



SUFFOLK ACADEMY OF LAW
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2023 Vehicle and Traffic Law Update

FACULTY

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Suffolk County Bar Association, New York

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David A. Mansfield, Esq. has been in solo practice since 1984.

He has co-chaired several Bar Association committees including the District Court, LRIS and most recently, The SCTPVA committee.

He has been a long time regular contributor to The Suffolk Lawyer and has conducted an annual update of the Vehicle & Traffic Law as well as participation in many other CLE programs.

He is frequently called upon to mentor the members of the Bar who ask his advice. These questions are always appreciated as it gives Mr. Mansfield the opportunity to keep his finger on the pulse and detect trends in the Vehicle & Traffic Law, the Department of Motor Vehicles as well as the local courts.

He handles matters primarily at the Suffolk County District Court, Nassau and Suffolk County Traffic and Parking Violations Agency and many village courts as well as matters throughout the state.

He has developed a wealth of experience and knowledge in handling Vehicle & Traffic matters is always willing to share to benefit the members of our profession and their clients.

2023 VEHICLE AND TRAFFIC LAW UPDATE
JANUARY 12, 2023
DAVID A. MANSFIELD, ESQ.
SUFFOLK ACADEMY OF LAW

VTL amended effective 4/1/21 with highlights regarding no driver license suspensions of non-owner operations for failure answer summons for §385 regarding weight, dimensions and height of vehicle under §226(3). §226 notifications of failure to appear by text, email and telephone in addition to first class mail if DMV has such information on file §1802 allows requests for payment plans to be approved by a judge or judicial hear officer with notification on the summons of the availability of a payment plan at the time of sentencing and on the website.

The highlights are that the plan must be requested based financial disclosure on a form to be provided by the commissioner. Financial Disclosure Report For Payment Plans (ny.gov) EXHIBIT A.

No more suspensions for failure to pay fines except overweight and other VTL §385 offenses in New York City.

This reform will allow your client to the opportunity to be advised by you of necessary steps to restore their driver's license to valid.

The range of actions include nothing else to be done if solely suspended for failure to pay fines to reapplication.

Note: all other DMV fees such as civil penalties, suspensions termination fees for failure to answer, suspension termination fees for lapse of insurance or other driver license suspensions remain in effect. Reinstatement and reapplication fees are unaffected.

The full text is available:

https://www.nysenate.gov/legislation/bills/2019/A7463/amendment/B?utm_content=signed_by_gov&utm_source=ny_state_senate&utm_medium=email&utm_campaign=bill_alerts

**THE RANSOMWARE ATTACK ON SUFFOLK COUNTY
GOVERNMENT AND THE VEHICLE AND TRAFFIC LAW
LAWYER**

The Coronavirus Pandemic which greatly altered the practice of law for

lawyers who defend clients on Vehicle & Traffic Law matters has receded into memory.

The new challenge is the ransomware attack on the Suffolk County government which has greatly impacted the operations of the Suffolk County Traffic and Parking Violations Agency.

The Agency has been conducting limited operations as this writing (1/5/23) but is progressing toward “normal” operations.

Previously scheduled trials are being held.

Special limited accommodations were made for the practicing bar to conference and dispose of cases with in-person conferences.

Remote video or telephone conferencing is on hold has been a useful tool for resolving fairly straightforward matters without the necessity of the client appearing or counsel physically appearing in Court.

Submission of an affidavit or a signed plea and sentence agreement will allow a disposition without the parties being present in Court.

To successfully participate in a remote disposition or any disposition without your client, you will need to have prepared a carefully worded authorization or affidavit as required by the jurisdiction which clearly sets forth the charges, your authority to enter into plea negotiations to enter pleas of guilty to reduced or amended or even the charge itself and

that a plea of guilty to a reduced or amended charge or the charge itself is the same as a conviction after trial.

It is always good practice to review any standard office affidavits or authorizations or any documents for any omissions and proofread to insure that it is accurate and up to date with the use of the document. Defense counsel should carefully read their file to determine if any custom revisions are necessary such as a case involving a motor vehicle accident or any specific driver license sanctions which may result from a disposition.

The paperwork should also contain a standard waiver of constitutional rights and an advisement a waiver of appeal of the conviction and sentence as required by the Suffolk County Traffic and Parking Violations Plea and Sentence Agreement. The Court of Appeals recently invalidated a number of such waivers in serious criminal cases under People v. Biso Number 79, 2020 NY Slip Op 07484, 36 NY3d 1013, but has not yet issued a blanket decision invalidating all such waivers.

The more serious cases such as 11-point speeding violations §1180(b)(d) or any other matter likely to result in a discretionary post-conviction suspension or revocation or mandatory driver license suspension or revocation, in the Suffolk County Traffic and Parking Violations Agency. You want to carefully consult the SCTPVA plea and sentence agreement which requires a waiver of appeal of the conviction and sentence.

Defense counsel is well advised to use a written fee agreement in these

cases that will clearly define the scope of your representation as to additional fees for trials, appeals and Department of Motor Vehicle hearings.

NOTE: In many instances you will be able to appear with your client before the judicial hearing officer.

Current Agency procedure on these 11-point offenses is to require an appearance before the judicial hearing officer upon filing a notice of appearance which must be on or before the return date.

Counsel must be prepared to have their client present or have the appropriate written authorization.

The authorization should state your client is subject to a post pre-conviction recommendation by the Agency prosecutors of a driver license suspension of §510(3)(a) and a post-conviction suspension under § 510(3)(d).

Defense counsel may oppose the application, experience has shown that the judicial hearing officer will most likely grant or modify the request. Your client will be unable to obtain a restricted use license §530(6) due to 15 NYCRR Part §135.7(8) which makes discretionary suspensions from the Agency ineligible for a restricted-use license.

For all practical purposes your client should be advised that they will not be eligible for a restricted-use license. 15 NYCRR Part §135.7 (8)

The authorization, if proceeding in their absence, should contain a statement about the Driver Responsibility Assessment fees and the mandatory Department of Motor Vehicles Hearing to be scheduled at a later date and a waiver of the right to appeal the conviction and sentence and consent to a disposition by a remote video court proceeding. It is also a good practice that your client signs an edited SCTPVA plea and sentence agreement which will backstop your authorization.

Note: I prefer, where possible to appear, with the client.

This allows your client to observe you advocating on their behalf.

It is also opportunity for them to see the process in action which is more effective than any post-disposition phone conference.

Important practice tips:

Your client should also be instructed upon the conclusion of the 11-point speeding case to pay the mandatory \$50 suspension termination fee online upon receipt of the official DMV Order of Suspension in order to ensure that the driver license suspension will end of the scheduled expiration date. [NYS DMV | Pay Suspension Termination Fee | Enter Information](#)

Very Important: Defense Counsel should follow up with their client in about 3 weeks post-disposition to determine if they received the official DMV order of suspension and paid the suspension termination fee. If not, you go the attorney's window and ask that the paperwork be re-sent.

Your client should be instructed to, if eligible, to take a point/insurance reduction course online New York DMV | About online and alternative delivery method courses (I-PIRP/ADM) (ny.gov) to use as talking points when participating in a Department of Motor Vehicles Safety Hearing which are now conducted with a remote video format.

The hearings are assigned at random to administrative law judges on a statewide basis. The best practice is, upon being retained, to promptly file a notice of appearance with the Department of Motor Vehicles Safety and Business Hearings Bureau or at the fax or email address on the notice of hearing.

You should forward any evidence such as proof of completion of a point insurance reduction program class as far in advance of the hearing as possible.

Do not assume the course completion will appear on your client's

driving records.

These hearings usually start on time and counsel should log on ten minutes in advance to iron out any technological issues.

While your client can sign in from another remote location, unless there is a compelling reason, it is best if they arrive at your office 30 minutes prior to the scheduled hearing time. Defense counsel and the parties may prefer to participate from remote locations in light of ongoing Coronavirus Pandemic. Proper attire is important in light of the video hearings.

I would recommend calling your client when they are participating from a separate remote location at least 30 minutes in advance of the scheduled hearing time to confirm their participation and final preparation for their hearings.

