

A newsletter by **Taheri & Todoro, P.C.**, devoted to Driving While Intoxicated law in New York State
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The Theory of Defense in a Breath Test Case

In most cases, when a case involves a blood alcohol score from a breath test device on the "approved list" contained in the New York Code of Rules and Regulations (10 NYCRR 59.2), the score will be admitted by the trial court as evidence against the accused. Other than an objection by defense counsel that the prosecution has not established "a proper foundation," *People v. Freeland*, 68 NY2d 699 (1986), courts tend to take the view that objections go to the "weight" that should be given to the breath test score by the fact finder and *not* to admissibility.

Although counsel can file pre-trial motions seeking preclusion of the breath test score, in the majority of cases counsel will need a bona fide *trial* defense. Thus, in VTL § 1192[2] cases and related prosecutions, counsel must always strive to develop a theory of defense that addresses the breath test score. Leaving the BAC score unchallenged and hoping that the trier of fact will merely ignore this evidence all but guarantees a verdict of guilty. As a result, counsel *must* develop a theory of defense to the breath test score that may be implemented at trial.

The Theory Of Defense: A Working Definition

The theory of defense is the core to successfully defending any criminal prosecution, including a charge of Driving While Intoxicated, per se (VTL § 1192[2]). It evolves over time and is only completed when counsel has achieved a total understanding of the interrelationship between the client, the factual situation surrounding the charge, and the legal elements that give rise to the charge. Briefly defined, the theory of defense is a concise statement by

counsel explaining *why the client should be found "not guilty"* by the trier of fact.

Although many terms can be used to describe the theory of defense (e.g., "the case rationale" or "the scenario"), it always serves as the "essence" or "guts" of the defense lawyer's case. The theory of defense may change as information is gathered both through discovery materials obtained from the government and through sources developed independently by the defense team. Ideally, the theory of the defense should be reduced to a single sheet of paper. This one page document, when properly prepared, will provide the springboard for the defense attorney's *voir dire*, the basis for the opening and closing statements, and the goals to be achieved during any direct and cross-examinations.

The theory of the defense can be divided into two major categories — the law and the facts. In its simplest form, the theory of defense consists of the following elements:

The Law:

1. the accusatory instruments
 - a) the indictment
 - b) the information
 - c) the complaint
2. applicable vehicle & traffic law sections
3. applicable penal law provisions
4. case law
5. administrative rules and regulations

The Facts:

1. the persona
 - a) people
 - b) places
 - c) things
2. the chronology

Each of these elements consists of a "separate

universe" which must be developed and understood by the defense attorney as the case proceeds to trial. The two main categories and their respective elements are neither listed in terms of importance to the defense lawyer nor arranged in a specific chronological order for purposes of case preparation. Rather, each of the individual elements evolves and develops concurrently with the other elements. The theory of defense and the process that it involves should never be "forced" by the lawyer. Instead, it should be predicated upon deductive reasoning, with counsel striving to constantly narrow the issue for the trier of fact. When engaging in this process, the final goal is to have a theory that is both factually and legally sound.

As the lawyer prepares the case for trial, the theory of defense should be the centerpiece. It is appropriate to inform the court of the defense at the earliest possible moment. Once the theory is revealed, it must be hammered relentlessly. The theory must remain constant, the theme must be readily identifiable by the trier of fact at an early stage of the trial, and the defense lawyer must be relentless — from *voir dire* through the jury charge — in presenting the theory of defense.

*For a more detailed discussion of this topic, the reader is encouraged to review the materials found in **Am Jur Trials**, volumes 70 and 76.*