

LAW OFFICE OF MICHAEL D. LITMAN, PLLC

DWI GENERAL INFORMATION

This document is meant to provide general information about what to expect if you are charged with a DWI in New York State. To discuss the specific circumstances of your case, please contact us at 917-554-8231.

FIRST COURT APPEARANCE - ARRAIGNMENT

On your first court appearance, called the arraignment, a reading of the charges is usually waived (meaning the judge doesn't need to read the charges to the entire court) and a plea of not guilty is entered on your behalf. Your driver's license, or privilege to drive in New York may be suspended (discussed below). The judge will determine if setting bail is necessary to ensure your return to court. You may be referred to TASC (Treatment Alternatives for Safer Communities), to be evaluated for any alcohol or drug abuse issues by and OASAS provider (discussed below). Your case will then be adjourned for you to get the OASAS evaluation, and for us to negotiate with the DA's office.

OASAS EVALUATION & TASC

If you are accused of a DWI, you will be required to get an assessment for any drug or alcohol dependency, which is called an OASAS (Office of Alcoholism and Substance Abuse Services) evaluation from a certified OASAS provider. The OASAS evaluation will either state that you do not have any issues with drugs or alcohol, and are not in need of further treatment; or it will recommend additional treatment. If it recommends additional treatment, you may need to comply with the additional treatment recommendation in order to get the best plea bargain offer, or as a condition of the plea bargain from the judge.

TASC (Treatment Alternatives for Safer Communities) is an intermediary agency, used by some courts, which will assign you to a treatment facility for an OASAS evaluation, then report back to the court with the results of the evaluation and any treatment. Good TASC reports can help you, and bad TASC reports can derail a case, and cause judges to set or increase bail.

It is our preference to find a private OASAS provider to do the evaluation and treatment, rather than relying on TASC. We will work with you to find a provider for you to go to, in order to complete the mandatory evaluation. You can search for an OASAS provider [here](#).

**LICENSE SUSPENSION AT THE ARRAIGNMENT
SUSPENSIONS PENDING PROSECUTION (VTL § 1193(2)(e)(7))**

If you took a chemical test (of your breath, blood or urine) when you were arrested for DWI, which showed a blood alcohol concentration (BAC) of .08% or more, your license will be suspended by the judge at your arraignment. That suspension will last for the pendency of the case.

THE HARDSHIP PRIVILEGE/LICENSE

If your driver's license was valid prior to the above mentioned suspension by the judge, and you are not charged with a refusal to take a chemical test, you may be eligible to get a hardship privilege to drive. In order to get a hardship privilege, you must demonstrate an extreme hardship, which is defined by VTL § 1193(2)(e)(7)(e) 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." You (through your attorney) have the burden of establishing that there is an extreme hardship, which cannot only be based upon your own testimony. You will need to present the following types of evidence:

1. Testimony of a witness that can confirm the extreme hardship, which can include your spouse, family member, co-worker or friend;
2. Testimony that there is no one else that can drive you to your destination;
3. Proof of the location of the place you need to go (work, school, medical facility, etc.);
4. Proof of your schedule (hours at work, class times, etc.);
5. Information regarding the cost of taxi or Uber service from home to your destination;
6. Proof of your income to show that taxi service is unaffordable;
7. Information regarding access to public transportation between home and your destination, as well as the amount of time the trip would take; and
8. Proof of any medical condition that would make it hard to take public transportation.

It will be in the judge's discretion about the manner in which to hold the hearing, and if the proof is sufficient to grant the hardship privilege. Depending on the jurisdiction, some judges will ask for an offer of proof without a formal hearing, other judges will want a full hearing. Either way, you will need your witness and proof in order for the hardship privilege to be considered by the court.

You are not eligible for a hardship privilege in the following situations:

1. If you are charged with refusal to take a chemical test (breath, blood or urine);
2. If you had a DWI conviction within the last five years; or
3. If you drive for work (delivery, UPS, taxi, etc.), you can only use the hardship privilege to drive to and from work, not drive for work.