Most Department Motor Vehicles hearings held under §510 will start promptly, especially for persistent violation and excessive speed as no outside witnesses have been notified to attend. The procedural rules for these hearings can be found at 15 NYCRR Part §127.

Practice tip: it is best to use your desktop with a stable power source and to dial in the computer audio for better quality of sound.

Cellphones and laptops may be subject to loss of battery power unless plugged into a stable power source.

Clients should be encouraged where applicable to pay all fines online in your disposition letter with the appropriate links. You should request a

copy of the transaction confirmation.

Relatively new for 2023! The Suffolk and Nassau County District Court now have an online payment option.

Please log onto [Payments.nycourts.gov](https://payments.nycourts.gov)

**Please choose the option "Courts outside New York City."
The docket number is should be included in your client correspondence.
Clients should be encouraged to use this payment option.**

Office appointments should be limited when possible as the Corona Virus continues to circulate and mutate.

Only a small percentage of the population has received the latest booster shot.

You may be able to have standard data base paperwork prepared by asking your client to scan and forward copies of the relevant documents in advance of the office appointment to reduce everyone's exposure.

The Governor had issued a series of Executive Orders extending the expiration license, inspection and registration dates which should be kept in mind when defending these matters which expired in 2020.

INITIAL INTERVIEW OF THE VEHICLE AND TRAFFIC LAW CLIENT

Conduct the interview as with any criminal defense matter. Your client's immigration status should be asked of everyone in a non-offensive manner such as: were you born here? A non-citizen will face vastly different

consequences of seemingly ordinary dispositions or convictions. You should have a colleague whom you can rely upon for expert advice even for a fee.

Counsel should be direct but firm in asking about prior DWI, convictions or incidents which include findings of chemical refusals. Does your client hold a valid license and have 3 or more DWIs conviction or refusal incidents in their background, if defending a five point or higher offense which because a conviction as charged will trigger a mandatory 15 NYCRR Part §132 hearing which could result in the revocation of your client's license.

When interviewing a client charged with a DWI, inquiry into non-DWI related criminal background is essential. This may be your client's first DWI but if they have any criminal background, it could affect the plea bargain and sentence recommendation from the prosecutor. For example, a remote, unrelated but substantial criminal history will complicate what seemed on the surface to be a routine case.

Extremely Important: Leandra's Law: DWI case, any passengers in their vehicle and their ages. Was anyone under 16, even their own child? It is very important to obtain the summons, uniform traffic tickets or information.

Use Internet or telephone if client does not have any paperwork to determine where and when case will be heard.

Be like Sherlock Holmes and use deductive reasoning. Was there a motor vehicle accident? How serious was the MVA? Obtain and carefully review their driving record for suspensions, revocations, convictions, etc.

Defense counsel must be thoroughly familiar with the requirements of the Driver's Privacy Protection Act or DPPA 18 U.S.C. §2721 et seq. You should obtain a signed a notarized MV-15GC or general consent to release information at the time of the interview.

This form is now required to be notarized by someone other than the requestor. <http://www.nydmv.state.ny.us/forms/mv15gc.pdf>.

Defense counsel must be able to demonstrate and attorney-client relationship by business records dated prior to the DMV record search.

Such records are traffic tickets, retainer agreements, and e-mails, redacted credit card receipts.

The advent of the use of DMV Compass Abstracts enhanced driving records means that the prosecutors will know not only what your client plead to or was convicted of a lesser charge, but also the original charges and any pending charges. Charges that are dismissed do not appear unless dismissed or “covered” in satisfaction of a plea(s) of guilty. Pending charges will also appear on this record.

You must ask your client if any charges were reduced especially with in the past four years. You should inquire if there were reductions on any previous charges of similar nature for which you are consulted. The client should be quizzed as to any other pending charges. Your client should be questioned about any prior 11-point speeding charges reduced or convictions as charged which will result in no plea bargain being offered on the new pending charges.

Was the charging document handwritten as during the ransomware attack era or as with most traffic matters, electronic with “a drive through supporting deposition?” Is it Aggravated DWI? Aggravated DWI with a MVA with serious personal injury can spell Vehicular Assault 1st PL §120.04 or if a pedestrian suffered serious injuries can be Vehicular Assault 3rd Degree PL 120.03-A as a Class E Felony with a license revocation of up to seven years. Does your client face permanent license revocation? Does your client face a mandatory one-year CDL revocation or if a second offense, a 10-year CDL revocation? It is very important to ask your client if they had a previous 1-year CDL revocation. Explain Ignition Interlock Device, costs and application.

What actions must be taken to terminate suspensions or to clear the revocation? Was the revocation or suspension the result of a Department of Motor Vehicles TVB or SCTPVA default conviction? Can it be vacated with proof of insurance and a meritorious defense and a reasonable able excuse by filing a motion? SCPTVA now has a short form application tom reopen any insurance default conviction Is client eligible for a conditional or restricted license?

2023 Practice Tip: Some revocations, such as the mandatory one-year revocation for operating without insurance may be eligible to cleared by a phone call to the New York State Department of Moto Vehicles Driver Improvement Bureau. 518 474 0774.The civil penalty must be paid first. New York DMV | How to pay a driver civil penalty (ny.gov)

Your client will also be informed of the next steps to restore their

license.

Have someone drive your client to your office at 8 AM to allow you to call Driver Improvement promptly at 8:30 AM. I start dialing at 8:28 AM. Your client will be able to verify any required personal information with the DMV representative.

Driver Improvement Bureau answers the phones from 8:30 AM-12 PM. Dialing early will ensure the shortest waiting time.

There is a call back option in the event of a lengthy wait time.

Does client have a CDL or another special license? (§19-A) Pistol permits, security guard licenses and other licensed professional have prompt notification requirement in the event of an arrest or the issuance of a field appearance ticket (F.A.T)

When should the client be directed to take a point/insurance reduction course?

Has your client been licensed at least ten years to qualify for a possible SCTPVA reduction of an improper cell phone use charge §1225-c (2a) or §1225-d portable electronic device? 2022 note: All these charges, if eligible as a first offense require prior completion an EAC administered diversion program before a reduction. Only a very limited reductions of §1225-d will be available. Completion of a diversion program carries with it a lifetime bans on future plea bargaining at the Agency.

Can they produce an original license document from another state or nation to support 10 years of licensed driving prior to the date of incident?

Is your client an honorably discharged U.S. service veteran to qualify for the SCTPVA Veterans Day Docket?

Was the offense committed with a commercial vehicle or had commercial plates and the registered weight in excess of 10,000 pounds? This is especially important for cellphone/portable electronic device violations §1225-c2a, §1225-d returnable at SCTPVA. The Agency does not reduce these offenses and may request a suspension pending prosecution §510-3a and a post-conviction suspension §510-3d. A trial may be in the

offing. Inquire of conversation at the scene and carefully review the electronic supporting deposition and CPL §710.30 notice.

Was the violation committed on a Class DJ/MJ license or Learner's Permit? Please refer to §510-c for suspensions and revocations. Formulate your defense strategy. Was it a probationary license committed within six months of passing a road test or full license restoration? Please see §510-b for collateral consequences Do not assume because your client is over 25 that their license status is not probationary or they have been driving more than 10 years. You have to ask otherwise you will find out at your first pre-trial conference. Were the offenses committed in learner's permit, conditional or restricted-use license status?

Is your client 18 years-old or under with an 8-point speeding offense returnable at SCTPVA? Maybe subject to a §510-3a driver license suspension pending prosecution as well as Youth Court.

SCTPVA Youth Court is in person as well as diversion classes are back in session. You client and parent may be required to successfully complete 2 diversion courses for "high " speeds.

Defense counsel must first obtain a referral at a remote video conference.

You will be given an assigned time and date at least several months later to appear without any input from defense counsel.

All Youth Court referrals are provisional and can be rescinded after review or because your client received a new traffic summons or failed to complete the point/insurance reduction course by the date set by the Agency or fails to appear for the remote conference with a parent.

