

# Taheri & Todoro, PC

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Dear Sir/Madam:

As a result of your arrest for Driving While Intoxicated, you are going to have numerous questions that need to be answered by me or other members of the law firm. Our firm has learned over the years, however, that certain questions are often asked by clients who are charged with an alcohol-related offense.

When reviewing this information, please be aware that many changes to the law surrounding DWI prosecutions became effective November 1, 2006. As a result, this new legislation have not been reviewed by the courts. Therefore, our legal advice on these topics may change as the justice system provides us with guidance on the new areas of law.

Discussed below are several of the most commonly asked questions and concerns that arise in DWI cases. Please review this information, along with the accompanying chart, so that you have a better understanding of your case and the penalties that could be imposed should there be a conviction under any section of VTL § 1192.

## **SUSPENSIONS PENDING PROSECUTION (NY VTL § 1193[2](e)(7))**

If you submitted to a chemical test of your blood (the most common method being a breath test) and "scored" .08 BAC or more, you license *shall* be suspended at arraignment.

If you had a valid driver's license prior to the suspension pending prosecution and did not have a prior conviction for Driving While Intoxicated or Impaired, or complete the Drinking Driver Program within the proceeding five (5) years, you may be eligible for a conditional license after the expiration of 30 days. The conditional license will be issued by the Department of Motor Vehicles. Please discuss this issue with me should you have any questions.

## **THE HARDSHIP LICENSE**

Sometimes a driver *may* be eligible for a hardship license. The court which conducts your arraignment will decide your eligibility for this limited license. To be eligible, the court must determine that you will be subject to "extreme hardship" without this license. NY VTL § 1193[2](e)(7)e defines "extreme hardship" as:

...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.

This license only allows the driver to operate their vehicle to and from their place of employment. It does not allow a driver to operate a vehicle *for* work.

### ADWI, DWI vs. DWAI

Accompanying this letter is a chart which sets forth the mandatory minimum and maximum penalties that a court may impose should there be a conviction for an alcohol-related offense. You should review this chart to determine the potential penalties that may be imposed upon you. Be certain that you consider any prior alcohol-related convictions when utilizing the chart. Also, please pay particular attention to the additional fees that can be imposed by the Department of Motor Vehicles, should you sustain an alcohol-related conviction.

If your BAC was .18% or higher, you will face a charge called Aggravated Driving While Intoxicated, which, like Driving While Intoxicated, is an unclassified misdemeanor. This charge does, however, carry stiffer fines and harsher sanctions to your driver license.

If you are uncertain as to whether or not you have sustained a prior alcohol-related conviction (or the type of conviction), please let us know, and we will make arrangements with the Department of Motor Vehicles to obtain a printout of your driving history. If you had a prior alcohol-related conviction in another state, please let us know so that we can determine its impact upon your current charge. Such a conviction will normally show up on a criminal record check.

### CHEMICAL TEST REFUSALS (NY VTL § 1194)

It is important to understand that there are two types of breath tests. If you refuse a "screening test" *prior* to an arrest, you may be issued a ticket and, if convicted, be fined for refusing.

*After* an arrest, you may be requested to take a chemical test. This test, which is usually a breath test but may also be a test of blood, urine, or saliva, is the test used as evidence in court. If you "refuse" to take this chemical test, there is a different set of penalties.

A chemical test refusal mandates suspension of your license at your arraignment, which usually occurs at your first appearance before a judge. At your arraignment the judge will direct that you provide him or her with your driver's license. Thereafter, the court will mail your license to the Department of Motor Vehicles in Albany, NY.

Although there is no hearing associated with the judicial suspension of your license, the court will schedule a "refusal hearing" with the Department of Motor Vehicles. This hearing must be scheduled within 15 days of your arraignment or your license will be reinstated by the Department of Motor Vehicles.

A refusal hearing is an evidentiary proceeding conducted before an Administrative Law Judge. If the Administrative Law Judge concludes that you, in fact, refused to take a chemical test as requested by a member of law enforcement, then your license **must be revoked for a minimum of one (1) year**.

In addition to revocation of your license, you will be required to pay a \$500.00 civil penalty prior to

restoration of your "full" driving privileges pursuant to NY VTL § 1194[2](d)(2). A refusal adjudication will also affect future suspensions and revocations arising out of unrelated alcohol-related convictions. For instance, a second chemical test refusal within five years of an initial refusal or alcohol conviction carries an enhanced civil penalty of \$750.00. More serious, however is the fact that a second refusal revocation within five years of a previous alcohol violation or refusal results in a **mandatory minimum eighteen month revocation of your license**.

