1193(2)(e)(1)(b).

If a suspension is imposed pursuant to VTL § 1193(2)(e)(1) as a result of the defendant being charged with a felony under Penal Law Article 120 or 125:

> [A]nd the holder has requested a hearing pursuant to [CPL Article 180], the court shall conduct such hearing. If upon completion of the hearing, the court fails to find that there is reasonable cause to believe that the holder committed a felony under [Penal Law Article 120 or 125] and the holder has not been previously convicted of any violation of

> [VTL § 1192] within the preceding [5] years the court shall promptly notify the commissioner and direct restoration of such license to the license holder unless such license is suspended or revoked pursuant to any other provision of this chapter.

VTL § 1193(2)(e)(1)(b).

In light of the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), it seems clear both (a) that the procedural due process requirements set forth therein apply equally to both VTL §§ 1193(2)(e)(1) and (7), and (b) that evidence of a defendant's alleged prior VTL § 1192 conviction must be submitted to the Court in "certified, documented form." See § 45:3, *supra*. See also CPL § 60.60; People v. Van Buren, 82 N.Y.2d 878, 609 N.Y.S.2d 170 (1993); People v. Smith, 258 A.D.2d 245, 697 N.Y.S.2d 783 (4th Dep't 1999).

In People v. Osborn, 193 Misc. 2d 173, ___, 749 N.Y.S.2d 853, 855 (Sullivan Co. Ct. 2002), the Court held that "the principles upon which the Court of Appeals based Pringle, supra in regard to V & T § 1193(2)(e)(7) apply equally herein with regard to V & T § 1193(2)(e)(1)." In so holding, the Court reasoned that:

> A drivers license is a substantial property right and due process must be followed whether that property right is sought to be taken under V & T § 1193(2)(e)(7) or (2)(e)(1).
>
> The statutory language of V & T § 1193(2)(e)(7) is almost exactly the same as V & T § 1193(2)(e)(1) with the one exception that one of the criteria for the taking under V & T § 1193(2)(e)(7) is blood alcohol content of [.08] or higher while one of the criteria under V & T § 1193(2)(e)(1) is a prior conviction of any section of V & T § 1192 within the preceding five years. This distinction does not mollify one's Due Process rights under Pringle.

Id. at ___, 749 N.Y.S.2d at 855.

Similarly, in People v. Giacopelli, 171 Misc. 2d 844, ___, 655 N.Y.S.2d 835, 839 (Clarkstown Just. Ct. 1997), the Court held that:

> [B]oth sections 1193(2)(e)(1) and (7), providing for pretrial suspension, have a "deprivational" effect, and as the very same "substantial property interest" is at issue under both statutes, Pringle v. Wolfe must

> apply to both sections equally. Perhaps more importantly, there exists a stronger reason for a hearing under section 1193(2)(e)(1), as there exists no tempering of the suspension with the grant of a "hardship license" as is available in section 1193(2)(e)(7)(e).

§ 45:17 VTL § 1193(2)(e)(1) -- Effect of failure to comply with statute

In Matter of Plumley v. Leuenberger, 131 Misc. 2d 543, ___, 500 N.Y.S.2d 911, 913 (Oneida Co. Sup. Ct. 1985), the Court lifted the suspension of the petitioner's driver's license pending prosecution and ordered that the license be returned where the Town Court failed to follow the requirements of the suspension statute. The Court held that the suspension was untimely in that it occurred after the arraignment had been completed. Id. at ___, 500 N.Y.S.2d at 913. In addition, "[n]o findings were made and transmitted to petitioner. Consequently, he was not given an opportunity to rebut them. Thus, there has been no compliance with the statute, and the suspension should be lifted and the license returned." Id. at ___, 500 N.Y.S.2d at 912.

On the other hand, in Matter of Kinney v. Bortle, 136 Misc. 2d 68, ___, 518 N.Y.S.2d 336, 337 (Oneida Co. Sup. Ct. 1987), a different Judge of the same Court held that the Town Court's failure to comply with the suspension statute "cannot be construed as a waiver of the statutory requirement that petitioner's license be surrendered. A Town Justice simply has no authority to waive the requirements of V & T § 510(2)(b)(vi)(a) and (b). The Town Justice's letter directing surrender of the license which was sent some three week [*sic*] after petitioner's first appearance, is legally effective, and petitioner must immediately comply with that directive."