Does your client have outstanding Suffolk County red light camera violations (notices of liability) if the case is pending at SCTPVA, The Agency will require payment prior to offering a disposition. Does your client's abstract reflect suspensions for failure to pay a court fine? If so, The Agency will not grant time to pay fines further complicating your case.

Has your client previously completed a SCTPVA diversionary program which will bar further reductions of future charges.

Determine your client's motivations and expectations and make special notes. Closely review the case file for issues regarding motions, if

applicable or jurisdictional defenses. Use a computerized typewritten fact sheet to preserve initial intake as solid foundation for representation. Please see sample intake/consultation sheet annexed, as **Exhibit B**.

CAVEAT: You will be best served by a copy of your client's lifetime driving record which *your client can now obtain online and counsel will need their duly executed MV-15GC can do the same*. Please note new development, the requestor cannot notarize the form.

<https://dmv.ny.gov/dmv-records/how-get-my-own-lifetime-driving-record>

The lifetime driving record is currently available by mail to counsel by MV-15 which will also require an executed MV-15GC with an approximate two-week or longer turnaround time, if done correctly. The Suffolk County Traffic and Parking Violations Agency for traffic infractions other than DWAI makes it very important to have the driving record in your file to discuss §510(3) (a) (d) suspensions pending prosecution and post-conviction Agency suspensions, DMV administrative hearings for license suspensions and exposure to the Driver Responsibility Assessment fee. The Agency will consider any prior offenses still current on the abstract even if not within 18 months. Pending charges may also affect the negotiations. This will impact the plea bargain offer.

The "Compass" Abstract used by SCTPVA prosecutors and judicial hearing officers shows all previously reduced charges even to parking offenses as well as pending offenses over the previous ten years.

You may refer to Compass as your client's "dark web" driving record.

"Compass" is not available to defense counsel.

It is imperative for counsel, in those cases which may proceed to a SCTPVA or other traffic trial, thoroughly question their client about "uncharged violations" or being given a "break" at the scene. The officer will be sure to mention other alleged infractions for which your client was not cited which could influence the judicial hearing officer to take administrative action to suspend your client's license or possibly impose a sentence of incarceration in extreme cases. Be sure to inquire in as much detail as possible as to the conversation with the officer to avoid surprise at trial. This will allow you to properly set your client's expectations concerning a post-conviction §510(3) (d) discretionary license suspension or to justify a plea bargain.

Build rapport with client. The best practice is to use written fee agreements to specify what services are covered. Cases where the fee for representation will exceed three thousand dollars (\$3000) require a Letter of Engagement Part §1215 of the Joint Rules of the Appellate Division.

Most importantly, the retainer agreement will clearly spell out the services which are NOT included such as a jury or other trials, appeals, judicial review, defense or commencement of civil forfeiture actions or appearances at preliminary administrative hearings concerning seized property, representation at DMV or other administrative or court hearings; most likely motor vehicles incident to a DWI arrest, or serving so ordered subpoenas to obtain governmental records such as 911 tapes and speed detection maintenance and calibration records. Violations of conditional discharges or probation or Declarations of Delinquencies should be excluded. These cases usually arise from issues with completion of the impaired driver program or ignition interlock device lock outs, test failures, or someone else giving a breath sample.

The State of New York, after years of debate has enacted the Driver License Access and Privacy Act, popularly known as the “Green Light Law”, which allows individuals without legal immigration status with satisfactory proof of identity to obtain a limited regular class driver’s license for a period of five years not for federal purposes.

New York State has joined other at least 14 jurisdictions in granting driver’s licenses to certain individuals without legal immigration status: California, Connecticut, Colorado, Delaware, The District of Columbia, Hawaii, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, New Jersey and Washington State.

The law amends §201 of the Vehicle & Traffic Law by adding restrictions on the disclosure of personal information received in the course of the driver license application.

This is designed to avoid disclosure to federal immigration enforcement agencies.

Personal information of the undocumented applicants or holders of the learner’s permits or driver licenses can be disclosed or released under certain circumstances.

The exceptions include: a lawful court order, judicial warrant signed by a federal judge or a properly issued subpoena under the criminal procedure law or the civil practice law and rules or the applicant requests their personal information.

The National Driver Registry, 49 U.S.C §303 is exempt from the non-disclosure provisions.

New York State will inform the National Driver Registry if their privileges have been suspended or revoked as with any regularly licensed driver.

§502(1) of the Vehicle & Traffic Law is amended to provide for an application for non-commercial driver's license or learner's permit which does not meet the federal standards for identification, chiefly for boarding a regularly scheduled commercial airline flight.

The amendments to §502(1) provide that an applicant still needs to have acceptable proof of identity which consists of a valid unexpired foreign passport issued by the applicants country of citizenship which shall also be eligible as proof of age, a valid unexpired consulate identification document issued by the applicants country of citizenship or a valid foreign driver's license which includes a photo image of the applicant which is unexpired or expired less than two years from the date of expiration. These will serve as the main items of proof. The Commissioner is authorized to accept additional proofs of age.

The applicants will have to provide proof of residency in New York State such as a utility bill.

The purpose of law is for people who have not been issued a social security number to be able to qualify for a driver's license not for federal purposes in non-CDL class.

The applicants under the new law will not be eligible for any class of an

Enhanced Driver's License or federal Real ID license.

§502(6) sets forth that an application for non-commercial driver's license or learner's permit which would not meet the federal standards for identification will require that an affidavit that the applicant has not been

issued a social security number.

DRIVER LICENSE REVOCATION AND SUSPENSIONS 15 NYCRR Part §136

The terms suspension and revocation should never be used interchangeably because the consequences are not the same.

Any revocation is indefinite with a minimum waiting period to reapply.

There is always a risk that as a result of a driver license revocation, your client may be classified as a problem driver Part§136.1(b)(1) for series of convictions, incidents and/or accidents and that the commissioner will deem them as an unusual and immediate risk upon the highways could result a “permanent” denial letter especially after an administrative finding of revocation as a result of a hearing to investigate a fatal accident or having an extremely long lifetime driving record.

Some revocations may be served with a restricted-use §530 or conditional license §1196.

A revocation may be permanent with a 25-year or lifetime look back period as will be discussed regarding the “three strikes” for alcohol or drug related driving convictions and incidents (a finding of a chemical test refusal not tied to a conviction for an alcohol drug related driving offense is a separate “strike”) rule with a very limited, complicated path to relicensing.

A revocation will be subject to a 3 year look back for non -dwi and non-problem driver revocations. Most commonly involving repeated incidents of driving while suspended or revoked or simply too many convictions for moving violations resulting in negative safety units in excess of 24.

Your client’s license is revoked after an administrative hearing for a fatal accident may find them subject to an indefinite denial and be issued a denial letter that resembles the “three strikes” letter classified as a” problem driver” posing an unusual and immediate risk upon the highways.

A driver license suspension other than failures to answer or pay fines have a definite period of time unless termination by payment of a suspension fee.

A suspension does not trigger a look back period.

INTERESTING CASES New York State Official Reports Case
Citor link : <http://www.nycourts.gov/reporter/citations/SearchPage.aspx>

Eighteen-month discretionary license suspension upheld and did not require testimony as clearly marked lanes uphold numerous failed to signal charges. People v. Michael Wahl, 2022 NY Slip Op 22145, 75 Misc3d 40. Six-month discretionary license suspensions for convictions of using a portable electronic device §1225-d imposed by the Suffolk County Traffic and Parking Violations Agency, People v. Ehlers, 2021 NY Slip Op 51064(U), People v. Espinal (Douglas) 2021 NY Slip Op 50946(U), 73 Misc 3d 130(A). The Espinal decision squarely addressed the issue of the discretionary license suspension for the conviction while operating a commercial vehicle as not an improvident exercise of discretion.

The following cases are mostly recent Appellate Term Second Department decisions:

People v. Glatman, 2022 NY Slip Op 50444(U), 75 Misc 3d 131(A) Upholds the excess speeding conviction and that the People can object and refuse to consent to a waiver of the defendant's personal appearance at trial CPL §340.50 (2).

People v. Reyes (Alex), 2022 NY Slip Op 50443(U), 75 Misc 3d. 31(A) reversed the granting of defendant's motion to vacate a default conviction for operating without insurance.