If your license is "revoked" by the administrative law judge at the refusal hearing, it means your license is canceled. To get a new license, you must re-apply to the Department of Motor Vehicles once the revocation period is over. The Department of Motor Vehicles will decide whether or not you will be issued a new license.

You do not have an absolute right to speak to an attorney before agreeing to submit to a breath test. Instead, in New York State you have a qualified right to speak with an attorney. In *People v. Gurse*y, 22 NY2d 224, 292 NYS2d 416, 239 NE2d 351 (1968), the New York State Court of Appeals held:

Where the defendant wishes only to telephone his lawyer or consult with a lawyer present in the station house or immediately available there, no danger of delay is posed. But, to be sure, there can be no recognition of an absolute right to refuse the test until a lawyer reaches the scene.

*Gurse*y at p. 229.

A New York State Appellate Division court ruled in 1994 that a motorist who sought to first consult with his attorney before submitting to a test was, in essence, refusing.

### **THE DRINKING DRIVER PROGRAM (NY VTL § 1196)**

If this is your first alcohol-related arrest, and you are convicted of either DWI or DWAI, then you are eligible to participate in the New York State Drinking Driver Program (DDP). This program consists of weekly classes for approximately seven weeks and involves a total of approximately fifteen (15) classroom hours. The cost to enroll in the DDP is approximately \$225.00.

Participation in the DDP is limited. Repeat offenders are not permitted to participate in the program if the time from their prior completion of the program to the date of their next arrest is less than five years. The five years runs from the date *the DDP was completed* until the date of the most recent arrest. It does *not* run from the date of your last conviction.

### **THE CONDITIONAL LICENSE**

If you are permitted to participate in the DDP, then, absent any aggravating factors, you are also eligible for a conditional license. Although there are limitations imposed on the holder of a conditional license, it does allow you to drive under the following conditions:

- a. To and from your employment and during employment when required;
- b. To and from a class or activity that is part of your rehabilitation program;
- c. To and from classes at an accredited school or vocational institute;
- d. To and from any court ordered probation activities;
- e. To and from the DMV for the transaction of business associated with the license or program;

- f. To and from medical treatment for yourself or a member of your household (requires a letter from a licensed medical practitioner);
- g. During a period of three consecutive daytime hours;
- h. To and from a place, including a school, where your children are cared for and that is necessary to maintain your employment or enrollment in school.

(See Section 1196[7](a) of the Vehicle and Traffic Law.)

The cost for the conditional license is approximately \$75.00; this is in addition to the fee to enroll in the DDP. It will cost you an additional \$25.00 to return your conditional license to the DMV.

One third of all DDP attendees are sent for additional assessments and/or treatment. If the Department of Motor Vehicles determines that he/she is in need of additional counseling, failure to complete that treatment will result in the revocation of all driving privileges including a conditional license.

### **DRUG COURT PROGRAMS**

Several courts in New York State now have "drug court" programs. Some individuals arrested for alcohol-related driving offenses may be eligible for the programs; the specific criteria necessary to enter varies from court to court. Also, some courts may strongly encourage participation in a drug court program as a way to avoid incarceration.

Drug court programs divert the defendant, while the charge remains pending, into an intensive, court-monitored program of group and individual counseling. The defendant waives his or her constitutional rights and consents to such conditions as random breath tests and regularly reporting to the court. The length of this program varies, but it typically lasts from six to twelve months. If the defendant fails to comply with the conditions of the program, there are several different sanctions, including jail time, that may be imposed. If the defendant successfully completes the program, he or she usually will receive a lesser sentence.

### **MANDATORY INCARCERATION OR COMMUNITY SERVICE FOR SOME REPEAT OFFENDERS**

Section 1193[1-a] the Vehicle and Traffic Law requires mandatory incarceration *or* the performance of community service by individuals convicted of Driving While Intoxicated or Driving with .08% or Greater BAC who also have one or more prior convictions for those offenses within the previous five years. The length of mandatory incarceration or community service depends on the number of prior convictions as set forth below:

	<b>Mandatory Incarceration</b>	<b>Community Service</b>
<b>One</b> prior Driving While Intoxicated or Driving with .08% or Greater BAC conviction within the past five years	at least <b>Five</b> days; or	at least <b>Thirty</b> days
<b>Two or more</b> prior Driving While Intoxicated or Driving with .08% or Greater BAC convictions within the past five years	at least <b>Ten</b> days; or	at least <b>Sixty</b> days

If you have one or more prior convictions for Driving While Intoxicated or Driving with .08% or Greater BAC within the past five years, please contact my office. We can provide you with suggestions regarding where to perform community service.