It should be noted that, since both Plumley and Kinney were decided long before the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), the continued validity of these cases is questionable.

In People v. Giacopelli, 171 Misc. 2d 844, ___, 655 N.Y.S.2d 835, 839 (Clarkstown Just. Ct. 1997), which was decided subsequent to Pringle, the Court held both (a) that Pringle applies equally to both VTL §§ 1193(2)(e)(1) and (7), and (b) "that having suspended the defendant's driver's license prior to holding a hearing was a violation of the defendant's due process rights to a hearing."

§ 45:18 VTL §§ 1193(2)(e)(1) & (7) -- Suspension time frame

The prompt suspension law provides that, with two exceptions, the Court must impose a suspension thereunder "no later than at the

conclusion of all proceedings required for the arraignment." VTL § 1193(2)(e)(7)(b). See also Pringle v. Wolfe, 88 N.Y.2d 426, 429, 432, 646 N.Y.S.2d 82, 84, 85 (1996).

The first exception is that if, for some reason, the results of the chemical test are not available prior to the completion of the arraignment (which is only the case where the chemical test is a blood or urine test, as breath test results are available almost instantaneously), "the complainant police officer or other public servant shall transmit such results to the court at the time they become available." VTL § 1193(2)(e)(7)(b). The Court is thereafter required to impose a prompt suspension law suspension "as soon as practicable following the receipt of such results and in compliance with the requirements of [VTL § 1193(2)(e)(7)(b)]." Id.

The second exception applies to an underage offender with a class DJ or MJ driver's license/learner's permit. In this situation, VTL § 1193(2)(e)(7)(b) provides that "the suspension occurring under clause a-1 of this subparagraph 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."

VTL § 1193(2)(e)(1)(b) provides that the Court must impose a suspension under VTL § 1193(2)(e)(1) "no later than [20] days after the holder's first appearance before the court on the charges or at the conclusion of all proceedings required for the arraignment."

§ 45:19 VTL §§ 1193(2)(e)(1) & (7) -- Length of suspension

If imposed, a suspension pending prosecution pursuant to either the prompt suspension law or VTL § 1193(2)(e)(1) will remain in effect for as long as the case is pending. In addition, the time period during which the defendant's driver's license is suspended pending prosecution will *not* be credited toward any post-conviction suspension/revocation period if the charges ultimately result in a VTL § 1192 conviction. See People v. DeRojas, 196 Misc. 2d 171, ___, 763 N.Y.S.2d 386, 388-89 (App. Term, 2d Dep't 2003).

Furthermore, it is critical to note that if the defendant's driver's license is suspended pending prosecution pursuant to VTL § 1193(2)(e)(1), the defendant is ineligible for either a hardship privilege and/or a pre-conviction conditional license (both of which are discussed at length *supra*), as he or she would be ineligible for a conditional license if convicted of the underlying VTL § 1192 or Penal Law charge(s).

Accordingly, if a plea bargain resolution of the case is contemplated, defense counsel should attempt to conclude the case as soon as possible (ideally at arraignment) in order to avoid unnecessarily extending the length of the defendant's loss of license.

§ 45:20 VTL §§ 1193(2)(e)(1) & (7) -- Constitutionality

In Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), the Court of Appeals declared VTL § 1193(2)(e)(7) to be Constitutional. In so holding, the Court summed up the due process issue as follows:

> In sum, though the private interest affected by the prompt suspension law is substantial, the severity of the license suspension is mitigated by its temporary duration, the availability of a conditional license and hardship relief, and the significant protection of a presuspension judicial hearing, which militates heavily in favor of the statute's constitutionality. Further weighing against the driver's interest in maintaining his license are the slight risk of an erroneous deprivation and the overriding State interest in "the prompt removal of a safety hazard" from its streets. Based on the foregoing, we hold that the prompt suspension law affords the driver all the process that is constitutionally due.

Id. at 435, 646 N.Y.S.2d at 87-88 (citations omitted).