People v. Tyler McNeil, 2022 NY Slip Op 50437 (U), 75 Misc. 3d 131(A) uphold the granting a motion to vacate default conviction for operating without insurance.

People v. Searles, 2022 NY Slip Op 22201, 76 Misc 3d 1 reversed a conviction for §511 (1a) for lack of sufficient proof in the record of knowledge of the defendant's knowing or having reason to know that their license or privilege was suspended or revoked.

People v. Crespo, 2022 NY Slip Op 22261, 76 Misc 3d 10, parking and unregistered vehicle and abandoned vehicle §1224(7) convictions reversed for lack of sufficient testimony as to the parking lot and public highway.

People v. Velez, 2022 NY Slip Op 50918(U), 76 Misc 3d 133(A), illustrates the difficulties in overturning an excessive speeding conviction based upon a visual speed estimate and a properly tested laser speed measuring device based upon credible testimony of training and experience. The 30-day discretionary license suspension for 111 mph was vacated. A conviction for operating without insurance was reversed for lack of proof of ownership and knowledge.

People v. Vig, 2022, NY Slip Op 503070(U), 75 Misc 3d. 127(A), failure to yield right of way to emergency vehicle §1144-a, a "move over" conviction was reversed because the Court found that the defendant could not have moved her vehicle to the right with lane with "reasonable safety".

People v. Ambrosini, 2022 NY Slip Op 22054, 74 Misc 3d. 83. §1180(a) speed not reasonable and prudent conviction reversed for lack of testimony as any to any condition or actual and potential hazards.

People v. Marino (Andrew), 2022 NY Slip Op 50369 (U), 75 Misc 3d 127(A) following too closely conviction for summons issued after a three-vehicle crash upheld on appeal. It can be inferred that trooper did not witness the accident because the defendant challenged the trooper's authority to issue the summons.

People v. Altman, 2020 NY Slip Op 50886(U), 73 Misc 3d 127(a), a very recent Appellate Term Second Department case from the Suffolk County Traffic and Parking Violations Agency is worth reading.

The significant takeaway is that the Court upheld the conviction and declined to apply the speedy trial provisions of CPL §30.30 to stand alone traffic infractions.

The rest of the decision is a primer on the preservation of the record, elements of proof of an excessive speeding violation and the scope of review of the conviction and sentence.

People v. Zelaya (Alexander) 2020 NY Slip OP 51726, 69 Misc3d 135(A) reversed a Suffolk County Traffic and Parking Violations Agency conviction after trial for §1110(a) based upon a denial of a motion to dismiss for failure to serve a supporting deposition based upon the absence of special circumstances warranting a reprosecution.

People v. Garcia (Andrew) 69 Misc 3d 146(A), 2020 Slip Op 51415(U) SCTPVA convictions for §600(1), §1180(a) reversed and dismissed based upon reversible error to admit defendants' statements without proof of CPL §710.30 notice served by The People. Panel found failure prove all necessary elements as a result.

People v. Bautista (Joe), 2020 NY Slip Op 50740(U)67 Misc 3d 142(A) Decided on June 18, 2020, Appellate Term, Second Department, which reversed a default conviction out of the Suffolk County Traffic and Parking Violations Agency where the Vehicle & Traffic Law §1806-a (1) does not authorize the entry of a default judgment against the Defendant since the summons was answered thereafter through his counsel's plea of not guilty in court.

The case was reversed and remanded, at least in part, as the People failed to establish on the record that the sufficient Parker warnings were given concerning the consequences of the failure to appear

for any subsequent proceedings such as the trial, People v. Parker, 57 NY2d 136 (1982) The case was decided without addressing the issue of whether the judicial hearing officer's denial of defense counsel's adjournment request was appropriate.

People v Garafalo (Therese), 2020 NY Slip Op 50722(U), 67 misc3 1decided on June 11, 2020, Nassau County District Court Criminal Term.

Defense counsel, prior to trial, obtained a dismissal of the charges of reckless driving, §1212, improper no signal, §1163, driving across hazardous markings, 1128(d).

The police lieutenant admitted that he had not made an independent estimate of defendant's speed based upon observation as is the usual custom and practice in speeding trials.

The Court upheld the conviction of 114/55, based upon the scope of review in viewing the evidence like most favorable to the People with the standard reference of great deference to the judge's opportunity to view the witnesses' testimony, observe their

demeanor and assess their credibility.

Matter of Sonders v. New York State Department of Motor

Vehicles Traffic Violations Bureaus, 187 AD3 1, 2020 NY Slip OP

04443 decided August 6, 2020, Appellate Division, First

Department reversed a dismissal of an CPLR Article §78 petition

by Supreme Court Special Term and found the imposition of one-

year revocation for operating without insurance under Vehicle and

Traffic Law §318(3) 24 years after the fact due to an admitted data

entry error was arbitrary and capricious.

People v. Vogt, 2020 Slip Op, 20300 70 Misc 3d 30.

Milan Town Court conviction for §1225-D upheld as no motion

made as to sufficiency of “drive through” supporting waiving that

issue.

Conflicting testimony of witnesses but Trooper’s account found

credible by trier of fact under scope of review.

People v. Casagrande 2020 NY Slip Op 51515(U) 70 Misc 3d 129(A)

SCTPVA speeding conviction upheld on scope of review as not against the weight of evidence on the record.

People v. Ashley Quintero, 2019 Slip Op 51296(U) 64 Misc 3d 144 (A)

Supreme Court, Appellate Term, Second Department upholds Briarcliff Manor Village Justice Court conviction for a stop sign violation.

The case is instructive as to the scope of review: “we accord great deference to the factfinder’s opportunity to view the witnesses, hear their testimony and assess their credibility. “The standard is “not against the weight of evidence upon the record”.

People v. Dickerson, 2019 Slip Op 51298(U) 64 Misc 3d 144(A) Supreme Court, Appellate Term, Second Department reversed a conviction for a for reduced speed of 50/45 as the panel found the verdict was against the weight of evidence in that the defendant’s testimony was insufficient to establish that she had been speeding in zone after the Court specifically rejected the radar testimony of the police officer in the Town of Crawford case.

Court of Appeals upholds Department of Motor Vehicles “three strikes” regulations in 2017 for permanent driver license or privilege revocation for repeat alcohol/drug related convictions or incidents which has effectively ended legal challenges.

The Court of Appeals issued two very important decisions which will have a great impact on the practice of law by defense lawyers who are members of our Association.

The much-anticipated ruling on the validity of the controversial Department of Motor Vehicles regulations 15 NYCRR Part §136.5 for the “three strikes” rule for alcohol and drug related driving offenses as convictions or incidents which results in the permanent denial of a driver license or privilege application was decided on May 9, 2017.

The official cite is 29 NY3d 202 (2017) for Matter of Kevin B. Acevedo, Appellant vs. New York State Department of Motor Vehicles et al., Respondents, and Matter of Michael W. Carney and the Matter of Caralyn A. Matsen.

The regulation 15 NYCRR Part§ 136.5 has been the subject of much litigation in the Department of Motor Vehicles administrative appeals system, in Supreme Court Special Term by lawsuits for judicial review

under CPLR Article§ 78 and the appellate process since the effective date of September 25, 2012.

Acevedo had his driver license application approval withdrawn 3 days later. DMV issued a permanent denial with an additional five-year waiting period for the opportunity to apply for an A2 problem driver restriction with a restricted-use license and mandatory ignition interlock for 5 years.

Matsen had her license application held in abeyance in March 2012, six months prior to the effective date of the three strikes regulation.

Carney had six previous DWI convictions.

The regulations provide for a 25-year look back period for three or four alcohol or drug related driving convictions or incidents from the date of the most recent revocable offense on your client's driving record. Five such convictions or incidents trigger a lifetime driving record review.

The Court rejected the legal challenges citing public policy and upheld the Appellate Division decisions affirming the denials of the Petitions in Supreme Court Special Term in dismissing each of the three proceedings.

The Appellate Division panel determined that the Department of Motor Vehicles did not exceed its regulatory authority because it did not act on its own ideas of public policy, but rather implemented the legislature's policy of promoting highway safety and found that it was an appropriate discretionary determination by the commissioner.