### **IGNITION INTERLOCK DEVICE**

An “ignition interlock device” is, to put it simply, a breath test machine attached to the ignition of an automobile. The driver must blow into the device and register no alcohol in his or her breath before being able to start the car.

If you are convicted of Aggravated Driving While Intoxicated and receive a sentence of probation, the court must require that an ignition interlock device be installed as a condition of your probation.

Also, Section 1193[1-a](c) of the Vehicle and Traffic Law makes ignition interlock devices mandatory for individuals convicted of Driving While Intoxicated or Driving with .08% or Greater BAC two or more times within five years. This new law requires that ignition interlock devices be attached to all vehicles owned by the convicted driver. Such devices must remain installed during any period of license revocation. Moreover, after the revocation period has ended, they may remain installed for an additional period as determined by the court.

If you are required to install such a device, you will be responsible for the installation fee and monthly charge associated with its operation. This fee is generally several hundred dollars, along with a monthly monitoring fee.

### **MANDATORY ALCOHOL ASSESSMENTS**

New York State has enacted a system requiring different levels of alcohol and drug use evaluation and potential treatment for different offenses. At arraignment or, at the discretion of the court, prior to sentencing, you shall be required undergo either mandatory *screening* or a mandatory *assessment*. The details of this system are broken down below.

#### *Mandatory Screening*

First time violators charged with Driving While Ability Impaired by Alcohol, Driving While Intoxicated, or Driving While Intoxicated per se and either had a breath test result of less than .15% or refused the chemical test, must be screened by treatment professional using a standardized written screening test. If your screening indicates that you are abusing or dependant upon alcohol or drugs, you then must undergo the mandatory assessment as set forth below.

#### *Mandatory Assessment*

You will be required to undergo a mandatory assessment under any of the following circumstances:

1. The screening process set forth above indicates abuse or dependance upon alcohol or drugs;
2. You have been charged with Driving While Intoxicated or Driving While Intoxicated per se and had a BAC score of .15% or greater;
3. You have been charged with Aggravated Driving While Intoxicated;
4. You have been charged with violating any provision of VTL § 1192 and have either (a) a prior conviction for any provision of VTL § 1192, Vehicular Assault or Vehicular Manslaughter within the last 5 years, or (b) two such convictions within ten years.

The assessment must be forwarded to you and the court within thirty days. If it indicates that treatment is required, the court must require such treatment as a condition of any sentence of probation or conditional discharge.

*Miscellaneous Provisions regarding Screening/Assessment/Treatment*

All screenings and assessments, along with any treatment arising from such assessment, must be conducted by an “alcohol or substance abuse professional” or “licensed agency” approved by the New York State Office of Alcoholism and Substance Abuse Services. While many alcohol counselors are professionally licensed by the New York State Education Department and/or approved by the Department of Motor Vehicles, this level of approval is not sufficient to participate in the new court-mandated program.

In you are allowed to enter a guilty plea to a charge of Driving While Ability Impaired by Alcohol, participation in the Drinking Driver Program shall be considered compliance with the mandatory treatment program.

Moreover, in addition to requiring the installation of ignition interlock devices in certain cases, Section 1193[1-a](c) of the Vehicle and Traffic Law also requires that, for defendants convicted of Driving While Intoxicated or Driving with .08% or Greater BAC two or more times within five years, the Court “order that such person receive an assessment of the degree of their alcohol abuse. Where such assessment indicates the need for treatment, such court is authorized to impose treatment as a condition of such sentence.”

**DRIVER RESPONSIBILITY ASSESSMENT**

Section 1199 of the Vehicle and Traffic Law requires that, in addition to any other court imposed fines, a driver convicted of ADWI, DWI, DWAI, or of having refused a chemical test, must pay a mandatory "driver responsibility assessment" to the Department of Motor Vehicles in the amount of \$250 per year for three years. If you are convicted of any of these offenses, you will be notified by the Department of Motor Vehicles through the US mail regarding the time and manner of making these payments. Failure to pay any portion of this assessment will result in a suspension of your driver license or, if you do not have a driver license, suspension of your privilege to obtain a license, until it is paid in full. You may also wish to speak with the DMV about your payment options.

**COMMERCIAL DRIVER LICENSE**

Section 1196[7](g) of the Vehicle and Traffic Law states:

Notwithstanding anything to the contrary contained in a certificate of relief from disabilities issued pursuant to article twenty-three of the correction law, any conditional license or privilege issued to a person convicted of a violation of any subdivision of section eleven hundred ninety-two of this article shall not be valid for the operation of any commercial motor vehicle. In addition, no such conditional license or privilege shall be valid for the operation of a taxicab as defined in this chapter.