PRE-CONVICTION CONDITIONAL LICENSE

If your driver's license was valid prior to the above mentioned suspension by the judge, and you are not charged with a refusal to take a chemical test, you may be eligible for a pre-conviction conditional license. If you are eligible, you will receive a letter from the DMV within 30 days of your arraignment date, with instructions for getting a pre-conviction conditional license (see post-conviction conditional license details below to see where conditional driving is permitted). If you have a driver's license from a state other than NY, you'll need to obtain a drivers abstract from your home state, and submit that abstract to the NY DMV, in order to get a conditional driving privilege in NY.

THE DIFFERENT DWI RELATED CHARGES

1192.1 - Driving While Ability Impaired (DWAI): This is a violation level offense, and can be charged if your blood alcohol content (BAC) is between .05% and .07%.

1192.2 - Driving While Intoxicated, Per Se (DWI): This can be charged as a misdemeanor (1st offense or no prior DWI convictions within 10 years); an E felony (one prior DWI conviction within the last 10 years); or a D felony (two prior DWI convictions within the last 10 years). The basis for this charge is a blood alcohol level between .08 and .17, as measured by a chemical test of your blood, breath or urine.

1192.3 - Driving While Intoxicated (DWI): This can be charged as a misdemeanor or felony (similar to 1192.2 above). This DWI is based upon the observations made by the police officer and not on a specific chemical test measurement. It is often charged in conjunction with 1192.2, allowing the DA's office to have multiple theories of DWI by both a BAC reading and by observation.

The observations by the police officer of the vehicle and driver that are signs of intoxication include: traffic infractions committed; odor of alcohol; watery and bloodshot eyes; slurred speech; an open container of alcohol in the vehicle; unsteady walking and standing; inability to follow directions; and performance on the coordination tests (also known as Standardized Field Sobriety Tests (SFSTs)).

1192.2a(a) - Aggravated DWI, Per Se - This can be charged as a misdemeanor or felony (similar to 1192.2 above). The basis for this is a blood alcohol of .18 or greater as shown by a chemical test of blood, breath or urine.

1192.2a(b) - Aggravated DWI, with a child (Leandra's Law) - This is a felony charge, and will be charged if you are alleged to have driven under the influence of drugs or alcohol with a child aged 15 or younger as a passenger in the vehicle.

1192.4 - Driving While Ability Impaired by Drugs - This can be charged as a misdemeanor or felony (similar to 1192.2 above). The determination for drug impairment is based upon the officer's observation, if there are no signs of alcohol (i.e. no odor of alcohol). Drug impairment can be measured by coordination tests administered by a Drug Recognition Expert (DRE), or by chemical tests of blood or urine. Additionally, if the officer finds evidence of drugs, even some prescription drugs, in the possession of the driver or in the car, they may try to assume that the driver is under the influence of those drugs, although some evidence of impairment is needed.

1192.4a - Driving While Under the Combined Influence of Drugs and Alcohol - This can be charged as a misdemeanor or felony (similar to 1192.2 above). The basis for this will be the officer's observations of impairment along with a chemical test of blood or urine that is positive for both drugs and alcohol.

CHEMICAL TEST REFUSALS (VTL § 1194)

If you are suspected of a DWI, you can refuse the police officer's request to take a chemical test (blood, breath or urine). However, there are automatic penalties associated with the refusal. If

you refuse to take the portable breath test (PBT) at the location of the stop, you can be issued a traffic ticket (which courts have found to not be a actual chargeable offense and therefore able to be dismissed) and be fined for that refusal. If you refuse to take the official chemical test (most often a breath test administered at the police station), such a refusal can be used against you at trial to show consciousness of guilt, and the refusal will mandate the suspension of your license at your arraignment in court. If you refuse the chemical test, you will not be eligible for a conditional license or a hardship license as discussed above. At your arraignment on the DWI refusal, the judge will schedule a refusal hearing at the DMV for a date within 15 days of the arraignment.