The Court also rejected arguments that the regulations conflict with the Vehicle & Traffic Law and that they were impermissibly applied retroactively to the driver license or privilege applications.

The Court of Appeals found no statutory conflict issue because under the Vehicle and Traffic Law an applicant is not entitled to relicensing. The Vehicle & Traffic Law which specifically states that the statutory revocation periods are a minimum waiting period.

VTL§1193(2) (b) sets forth that the approvals of relicensing applications are solely decided at the discretion of the Commissioner.

The Court found that the regulations are uniform and that it provides that

anyone applying for a license or privilege will be treated equally.

The Court went on to reject the separation of powers argument and that the general takeaway is that the regulations are here to stay.

The Commissioner may deviate from these regulations by an administrative determination of unusual, extenuating and compelling circumstances.

My attendance at New York State Bar Association continuing legal education seminar conducted by Peter Gerstenzang, Esq., revealed the Commissioner granted these applications in less than 1% of the cases in a recent calendar year.

The Court of Appeals decision in *People v. Andrew R. Bushey*, 29 NY3d 158 (2017) NY Slip Op 03560 2017, has been overshadowed by the much anticipated “three strikes” cases rulings.

The three strikes cases apply to a certain limited class of citizens who fall within the category of three or four alcohol offenses or incidents within the 25-year lookback period or five such lifetime convictions or incidents. The *Bushey* decision encompasses every licensed driver in the State of New York or anyone who operates a motor vehicle in the State of New York.

The *Bushey* Court that found that a police officer may run a license plate without any suspicion of wrongdoing because there is no expectation of privacy in the display of the license plate.

The defendant was stopped when a routine registration check by a Buffalo State University police officer revealed a registration suspension for failure to pay campus parking tickets.

The defendant was subsequently arrested for driving while intoxicated and related charges.

The *Bushey* ruling allows probable cause for a stop not based upon observed traffic infractions if a registration and license check reveals a suspension or revocation.

Since there is no expectation for privacy it does not violate defendant’s fourth amendment rights.

An interesting case out of the Appellate Division, Third Department, *Matter*

of Merkel v. New York State Department of Motor Vehicles, 145 A.D. 3d 1279, 2016 NY Slip OP 080407.

This an appeal from a judgment of the Supreme Court, Albany County dismissing petitioner's CPLR Article 78 proceeding to review a determination denying her application for a driver's license.

Merkel had 5 or more lifetime alcohol/drug related driving convictions or incidents.

Merkel presented evidence of alcohol rehabilitation, long period of sobriety, became licensed as a registered nurse. She relapsed with two convictions in 2012. She was granted relief from disabilities pursuant Corrections Law §701.

The Appellate Division reversed the dismissal of the Petition but did not order the Department of Motor Vehicles to approve the application. The denial letter was not part of the record and that The Appeals Board determination that the denial was rational but not based upon a sufficient record.

The Appellate Division annulled the Respondents determination and remitted the case back to the Department of Motor Vehicles for further review of petitioner's application.

The Appellate Division did not order the Department of Motor Vehicles to approve the driver license application. The decision returned the application to the Department of Motor Vehicles for further review.

This case is very instructional as to the appeals and judicial review process based upon unusual, extenuating and compelling circumstances and that your client can "win" an appeal of a dismissal of a CPLR Article §78 petition and still not be granted approval of their application for a driver's license or privilege.

Agrudo v. New York State Department of Motor Vehicles, 149 A.D. 3d 830, 51 N.Y.S. 589 2017N.Y Slip OP 02786 (2 Dept 2017). Decided shortly before Acevedo upheld the regulation and rejected the same legal arguments challenging the authority of DMV.

A New York County Criminal Court decision People v. Olecki,

2016NY032655, NYLJ1202799136826 at*1Crim,NY, 2017 NY Slip Op 27281,decided September 5, 2017, has held that is ineffective assistance of counsel for a defense attorney representing a client charged with an alcohol or drug related driving charges not to be familiar with the collateral consequences of the Department of Motor Vehicles “three strikes” regulations NYCRR Part §136.5(b)(3)(ii).

The purpose of this discussion is to alert the defense bar to the pitfalls in defending these cases, rather than any implicit criticism of the defense lawyer.

This an example of how a seemingly optimal plea-bargain to a reduced lesser included non-criminal charge for someone with 2 prior similar convictions can have unanticipated very serious collateral consequences.

The fact pattern was a plea of guilty to a reduced charge of driving while impaired §1192(1) with a conditional discharge and a 90-day driver license suspension.

The defendant stated that her motivating factor in accepting the plea was to preserve her driving privileges with a conditional license would not have pleaded guilty to the reduced charge had she known about her ineligibility for a conditional license and a minimum 5 year “permanent” license revocation.

Defense counsel in the instant case advised the client that she should be eligible for a conditional license §1196 and 15 NYCRR Part §134, which later proved to be incorrect because the Department of Motor Vehicles 25-year lookback rule rendered the defendant ineligible for a conditional license under 15 NYCRR §134.7(a)(11)(1) because of three or more alcohol or drug related driving convictions or incidents with her two prior alcohol or drug related driving convictions for driving while ability impaired§1192(1) in 2004 and 2010.

The guilty plea triggered a permanent license/privilege revocation lasting at least five additional years.

Defense counsel stated that he or she was unaware of the Department of Motor Vehicles Regulations.

The Department of Motor Vehicles retains the right to correct any period of suspension or revocation imposed by the Court under §1193(10).

In addition to being ineligible for a conditional license, there is a possibility that in many cases if your client has one or more “serious driving offenses” such as a five point or higher point value conviction or 20 or more points during the look back period 15 NYCRR Part §136.5(2), their license or privilege will be revoked permanently.

Please note all periods of driver license revocation are indefinite with a minimum waiting period.

The Court found that counsel’s incorrect advice about the relicensing consequences about the guilty plea constitutes an ineffective assistance under both the federal and state constitutions.

The Court found that the defendant was prejudiced by the lack of competent advice.

The Court held that the relicensing ramifications were a collateral consequence and not a direct consequence of the plea under People v. Pegue, 22 NY 3rd. 168 (2013) that the Court was under no duty to advise to the defendant or defense counsel.

The application to withdraw the guilty plea was granted which means the defendant must proceed to trial for an acquittal or plead guilty to a non-alcohol/drug related driving offense not to exceed 4 points to avoid the minimum five-year revocation.

What does this mean for defense counsel?

Defense counsel must be thoroughly familiar, to the extent possible of the collateral consequences by conducting an in-depth initial interview to determine your client’s prior alcohol/drug relating driving convictions or incidents which include chemical test refusals.

It would behoove counsel to have your client request their lifetime driving record online or execute their signature before a notary public on the appropriate general consent Form MV-15(GC) and request a lifetime driving record by mail on Form MV-15 the request be made through your office. A printout in the file is preferable to telephone review. Annexed as **Exhibit C**.

Defense counsel can inquire of your client’s prior background by calling Driver Improvement Bureau, 518-474-0774 from 8:30 AM – 12:00

PM, but must expect to be placed on hold for a long time.

The better practice would be to obtain and carefully review the lifetime driving record for your client's second or subsequent alcohol/drug related driving offense or incident.

There is no substitute for the lifetime driving record printout in your file to be able to reviewed as needed.

People v. Glenn Smith, 2016 NY Slip Op 04973, 27 NY3d 643

Affidavit of Errors must be filed within 30 days of Notice of Appeal if the record was recorded electronically or digitally at the Suffolk County Traffic and Parking Violations Agency and other courts. It is a jurisdictional defect under CPL §460.10. The Court of Appeals does not like the law but leaves it up to the Legislature to change.

The following decisions are retained in the materials to demonstrate the numerous lower court case precedents prior to the Court of Appeals ruling in **Acevedo**, et al.

Reported CPLR Article §78 Supreme Court decisions have upheld the Department of Motor Vehicle Regulations, **Matter of Funes v. New York State Department of Motor Vehicles**, 2013 NY Slip Op 31082(U), **Gaebel v. New York State Department of Motor Vehicles**, 43 Misc 3d 185.