As a result, even if you were not driving a commercial motor vehicle at the time of your arrest, you will be *barred* from holding a Commercial Driver License if you are convicted of any alcohol-related driving offense. This bar will remain in affect until your full driving privileges are reinstated.

Obviously, if you need a Commercial Driver License as a part of your job, this law could seriously impact your employment. You should make your attorney aware that you hold such a license immediately so that you may explore your options. Because the only legal mechanism by which an individual charged with an alcohol-related offense may continue operating a commercial motor vehicle without interruption is full acquittal from all alcohol-related charges, the need for a Commercial Driver License may seriously impact the manner in which you choose to proceed with your case.

A certificate of relief from disabilities, which may be issued by the sentencing judge, is not sufficient to have your privilege to drive a commercial motor vehicle reinstated.

Holders of a Commercial Driver License should also be aware that should you refuse to submit to a chemical test, your commercial driving privileges will be revoked for eighteen months. This revocation applies regardless of whether you were driving a commercial motor vehicle at the time of your arrest and of the outcome of your case in criminal court.

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### **ALCOHOL-RELATED CONVICTIONS AND YOUR AUTOMOBILE INSURANCE**

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Suspension or revocation of your driver's license as a result of an alcohol-related conviction is just cause for your insurance company to cancel your automobile insurance policy.

An alcohol-related conviction increases the probability that your insurance company will not renew your present insurance policy. Assuming no other company agrees to offer you insurance, you will be relegated to the New York Automobile Insurance Plan (i.e., the "risk pool") at a substantially higher cost. In general, alcohol-related convictions remain on insurance company records and are used as a factor to determine premiums for between five (5) and ten (10) years.

### **ENTRY INTO CANADA AND OTHER COUNTRIES**

If you are convicted of any alcohol-related offense, you may be barred from entering Canada. Canada generally bars any U.S. citizens who have been convicted of a misdemeanor from entering their country. Canada has also been known to exclude individuals convicted of Driving While Ability Impaired by Alcohol (VTL § 1192[1], a traffic infraction) from entering the country.

To obtain entry to Canada following any conviction, you may need to apply for a Minister's Permit with the Canadian Consulate. Approval of this application would allow you to enter into Canada for a short-term visit. An individual convicted of a crime may not obtain long term entry into Canada until at least five years have passed from the date his or her sentence was completed. At that time, he or she may apply to the Canadian Consulate for "rehabilitation." If granted rehabilitation, a U.S. citizen with a criminal record may enter Canada in the same manner as if he or she had no criminal record.

The impact of a conviction upon your ability to enter other foreign countries varies from country to country. If being barred from traveling to a particular country could have a negative effect on your business or other dealings, you should inform your attorney so that this aspect of your case may be more thoroughly explored.

### **PISTOL PERMIT**

If you hold a pistol permit, the mere fact that you were arrested may result in an immediate suspension of your right to possess a firearm. If you are convicted of any section of VTL § 1192, a hearing will be held

to determine the length of any revocation period. This hearing would be conducted separately from your case and may be before a judge or a judge's law clerk.

### **PROFESSIONAL LICENSES**

If you hold a professional license, such as a license to practice law, a nursing license, an engineering license, or a certified personal accounting license, you should be concerned about the potential impact of a conviction on that license. If you hold a professional license, please bring this fact to the attention of your attorney. A conviction under VTL § 1192 may have to be reported to your professional licensing board and could trigger a hearing before the board to determine if your professional license should be suspended or revoked. Additionally, financial sanctions may also be imposed. Because of the impact this would have on your career, it is very important that the regulations surrounding your license and the impact of any conviction be fully examined before any determination is made regarding how to proceed with your case.

### **BUSINESS LICENSE**

If your business holds a special license issued from a government agency (e.g., the New York State Liquor Authority), a conviction under VTL § 1192 may have adverse consequences to that license. You should provide a copy of any such license to your attorney so that any potential problem may be explored before your case is resolved.

### **FINGERPRINTS AND MUG SHOTS**

Pursuant to NY CPL § 160.50, if you are convicted of the violation of driving while ability impaired or driving while intoxicated, your fingerprints and mug shots will **not** be returned to you and/or sealed by the court. Rather, they are permanently on file.

### **JURY DUTY**

If you are convicted of Driving While Intoxicated as a felony, you will no longer be eligible for to serve on a jury. This applies to both grand juries and petit (trial) juries. If you are convicted of Driving While Intoxicated as a misdemeanor or Driving While Ability Impaired by Alcohol (a traffic infraction), it will not impact your ability to serve as a juror.