At the DMV refusal hearing, an Administrative Law Judge (ALJ) will review the report of refusal that was filed by the police officer, and hear testimony from the officer and from you (you do not need to testify). In conducting the refusal hearing, VTL § 1194(2)(c) states that the ALJ will determine four things:

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.

If the ALJ decides that answer to all three questions is yes, your license will be revoked for a minimum of one (1) year, with the only way to get driving privileges back is to plead guilty or be found guilty on the underlying DWI or DWAI charges, after which you may be eligible for a post-conviction conditional license (discussed below).

IMPAIRED DRIVING PROGRAM

If you are convicted of a DWI or DWAI related offense, you will be required to take the Impaired Driving Program (IDP), formally known as DDP. The DMV will refer you to a program, which will consist of 16 class hours divided into one 2-3 hour class a week, for seven straight weeks. The DMV will charge you a \$75 fee, and the program can charge you up to \$234 in fees. Upon enrollment in the IDP, you may be eligible for a post-conviction conditional license if it is your first DWI related conviction, or if it has been more than five years since you previously took the IDP. More information about IDP can be found [here](#).

VICTIM IMPACT PANEL (MADD VIP)

The VIP is a requirement of DWI and DWAI convictions in some counties. It is a one-time group lecture that discusses the harm that DWI can do. In Westchester it is given once every other month at the Westchester County Center, and costs \$100 to attend. Attendees of the program can be administered a breath test when entering the facility. Upon completion of the VIP, a certificate of completion must be given to the court. It can be done before or after you finish the court case. The website for Westchester VIP can be found [here](#).

POST-CONVICTION CONDITIONAL LICENSE

After you are convicted, you may be eligible for a post-conviction conditional license after enrolling in the IDP if you do not have a prior conviction for DWI or DWAI; or have completed the Impaired Driving Program (IDP - discussed above) within the prior five years. With a conditional license pursuant to VTL § 1196(7)(a), you can drive:

1. To and from your place of employment;
2. For work, if your employment requires operation of a motor vehicle during work hours;
3. To and from a class or activity that is an authorized part of an alcohol or drug program;
4. To and from an accredited school or institution for vocational training;
5. To and from court ordered probation activities;
6. To and from the DMV to transact business related to this license or program;
7. For a three hour consecutive daytime period, on a day you're not working
8. To and from necessary medical exam or treatment program, or for a member of your household (for which a written letter for a doctor is required); and
9. To and from a place, including a school, where your children are cared for, and that it is necessary to regularly bring them in order for you to maintain employment or enrollment at your school.

IGNITION INTERLOCK DEVICE (IID)

If you are convicted (by plea or after trial) of a misdemeanor or felony DWI involving alcohol, you must install an ignition interlock device (IID) into any vehicle you own or operate for a minimum of six months. The court will sentence you to have the IID for the entire length of the conditional discharge period (one year for misdemeanors or three years for a felony), but you can apply to the court to shorten the time after six months, however it will be up to the sentencing judge to determine if it should be shortened. The IID is not required if you are convicted of the violation DWAI (1192.1) or Driving While Ability Impaired by Drugs (1192.4). If you do not own, or have access to a vehicle, you do not need to install the IID into anything, however, any vehicle you drive during the conditional discharge period will need to have an IID installed in it, even if you don't own it (i.e. a friend's car, relative's car, rental car, etc.).

In Westchester County, the probation department monitors the IID usage, but the device is installed and maintained by a private vender. New York State uses IIDs with cameras installed in the vehicle, so a picture can be taken by the IID to show who the person blowing is if a blow registers alcohol. Most courts in Westchester require installation and verification of installation (by probation) of the IID prior to sentencing. If you are not installing an IID because you do not own any vehicle, probation will be required to verify that prior to sentence.