A decision was rendered by Justice Steven M. Jaeger of Nassau County in **Matter of Brown vs. New York State Department of Motor Vehicles**, 2014 Slip Op 24082. The Department of Motor Vehicles position prevailed in **Matter of Acevedo v New York State Department of Motor Vehicles**, 2014 NY Slip Op 30422 (U), **Matter of Nicholson v. Appeals Board of Administrative Adjudication Bureau**, 2014 NY Slip Op 31537 (U), **Argudo v. New York State Department of Motor Vehicles**, 1428/13, NYLJ 1202665198378. **In the Matter of the Application of Araujo v. New York State Department of Motor Vehicles**, 5057/14, NYLJ 1202670156299 at *1 (Sup., NA Decided September, 9 2014)) **Matter of Rothschild v. N.Y. Department of Motor Vehicles**, 2015 NY Slip OP 51351 (U) [49 Misc 3d 1202(A) 000260-2015, NYLJ 1202738316730 at*1(Sup. RO, Decided August 14, 2015). **Allen v. New York State Department of Motor Vehicles** 45 Misc. 3rd 475, 991 N.Y.S. 701 (2014)

The Acevedo case is well worth reading. Eric H. Sills, Esq. submitted a brilliant brief which raised constitutional issues, such as improper delegation of authority, separation of powers and preemption.

The Court also considered due process and administrative delay in acting on a driver license application that was initially approved, only to subsequently have that approval withdrawn.

The Court rejected these challenges and upheld the administrative action of the Department of Motor Vehicles in denying the driver license application.

The permanent revocation regulations have been upheld by the Appellate Division, Fourth Department. Matter of Shearer v. Fiala, 124 A.D. 3d 1291, 2015 NY Slip Op 0051.,lv. den., 25 N.Y. 3d 909. The panel rejected arguments that Part §136 was legislative in nature or in conflict with any look-back period in the Vehicle and Traffic Law.

The decision found that the 25-year look back period was correctly applied in denying the Petitioner's driver license application. The Court of Appeals denied a motion for leave to appeal.

The Third Department recently upheld the regulations turning aside legal arguments concerning retroactivity, ex post facto application, legislative preemption and statutory conflict.

Matter of Acevedo v. New York State Department of Motor Vehicles, cite as Acevedo. DMV, 520060, NYLJ 1202734171346 at 1* (App. Div., 3rd Dept Decided August 6, 2015).

The Appellate Division also rejected challenges in Matter of Dahlgren v. New York State Department of Motor Vehicles, 124 A.D. 3d 1400 (App. Div 4th Dept.), Matter of Scism v. Fiala, 122 A.D. 3d 1197, 2014 NY Slip Op 8283 (App. Div 3rd Dept)

The Second Department has weighed in and reversed Special Term to uphold the determination of the Department of Motor Vehicles permanent denial of a driver license application. Matter of McKevitt v. Fiala, 2015 NY Slip Op 04649

The case was remitted to Supreme Court Special Term for determine whether unusual, extenuating and compelling circumstances exist to order The Department of Motor Vehicles to depart from the general policy of

permanent denial.

Defense counsel may wish file the appeal within 60 days of the denial letter under unusual, extenuating and compelling circumstances which must be filed directly with the Driver Improvement Bureau to preserve your client's arguments for administrative appeal and judicial review.

Your client will believe that such circumstances apply to their case and should be advised the Regulations for "three strikes" rule have been repeatedly upheld by the Courts and that chances for success are extremely limited.

The CPLR Article §78 challenges against the Department of Motor Vehicle regulations have become "the third rail" for Special Term.

Please see the adverse Article §78 Decision, in the Matter of the Application of Hugo Funes, 2013 NY Slip Op 31082(U), decided May 15, 2013 at Supreme Court, New York County. Special Term adopts virtually all of the legal arguments set forth by the Department of Motor Vehicles. The highlights are that possession of a driver license is a privilege and not a right which is subject to reasonable regulation.

Judicial review is limited to whether there was a rational basis for the administrative action.

The Court deferred to DMV where the actions are not manifestly irrational and unreasonable.

The Courts appear to be reluctant to substitute their judgment for administrative actions taken by the Department of Motor Vehicles.

The thrust of the legal attacks on the Regulations raises objections of ex post facto application and legislation by regulation.

Out of State (New Jersey) alcohol/drug related driving conviction served as a basis for "third strike".

Article §78 action for judicial review of the denial of administrative appeal of a driver license application is heard and decided Special Term and does not transfer to the Appellate Division CPLR §7804(g). No evidence was taken at a hearing. Client would be compelled to take a further appeal

from Special Term. *Yezek v. State Department of Motor Vehicles Appeals Bd.*, 62 A.D. 3d 107, 879 N.Y.S. 2d 571 (2 Dept. 2009).

SPEEDING CASE LAW DEVELOPMENTS-See also interesting cases

Speeding charge dismissed because no foundation for the accuracy of the radar unit and no visual estimate testimony. *People v. Lampman*, 55 Misc. 3d 628, 48 N.Y.S. 875 (City Court of Cohoes, 2017).

Speeding conviction reversed and remanded when the defendant was denied his request for counsel. *People v. Rankel*, 44 Misc. 3rd 134A, 2014 NYS Slip Op 51160 (U) (White Plains City Court)

Speeding conviction upheld. Laser speed measuring device speed reading admitted without certificate or independent expert scientific based upon the trooper's laser certification card and visual estimate. Proof of calibration held not to be required as visual speed estimate sufficiently corroborated the device's readings. *People v. Solanet*, 44 Misc. 3d 138(A) 2014 NY Slip Op 51253 (U).

§600-1 guilty plea vacated as field appearance ticket found to be the equivalent of simplified traffic information and defendant's motion to dismiss for failure to serve a supporting deposition should have been granted. *People v. Kearns*, 2014 NY Slip Op 24226 (Suffolk District Court)

Highlights:

It is now a Class E Felony when charged with a DWI/Drug related offense while in conditional license status. Formerly, a traffic infraction.

Minimum period installation of interlock device (IID) is 12 months.

Court can only waive installation of IID when person goes under oath that they are not the owner of a motor vehicle and will not operate any vehicle during period of restriction. Perjury charges possible in addition to VTL charges.

IID applies to Y.O.

The Regulations can be found on The Department of Motor Vehicles website at <http://www.dmv.ny.gov/problem.htm>.

There is an excellent chart and FAQ or frequently asked questions section for the technophobes, which can be found at <http://www.dmv.ny.gov/problem.htm>.

The official citation for the heart of the regulations is 15 NYCRR Parts §132, §136. The title is the definition section of Dangerous Repeat Alcohol or Drug Offenders.

A finding of a chemical test refusal not arising out of the same incident will be counted separately. If your client was acquitted or a DWI charge was dismissed in satisfaction of a guilty plea, but found to have refused to submit to a chemical test, that will be held against their driving record as per Part §132.1(a).

Clients meeting the criteria include five or more alcohol or drug driving convictions or incidents convictions in a lifetime will result in a permanent license revocation under Part §132.1(b)(1). They are not eligible for an A2 Problem Driver Restriction License.

Three or more alcohol or drug related convictions in the last 25 years plus at least one other serious driving offense in period is in this classification.

A “serious driving offense” (SDO) is defined Part §132.1(b)(d) as a fatal crash, a driving related penal law conviction, 20 or more points assessed for driving for the past 25 years with two or more convictions each with five points or higher.

It is apparent that if your client has two prior alcohol or drug related driving convictions or incidents, or more that they must be advised that they are in jeopardy of permanent license or privilege revocation in the State of New York.

Your client may seek to reopen previous convictions to reduce the points below 20 as a serious driving offense or reduce one or more 5 or more point as serious driving offenses.

Caveat. Convictions had within the Department of Motor Vehicles Administrative Adjudication or Traffic Violations Bureau (TVB) are considered closed within 30 days of conviction. The TVB is not a court of

law and absent a timely successful appeal or relief for unauthorized use of license or registration with Form FI-17, the matters are deemed closed.