Notably, however, the Court left open the possibility that additional Constitutional challenges could be raised in the future, stating that, while "various constitutional challenges to the prompt suspension law [are] currently pending in the lower courts, we only have occasion to reach those issues squarely presented on this appeal." Id. at 429 n.1, 646 N.Y.S.2d at 84 n.1.

In addition, a persuasive argument can be made that VTL § 1193(2)(e)(*1*) is unconstitutional. Ironically, this argument finds its support in Pringle, the very case that held VTL § 1193(2)(e)(7) to be Constitutional. First of all, unlike a suspension pending prosecution pursuant to VTL § 1193(2)(e)(7), a suspension pending prosecution pursuant to VTL § 1193(2)(e)(1) can theoretically be ordered without notice to the defendant. See VTL § 1193(2)(e)(1)(a) ("Without notice, pending any prosecution . . ."). But see People v. Giacopelli, 171 Misc. 2d 844, ___, 655 N.Y.S.2d 835, 839 (Clarkstown Just. Ct. 1997) (Court held that it is a violation of a defendant's due process rights to suspend his or her

driver's license pending prosecution pursuant to VTL § 1193(2)(e)(1) prior to holding a hearing).

Second, unlike under VTL § 1193(2)(e)(7), hardship relief and a pre-conviction conditional license are not available under VTL § 1193(2)(e)(1). Accordingly, if a pre-suspension Pringle-type hearing is not required with regard to suspensions pending prosecution pursuant to VTL § 1193(2)(e)(1), then 2 of the 3 factors that the Pringle Court found militated in favor of the constitutionality of VTL § 1193(2)(e)(7) are absent from VTL § 1193(2)(e)(1).

§ 45:21 VTL §§ 1193(2)(e)(1) & (7) -- Double Jeopardy and Equal Protection

It is well settled that the prosecution of a defendant for DWI following the suspension of his or her driver's license pending prosecution does not violate the Double Jeopardy Clause of either the New York State Constitution or the United States Constitution. See People v. Haishun, 238 A.D.2d 521, 656 N.Y.S.2d 660 (2d 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); People v. Malone, 175 Misc. 2d 893, 673 N.Y.S.2d 809 (App. Term, 2d Dep't 1997); People v. Busby, 175 Misc. 2d 509, 670 N.Y.S.2d 960 (App. Term, 2d Dep't 1997); People v. Steele, 172 Misc. 2d 860, 661 N.Y.S.2d 908 (App. Term, 2d Dep't 1997); People v. Uzquaino, 172 Misc. 2d 388, 661 N.Y.S.2d 438 (App. Term, 2d Dep't 1997); People v. Conrad, 169 Misc. 2d 1066, 654 N.Y.S.2d 226 (App. Term, 2d Dep't 1996).

Similarly, Courts have rejected the argument that the prompt suspension law violates the Equal Protection Clause of either the New York State Constitution or the United States Constitution. See Roach, 226 A.D.2d at ___, 649 N.Y.S.2d at 610; People v. Condarco, 166 Misc. 2d 470, 633 N.Y.S.2d 930 (N.Y. City Crim. Ct. 1995); People v. Boulton, 164 Misc. 2d 604, 625 N.Y.S.2d 428 (Troy City Ct. 1995).

§ 45:22 VTL § 1194(2)(b)(3) -- Temporary suspension of license at arraignment in chemical test refusal cases

At arraignment in a 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).

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.

§ 45:23 VTL § 510(3-a) -- Discretionary suspensions

VTL § 510(3-a), formerly an unlettered paragraph following VTL § 510(3)(i), provides that:

> Opportunity to be heard and temporary suspensions. Where revocation or suspension is permissive, the holder, unless he shall waive such right, shall have an opportunity to be heard except where such revocation or suspension is based solely on a court conviction or convictions or on a court commitment to an institution under the jurisdiction of the department of mental hygiene. A license or registration, or the privilege of a non-resident of operating a motor vehicle in this state or of the operation within this state of any motor vehicle owned by him, may, however, be temporarily suspended without notice, pending any prosecution, investigation or hearing.