The IID itself, is a breath test device, which requires you to blow into the device, and register no alcohol on your breath, in order to start your vehicle. If you are able to start your vehicle, the IID will require random retesting during the time that you are operating your vehicle, to make sure you don't drink after starting it. If your blow registers above a certain amount of alcohol (usually .05% - the minimum to be charged with a DWAI), it may be considered a violation of your conditional discharge, and you may be required to return to court to address the violation, which could lead to re-sentencing if the violation is serious enough.

LICENSING ISSUES: MULTIPLE DRIVING OFFENSES

If your current revocation is not due to a DWI related offense, but you've had three or four DWI related incidents or convictions in the prior 25 years, you will be denied re-licensing for two years in addition to the statutory period of your current revocation. Once you are re-licensed, you will have a restricted license for two years.

If your current revocation is due to a DWI related offense, and you've had three or four DWI related incidents or convictions in the prior 25 years, you will be denied re-licensing for five years in addition to the statutory period of your current revocation. Once you are re-licensed, you will have a restricted license for two years.

If you've had three or four DWI related incidents or convictions in the prior 25 years, and a serious driving offense (a fatal accident, a driving-related penal law conviction, a conviction of two or more violations for which five or more points are assessed, or 20 or more points from any violations), you will permanently be denied re-licensing unless you can show compelling or extenuating circumstances.

If you've had five or more DWI related incidents or convictions in your lifetime, you will permanently be denied re-licensing unless you can show compelling or extenuating circumstances.

LICENSE ISSUES: COMMERCIAL DRIVER'S LICENSE (VTL §1196(7)(g))

If you have a Commercial Driver's License (CDL), and are convicted of a DWI related offense, you will not be permitted to hold a CDL, even if you were not driving a commercial vehicle at the time of your arrest. The only way to keep your CDL is to fight the case, and be acquitted of all alcohol related charges.

If you have a CDL, and you refuse to take a chemical test, for your first offense, your CDL license will be revoked for 18 months, even if you weren't operating a commercial vehicle at the time of the refusal. If you are a repeat offender (prior refusal, prior DWI, prior leaving the scene of an accident, or prior felony involving a motor vehicle), your CDL can be permanently revoked.

LICENSE ISSUES: OUT-OF-STATE LICENSES

If your driver's license is from a state other than NY, your license cannot be taken by New York State. However, your privilege to drive in NY can be suspended, which will preclude you from driving in NY, but you may still be allowed to drive outside of NY. Even though NY can't take your license, the state that issued your driver's license may take reciprocal action to suspend or revoke your license after they are informed of the DWI suspension/revocation in NY.

DMV FEES

Driver Responsibility Assessment: If you are convicted of a DWI or DWAI, you must pay an assessment of \$750, which can be broken down into three yearly payments of \$250. Failure to pay will result in the suspension of your license or privilege to drive in NY.

Driver Re-licensing Fee: In order to restore your license after suspension or revocation, you will be required to pay a re-licensing fee to the DMV of approximately \$50-\$100.

Civil Penalty: If you violated the Zero Tolerance Law (under 21 alcohol), or refused to take a chemical test, the DMV will charge an additional civil penalty. The penalty for a Zero Tolerance Law violation is \$125. The penalty for refusing the chemical test ranges from \$500-\$750.

IMMIGRATION CONSEQUENCES

If you are not a US citizen, any conviction may have a negative impact on your ability to stay in the US or obtain a legal status, and may lead to deportation. You should consult with an immigration attorney prior to making the decision about accepting a plea offer or going to trial.

CONCLUSION

With all of the penalties and collateral consequences related to a DWI arrest, you need an experienced DWI attorney to help you get the best outcome possible. Sometimes a reduction in the charge is possible, but if it is not, you will need an attorney that can fight the case all the way through trial. Michael Litman is an experienced trial attorney, and he is prepared to fight for you from arrest through trial. Contact him immediately for a free consultation. 917-554-8231