Convictions in other jurisdictions may be subject to a motion to reopen to be decided on a case-by-case basis. Convictions tied to a disposition with a DWI or other misdemeanor or felony charges will probably be much more difficult to reopen.

Your client should be advised that the motion may be opposed or a favorable court decision appealed by the assistant district attorney.

The Court could, even in the absence of opposition from the assistant district attorney, deny your motion.

The citation for the license or privilege sanctions is Part§136.4, (b), §136.5(a) §136.10.

BEWARE OF VTL §600(1) CDL TRAP DOOR WHEN OPERATING ANY VEHICLE.

The traffic infraction of leaving the scene of a property damage incident without reporting is treated as an ordinary 3 point moving violation for non-CDL drivers/clients. Conviction for CDL licensed while operating ANY vehicle client will result in a minimum mandatory CDL revocation of one-year and a possible 10 year or permanent CDL disqualification if previous one-year CDL revocation.

A2 PROBLEM DRIVER RESTRICTION

Should your client have three or four alcohol convictions or incidents but no other serious driving offenses in the 25-year look back period from the date of the most recent revocable offense, the Department of Motor Vehicles will add five years to the statutory minimum revocation period if revoked for an alcohol or drug related driving offense.

The Department of Motor Vehicles will add an additional two years to a minimum period of revocation if your client has three or more alcohol/drug related driving convictions is revoked for a non-alcohol/drug related driving offense such as operating without insurance, speeding, reckless driving or an administrative finding after a fatal accident hearing.

The Department of Motor Vehicles will restore a license to a client in this category with an additional two-year period of a restricted use license which will limit your client's driving to and from work, school and medical

visits. An ignition interlock device is not required.

CAVEAT: The two-year revocation does not apply to Part §132 revocations which are governed by Part §136.5 as a permanent revocation of at least 5 years and in most cases a permanent revocation as a dangerous repeat or alcohol drug offender. Reminder any two-year revocation is a minimum waiting period to reapply and there can be no guarantee if and when the application will be approved.

Five year restricted-use license subject to revocation if convicted of §1129 (a), speeding, §1182 speed contest, operating out of restriction, §1212 or cellphone, portable electronic device, seatbelt. These offenses will not result in a revocation of a problem driver restriction restricted-use license: parking, stopping standing, equipment or inspection. If you, as a defense lawyer have a choice, choose the parking offense.

Those clients who are approved to relicensed with the A2 problem driver restriction after three or more alcohol and drug related driving offenses or incidents, the Department of Motor Vehicles will require the installation of an approved ignition interlock device on any owned or operated vehicle for a period of five years and a problem driver restriction for five years.

The ignition interlock device must be installed in advance your client taking any written or road tests.

A list of approved providers can be found at <https://www.criminaljustice.ny.gov/opca/pdfs/IID-Installation-Service-Provider-List.pdf>

The Department has extended the minimum §1192 related suspension or revocation period. Completion of the Driving Driver Program will not terminate the revocation and entitle repeat offenders defined as two or more, to have their full licenses restored. This does not apply to first offenders. Please see Parts §134.10, §134.11.

The defense lawyer is at a disadvantage in terms of lifetime driving records because our access is limited to ordinary printouts which only list most DWI convictions for 10 years and chemical test refusals for less than that time. You can file a Freedom of Information Law request with Form MV-15 with your client's execute4d MV-15GC for their lifetime driving

record. A properly filed request will be returned in about 2 weeks.

You should advise your client that they can go online and may be able to download their lifetime driving record which will allow defense counsel much faster access to this information. <https://dmv.ny.gov/dmv-records/how-get-my-own-lifetime-driving-record>

DWI convictions are kept on the public abstract for 10 years except those involving personal injury accidents and fatal accidents which are never removed from the public abstract.

Convictions for most other traffic offenses are off the regular abstract after about four years from the date of conviction.

You may need to know your client's lifetime driving record at the initial intake. Any client who appears to have two previous alcohol or drug related driving offenses or incidents will be subject to the severe sanctions. Defense counsel must be able to properly advise the client of the plea bargain offer and the collateral consequences. *Missouri v. Frye*, 132 S.Ct. 1399 (2012), *Lafler v. Cooper*, 132 S.Ct. 1375, (2012).

Please log onto <https://dmv.ny.gov/tickets/penalties-multiple-offenders>.

This section will be a discussion of Department of Motor Vehicle Denials of Driver License Applications for Repeat DWI Offenders, three or more convictions or incidents with the benefit of over ten years of experience with the subject matter.

Regulations took effect on September 25, 2012 and were upheld by the Court of Appeals on May 9, 2017.

It applies to clients who have three or four alcohol or drug related driving convictions or incidents within the 25 years look back period from the date of the most recent revocable offense or five or more alcohol/ drug related driving convictions or incidents lifetime review of driving record. Your client receives a Part §136.5 denial letter. Please see a copy of the current DMV Denial Letter annexed as **Exhibit D**. There are at least four variations: the five year and permanent revocations. The five-year revocation adds five years to the minimum statutory revocation. Relicensing is conditioned with a five-year restricted-use license with the further requirement of the installation of an ignition interlock device. The holder of

a post-conviction conditional license §1198(3) (a) may be denied approval for restoration of full license status, but allowed to retain the post-revocation conditional license until expiration.

Your client decides to appeal. There are two options within 60 days of the date of denial letter. An appeal by letter or form for Request for Relicensing Consideration After Denial to Driver Improvement Bureau based upon unusual, extenuating and compelling circumstances.

Unusual, extenuating and compelling circumstances can only be preserved for an administrative appeal and judicial review by direct appeal to Driver improvement Bureau.

Experience has shown that is very unlikely that your client will prevail. The other option is within 60 days to file a direct appeal to the Department of Motor Vehicles Appeals Board to contest the entire validity of the action which is unlikely to succeed in light of Acevedo which effectively ended all legal challenges to the regulations.

Another interesting question is whether a client who was previously revoked permanently under §1193 defined as five years or eight years at the end of the revocation period will DMV add on another five years to the statutory revocation or permanently, for real, impose a lifetime revocation?

The answer appears to be yes. The Department of Motor Vehicles has taken the position that the regulations take precedence over existing statutory provisions for minimum periods of revocation.

Your client has a post revocation conditional license and has three or more alcohol related offenses. Applications to restore post revocation licenses must go through the regular application process in Albany.

Albany denied the application but allowed the client to retain their post-revocation conditional license until the date of expiration which was 2020. The post-revocation licenses may be renewable thus allowing your client to avoid complete permanent revocation.

If your client is still aggrieved, and has exhausted their administrative remedies at the Driver Improvement Bureau and Appeals Boards levels and wishes to file an Article CPLR §78, it must be commenced within four months of the date of the adverse determination.

Please refer to the adverse Article 78 Decisions.

Part §132 Lifetime Review of Driving Records- Case Study

Your client has five or more previous DWI convictions or incidents but was relicensed well before the new regulations and holds a valid license.

Client pleads guilty by mail to a six-point speeding offense of 76/50. A separate issue is whether TVB accepted guilty plea in violation of 15 NYCRR Part § 123.5, in that a personal appearance should be required when a conviction may result in a driver license suspension or revocation. Client previously pleaded guilty to a four-point speeding offense without any collateral consequences. Please see **Exhibit E**.

The Appeals Board will decline to stay the administrative hearing process because the suspension or revocation was not issued by TVB.

Your client receives a Notice of Proposed Revocation of the license under Part §132. The client files for an administrative hearing and the hearing procedures will be governed under Part §127 and that the administrative law judge must find unusual, extenuating and compelling circumstances otherwise the administrative law judge shall issue an order of revocation.

Those with three or four alcohol related incidents are subject to 25 years look back from the date of commission of the high-point value offense of five or more points will trigger a notice of proposed revocation.

The Department of Motor Vehicles takes the position is if that the conviction for the high-point driving offense results in a revocation either after a waiver of hearing or an administrative hearing subjects your client's application for relicensing to Part §136.5 permanent revocation provisions as the revocation is for being a "dangerous repeat alcohol or drug offender".