This section has rarely been used in DWI cases. Rather, it has generally been implemented in cases of reckless and abhorrent driving which demonstrated "a reckless disregard for the life or property of others."

In Matter of Ryan v. Smith, 139 Misc. 2d 151, 527 N.Y.S.2d 174 (Schenectady Co. Sup. Ct. 1988), the petitioner brought an Article 78 proceeding challenging the suspension of his driver's license, pursuant to VTL § 510(3-a), pending prosecution of a DWI charge. The suspension appeared to be imposed due to petitioner's "extraordinarily high" BAC, which was alleged to have been .23%. In upholding the suspension, the Court noted that:

> While V & T § 510 in general may be considered a study in ambiguous draftsmanship, it appears from a full reading of the statute, and from reported decisions that both New York State and out of state drivers may have their licenses temporarily suspended pending any prosecution, investigation or hearing.
>
> Additionally, though the statutory language and structure is at best murky, it indicates that the arraigning court possessed the power to temporarily suspend the license by the force of the last sentence in § 510(3) [currently § 510(3-a)]. It must be firmly kept in mind that the suspension here is of a temporary, discretionary nature pending prosecution, and may not be categorized as a permissive suspension or revocation, or a mandatory suspension without notice. . . .
>
> Moreover, as a temporary, discretionary suspension, the procedural due process safeguards of V & T § 510(2)(b)(vi) [currently VTL § 1193(2)(e)(1)] do not appear to be applicable.

Id. at ___, 527 N.Y.S.2d at 175 (citations omitted).

In People v. Forgette, 141 Misc. 2d 1009, ___, 535 N.Y.S.2d 924, 927 (N.Y. City Crim. Ct. 1988), the Court expressly rejected the premise of Ryan (*i.e.*, that a suspension pending prosecution pursuant to VTL § 510(3-a) can be based *solely* on an allegedly high BAC).

> Rather, it seems entirely appropriate that a temporary suspension be grounded upon evidence that a driver's *continued* operation of a motor vehicle represents a danger to the public. Part of the criteria should necessarily entail a review of the arraigned charges. . . . Additional evidence demonstrating a threat to the public would normally consist of the defendant's past driving record. . . . Finally, it should be noted that a temporary suspension is indeed just that.

Id. at ___, 535 N.Y.S.2d at 927.

In Matter of Buckson v. Harris, 145 A.D.2d 883, ___, 536 N.Y.S.2d 219, 219-20 (3d Dep't 1988), the petitioner brought an Article 78 proceeding challenging County Court's Order "which directed petitioner to refrain from driving a motor vehicle as a condition of bail." The Appellate Division, Third Department, dismissed the petition, citing VTL § 510(3)(i) (currently VTL § 510(3-a)), as well as the fact that the petitioner had numerous prior alcohol-related convictions and was currently charged with felony DWI.

In Matter of King v. Kay, 39 Misc. 3d 995, 963 N.Y.S.2d 537 (Suffolk Co. Sup. Ct. 2013), the defendant's driver's license was suspended pending prosecution by a Judge of the Suffolk County District Court pursuant to VTL § 1193(2)(e)(7). However, another Judge of the same Court subsequently suspended the defendant's driver's license pursuant to VTL § 510(3-a). The only conceivable reason for doing so would be to deprive the defendant of eligibility for a pre-conviction conditional license. The defendant challenged the VTL § 510(3-a) suspension via an Article 78 proceeding.

In a very well reasoned decision, the Suffolk County Supreme Court annulled the VTL § 510(3-a) suspension, finding that VTL § 510(3-a) was inapplicable to the case. In so holding, the Court reasoned, in part, as follows:

> Vehicle and Traffic Law § 510(3-a) does not authorize a temporary suspension without a finding that suspension is permissive pursuant to Vehicle and Traffic Law § 510(3). Respondent made no such finding. Further, petitioner is charged solely with violations of Vehicle and Traffic Law § 1192, which without further findings, subjects petitioner to suspension under article 31, not Vehicle and Traffic Law § 510. In fact, at the time of respondent's November 26, 2012 determination, petitioner's license had already been temporarily suspended pursuant to Vehicle and Traffic Law § 1193(2)(e)(7).
>
> The propriety of the respondent's administrative determination must be judged solely on the grounds invoked by respondent. This Court finds no basis in the law to support the temporary suspension of Petitioner's license pursuant to Vehicle and Traffic Law § 510(3-a) on this record.