### **CONCLUSION**

After reading the information contained in this letter and the accompanying chart, you may have additional questions. We encourage you to contact us with these questions or any other concerns you may have as a result of your arrest.

Very truly yours,

MICHAEL S. TAHERI  
PETER J. TODORO

### DWI and Related Offenses\*

Offense	Mandatory Fines Minimum Fines and Maximum Fines	Maximum Jail Term	Mandatory Penalties to License
<b>Driving While Ability Impaired (VTL § 1192[1])<sup>(1)</sup></b>			
First Conviction	\$300 - \$500 <sup>(2) (3) (6)</sup>	15 days	90 day suspension
Second Conviction within 5 years of either a conviction for ADWI, DWI or DWAI	\$500 - \$750 <sup>(3) (6)</sup>	30 days	Revoked at least 6 months
Third Conviction within 10 years	\$750 - \$1,500 <sup>(4) (6)</sup>	180 days Misdemeanor	Revoked at least 6 months
<b>Driving While Intoxicated (VTL § 1192[2] and [3])<sup>(1)</sup></b>			
First Conviction	\$500 - \$1,000 <sup>(4) (6)</sup>	1 year Misdemeanor	Revoked at least 6 months
Second Conviction within 10 years (prior ADWI or DWI)	\$1,000 - \$5,000 <sup>(5)(6)</sup>	4 years "E" Felony	Revoked at least 1 year (18 months if prior conviction is for ADWI) <sup>(7)</sup>
Third Conviction within 10 years (prior ADWIs and/or DWIs)	\$2,000-\$10,000 <sup>(5)(6)</sup>	7 years "D" Felony	Revoked at least 1 year (18 months if at least one prior conviction is for ADWI) <sup>(7)</sup>
<b>Aggravated Driving While Intoxicated (VTL § 1192[2-a])<sup>(1)</sup></b>			
First Conviction	\$1,000-\$2,500 <sup>(4) (6)</sup>	1 year Misdemeanor	Revoked at least 1 year
Second Conviction within 10 years (prior ADWI or DWI)	\$1,000 - \$5,000 <sup>(5)(6)</sup>	4 years "E" Felony	Revoked at least 18 months <sup>(7)</sup>
Third Conviction within 10 years (prior ADWIs and/or DWIs)	\$2,000-\$10,000 <sup>(5)(6)</sup>	7 years "D" Felony	Revoked at least 18 months <sup>(7)</sup>

\* This chart only sets forth court imposed sanctions; separate and additional sanctions may also be imposed by the Department of Motor Vehicles.

<sup>(1)</sup> All convictions under Vehicle & Traffic Law section 1192 require the payment of a Driver Responsibility Assessment to the Department of Motor Vehicles in the amount \$250 per year for 3 years in addition to the mandatory fines set forth in this chart

- (2) First alcohol or drug-related violation by a driver under the age of 21: 1 year revocation  
Second alcohol or drug-related violation by a driver under the age of 21: revocation until age 21 or 1 year, whichever is longer
- (3) \$255.00: State mandatory surcharges which are in addition to mandatory fines
- (4) \$395.00: State mandatory surcharges which are in addition to mandatory fines
- (5) \$520.00: State mandatory surcharges which are in addition to mandatory fines
- (6) Chemical Test Refusal Revocation: \$500 civil penalty
- (7) Chemical Test Refusal with prior refusal or alcohol-related violation within five years: \$750 civil penalty, *see* VTL § 1194  
Additional licensing penalties may arise if the prior offenses occurred within 4 years of the current offense

### **VICTIM IMPACT PROGRAM**

Where court imposes a sentence for a violation of NY VTL § 1192, the court may require the driver to attend a single session of the Victim Impact Program; *see* NY VTL § 1193.

### **DRINKING DRIVER PROGRAM**

Administrative Fee: \$75.00 Paid by driver when s/he enrolls in DDP; fee is non-refundable.

Agency Fee: \$225 (approx. cost) This fee is paid to the agency that teaches the DDP course.

Evaluation/Assessment Fee: If driver is referred for additional alcohol evaluation or treatment, additional fees set by the mental health professional will also be incurred by the driver.

### **RE-LICENSING FEE**

If driver's license is *revoked* as a result of an alcohol-related conviction, the driver must *re-apply* for a new license. When *re-applying* for a new license, the driver must include a \$50 non-refundable re-application fee with his application.

As of September 22, 2003, if a driver license is *suspended*, the driver must pay a \$35 termination of suspension fee to the court that suspended his or her license. The court may not lift the suspension of the driver license until that fee is paid.