Id. at ___, 963 N.Y.S.2d at 544-45.

PART X

TEST REFUSALS

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, 258 (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. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); 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. Rodriguez, 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. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014);

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. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); 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 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 reghabilitation 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 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.

7. *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.

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 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: * info from class activities; * hearsay from other sources; * 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." B. A direct request from student to get help for his/her own substance abuse problem. NOTE: The DDP must get a signed statement from student affirming either of these situations.	A. No person can be legally kept in treatment without an abuse or dependency diagnosis being made. B. When people ask for help, they should get it.
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.

	CRITERION	OBJECTIVE STANDARD	RATIONALE
		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.
		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.	Supports Section 1193 of V & T Law: Suspension Pending Prosecution.
		B. Arrest reported in newspaper.	
		NOTE: DDP must get copy of ticket or of Court's Suspension Pending Prosecution order.	

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

JOHN A. PASSIDOMO
COMMISSIONER

EMPIRE STATE PLAZA

ALBANY, NEW YORK 12228

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 thereafter 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 resonable 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. Adduci
Commissioner

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 weight 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 attack 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:smb
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 deapartment 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 contace 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 Dep't 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
Drivers 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 enroll-

ment 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 re-

vocation 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 sec-

tion 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 appear-

ing 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 commis-

sioner 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 issued 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

SUTIN/BURGESS PRINTING ASSOCIATES INC PO BOX 587
COHOES N Y 12047-0587 (518) 237-7596

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 61

Letter from Department of Motor Vehicles Regarding Suspension Pending Prosecution

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

APR - 9

April 4, 2002

Eric H. Sills, Esq.
Gerstenzang, O'Hern, Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203

Re: Suspension Pending Prosecution

Dear Mr. Sills:

Neal Schoen has requested that I respond to your recent letter regarding suspension pending prosecution.

You ask whether a defendant's driver's license can lawfully be suspended pending prosecution pursuant to either Vehicle and Traffic Law §1193(2)(e)(1) and/or §1193(2)(e)(7) under the following circumstances:

1. The defendant is charged with common law DWI, in violation of VTL §1192(3);

2. The defendant refused to submit to a chemical test (and no test result was obtained); and

3. The defendant has no prior VTL §1192 convictions within the past five years (and there is no Penal Law Article 120 or 125 charges).

Under this set of facts, there is no statutory basis for a mandatory suspension pending prosecution. VTL §1193(2)(e)(1) provides that a driver's license must be suspended pending prosecution if the driver is charged with a violation of §1192(2), (3) or (4) and has any §1192 convictions within the preceding five years (or if there is an accompanying charge of vehicular assault or vehicular manslaughter). VTL §1193(2)(e)(7) provides that a driver's license must be suspended pending prosecution if the driver is charge with a violation of §1192(2) or (3) and has a BAC reading of .10 or more at the time of arrest. In the situation described above, there is no BAC reading and no prior alcohol conviction. Thus, a mandatory suspension would not be appropriate under these circumstances.

I trust this information will assist you.

Very truly yours,

Ida L. Traschen

Ida L. Traschen
Associate Counsel

ILT/mw

APPENDIX 62

Letter from Department of Motor Vehicles Regarding Hardship Privilege

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
EMPIRE STATE PLAZA
ALBANY NEW YORK 12228

RICHARD E. JACKSON, JR.
COMMISSIONER

WILLIAM J. FLORENCE, JR.
DEPUTY COMMISSIONER & COUNSEL

LEGAL DIVISION
NEAL W. SCHOEN
FIRST ASSISTANT COUNSEL

June 24, 1998

Timothy P. Donaher, Esq.
Doyle & Donaher
1501 East Avenue, Suite 201
Rochester, New York 14610

Dear Mr. Donaher:

I have received your letter of June 23, 1998 regarding People v. Raymond Speranza.

You ask for an informal opinion from the Department regarding the breadth of the hardship privilege. Section 1193(2)(e)(7) of the Vehicle and Traffic Law provides that the hardship privilege may be used "to travel to and from the licensee's employment." This is distinguished from the conditional license which may be used during the course of the licensee's employment.

In Mr. Speranza's case, he is the manager of various job sites which his company has been hired to clean. It is the Department's position that the hardship privilege may be used to travel to and from each job site since each site is a separate base of employment. However, Mr. Speranza may not travel during the course of his employment, i.e., he may not run errands or pick up materials for his work, for example.

I trust this information assists you.

Very truly yours,

Ida L. Traschen

IDA L. TRASCHEN
Assistant Counsel

ILT/hb

APPENDIX 67

Letters from Department of Motor Vehicles Revising Opinion Regarding Hardship Privilege

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
6 EMPIRE STATE PLAZA, ALBANY, NY 12228

DAVID J. SWARTS
Commissioner

NEAL W. SCHOEN
Deputy Commissioner and Counsel

IDA L. TRASCHEN
First Assistant Counsel
Legal Bureau

May 12, 2010

Steven B. Epstein, Esq.
215 Hilton Avenue
Hempstead, New York 11551-1200

Re: Hardship Privilege

Dear Mr. Epstein:

I have received your letter of May 11, 2010, regarding the scope of the hardship privilege, as set forth in Vehicle and Traffic Law §1193(2)(e)(7)(e), which provides in part:

> For the purposes of this clause, "extreme hardship" shall mean the inability to obtain alternative means of travel **to or from** the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate.

The Department has retreated from the opinion expressed in the "Speranza letter", which you enclosed. First, we defer to the court hearing the case because it is the court that grants the hardship privilege and has all of the facts about a particular defendant before it for consideration. Second, we believe that the opinion in the "Speranza letter" was too broad; i.e., the hardship privilege was not intended for travel to several job sites. Such travel falls within the scope of the conditional license, which may be used during the course of one's employment. Thus, in our opinion, it would not be appropriate for an attorney to use the hardship privilege to travel to and from various courts to represent his clients. He could travel to and from his office where he has his base of operation.

I trust this information assists you.

Very truly yours,

Ida L. Traschen
First Assistant Counsel

ILT/mjs

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
6 EMPIRE STATE PLAZA, ALBANY, NY 12228

BARBARA J. FIALA
Commissioner

NEAL W. SCHOEN
Deputy Commissioner and Counsel

IDA L. TRASCHEN
First Assistant Counsel
Legal Bureau

June 13, 2012

JUN 15 2012

Peter Gerstenzang, Esq.
Gerstenzang, O'Hern, Hickey, Sills & Gerstenzang
210 Great Oaks Boulevard
Albany, New York 12203

Re: Hardship Privilege

Dear Mr. Gerstenzang:

On June 24, 1998, I wrote a letter, which commented on the scope of the hardship privilege in relation to the case People v. Speranza. The letter is published as Appendix 62 in your book Handling the DWI Case in New York. Upon further review, Counsel's Office has modified the position expressed in the 1998 letter and requests that this letter be published in the next edition of your book.

Vehicle and Traffic Law §1193(2)(e)(7) provides that a court may grant a hardship privilege if the suspension pending prosecution results in extreme hardship. Extreme hardship is defined as:

> "[T]he inability to obtain alternative means of travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate."

The scope of the hardship privilege arises most often in the context of traveling to and from the licensee's place of employment. Since the privilege is limited to travel *to and from* one's place of employment, the Department believes that the opinion in the "Speranza letter" was too broad; i.e., the hardship privilege is not intended for travel to and from several job sites. Such travel falls within the scope of the conditional license, which may be used *during the course* of one's employment.

The essential question to be answered is whether travel is intrinsic to the defendant's job. If it is essential, then the hardship privilege is most likely not appropriate. For example, in our opinion, the privilege should not be issued to an attorney who travels to and from various courts to represent clients,

nor should the privilege be issued to a doctor who makes house calls. The Department, of course, defers to the court that must decide whether to issue the privilege. This letter only expresses the opinion of the Department.

Very truly yours,

Ida L. Traschen
First Assistant Counsel

ILT/dmv

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

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.