The revocation for the conviction for the non-alcohol related high-point driving violation is not considered a non-alcohol related revocation.

Improper Cellphone Use and Use of Portable Electronic Devices

The war on distracted driving continues with the five points assessed 15 NYCRR Part§ 131.3(b) (4) (iii) for improper cell phone use §1225-c and use of a portable electronic device while operating a motor vehicle §1225-d. §1225-d is much broader than just texting. If your client is caught even looking at the device, you or your client could be issued a summons.

Convictions for §1225-c2a and §1225-d violations have been added to the probationary license suspensions or revocations under §510-b, for offenses

committed on or after November 1, 2014, making these offenses primary offenses for a conviction that will result in a mandatory suspension of 120 days for a permit holder, Class DJ or MJ or revocation if committed during probationary license period of six months.

Eligibility for a restricted-use license will be determined by §530-6 and 15 NYCRR Part §135.

Upon restoration of a probationary license when the full license is restored or the 60 days is deemed served, that person will commence a new six-month probationary license period under §510-b(3).

Please note that a conviction for this type of an offense committed while in the second probationary license status after having a probationary license restored will result in a mandatory minimum six-month revocation. Your client will be ineligible for a restricted-use license as they previously opted to obtain one to serve the initial probationary suspension with a restricted-use license.

Improper Cellphone Use and Use of Portable Electronic Devices are 5 points §131.3(4) also “high-point driving offenses” §132.1(c). Improper cell phone use violations §1225-c committed on or after 5/31/13 and texting while driving, §1225-d is now a primary offense 2/16/11-10/4/11 are two-point offenses and, §1225-d §1225-c2a. Both were three-point offenses 15 NYCRR Part §131.3 (b) (6) (vii) effective 10/5/11-5/31/13.

Greater restrictions on operators of commercial motor vehicles prohibited from using cell phones or portable electronic devices while stopped temporarily in traffic or a traffic signal. Operator must pull off the road and be legally parked.

Commercial drivers have a broader presumption of “using” the cellphone or electronic device for operators of commercial vehicles. Dialing or answering a mobile telephone by pressing more than a single button or reaching in a manner no longer in a seated driving position, restrained by a seat belt. Considered a serious traffic violation §510-a(4) but not a cause for a suspension for a first offense but SCTPVA prosecutors will request and often be granted a post-conviction driver license suspension for these offenses.

The assignment of five points 15 NYCRR Part §131.3(4) (iii) means that these violations are defined as a high-point value of Part §132.1(c.) In an

extreme case, if your client is validly licensed, but is subject to lifetime review under the regulations Part §132 could lead to a permanent license revocation for a conviction for these offenses.

There is a presumption that holding a mobile telephone to or in the immediate proximity of the user's ear is that someone is engaged in a call.

The presumption is rebuttable and the vehicle must be in motion except for operators of commercial motor vehicles.

The exemptions are calls made regarding an emergency situation to an emergency response operator, a hospital, physicians or Ambulance Company or corps, a fire department, a fire district or Fire Company or a police department.

§1225-c (2) (a) no person shall operate a commercial motor vehicle as defined by Transportation Law §2 (4) (a) while "using" a mobile telephone even while temporarily stopped in traffic.

4-a. "Commercial motor vehicle" means any self-propelled or towed motor vehicle used on a highway in intrastate, interstate or international commerce to transport passengers or property when the vehicle (a) has a gross vehicle weight rating or gross combination weight of ten thousand one pounds or more, whichever is greater; or (b) is designed or used to transport more than eight passengers including the driver for compensation; or (c) is designed or used to transport more than fifteen passengers including the driver and is not used to transport passengers for compensation; or (d) is used in transporting material found by the United States secretary of transportation to be hazardous under §5103 of title 49 of the United States Code and transported in a quantity requiring placarding under regulations prescribed by such secretary under subtitle B, chapter I, subchapter C of Title §49 of the code of federal regulations.

While using a mobile telephone call to engage in a call on a public highway including while temporarily stationary because a traffic control device or other momentary delays using a as a commercial person operating a commercial motor vehicle.

A person operating a commercial motor vehicle will not be deemed to be operating a commercial motor vehicle while using a mobile telephone to engage in a call if such vehicle is stopped at the side of or off on a public highway or in a location where such vehicles are not otherwise prohibited to stop by law or regulation or lawful order. There is an exception for calls

made at the direction of a police officer.

§1225-c(2)(b) creates a new presumption for the operator of a commercial motor vehicle who holds a mobile telephone, even if temporarily stationary because of stopped traffic, a traffic control device or other momentary delays is presumed to be engaged in a call unless the vehicle is off the roadway in a legally permitted area.

§1225-c(1)(c) creates a separate definition of using a mobile telephone for operators of commercial motor vehicles as holding a mobile telephone to in the immediate proximity of the user's ear or dialing or answering a mobile telephone by pressing more than a single button or reaching for a mobile phone in the manner that requires such person to maneuver or he or she is no longer seated in the driving position, restrained by a seat belt installed in accordance with the Title §49,§393(3) of the Code of Federal Regulations.

Commercial drivers convicted of these offenses face civil penalties up to \$2,750 and driver disqualification for multiple offenses. Employers who require their employees to violate the law face civil penalties up to \$11,000. <http://www.fmcsa.dot.gov/driver-safety/distracted-driving>

Portable electronic device conviction reversed as portable dictation device not a "portable electronic device within the meaning of the statute." *People v Ingber*, 58 Misc. 3d 49, 66 N.Y.S. 3d 785, NY Slip Op 27402(2 Dept 2017).

Improper use of a mobile phone conviction reversed as statutory presumption rebutted by cellphone records. The record was silent as to the evidentiary requirements at the District Court of Nassau County Traffic and Parking Violations Agency *People v. Wells*, 57 Misc.3d 21, 62 N.Y.S.3d 877(2 Dept 2017)

An Article §78 action against the Department of Motor Vehicles Appeals Board upheld the TVB conviction for the use of a speaker enabled iPhone while the operator was using one of his hands to hold the device next to his ear. *Smilow v. New York State Department of Motor Vehicles*, 95 AD 3rd 1023, 944 NYS 2nd, 948 (2012)

A review of the record apparently convinced The Court that the only dispute was how far the speaker-enabled iPhone from the operator's ear was.

The use of portable electronic devices law §1225-d has also been changed with additional restrictions on operators of commercial vehicles.

Portable electronic devices and any hand held telephones defined by §1225-c (1) as a personal digital assistant, PDA handheld device with mobile data access, laptop computer, pager, broadband, personal communication device, two way messaging device, electronic game, portable computing device and any other electronic device when used to input write, send or read text for present or future communication.

Using a portable electronic device is defined as taking or transmitting images, playing games or for the purpose of present or future communication performing a command or request to access a worldwide web page, composing, sending, reading, viewing, access and browsing, transmitting, saving or retrieving email, text messages, instant messages or other electronic data.

§1225-c (4) has enhanced restrictions on operators of commercial motor vehicles in that it is no longer permissible for to use such devices while momentarily stopped in traffic or at a traffic signal or control device.

The presumption is rebuttable.

Class DJ, MJ, Learners Permits and Probationary Violations

Cell phone and portable electronic device violations, texting violations are especially serious for holders of learner's permits and class DJ and class M licenses as well as probationary drivers.

Convictions for these offenses will result in a mandatory 120 day suspension if committed while in probationary status which is defined as six months from the date of the passing of the road test or the date the license was restored under § 510-b(3). Eligibility for a restricted-use license is determined by §530(2).

A learner's permit for a class DJ and MJ licenses under §510-c upon a conviction of a serious traffic violation as defined in subdivision (2) will result in a revocation for a period of a minimum of 60 days except portable electronic device and cell phone convictions.

The takeaway is, of course do not text and drive and use your cellphone in only hands-free mode only as absolutely necessary. Touch your device or look at your device and you are in danger of receiving a summons.

Defense counsel wishes to avoid five point or higher convictions wherever possible because of Part §132. When representing anyone charged with one of these offenses it is imperative to inquire if there is 3 or more alcohol or drug related driving offenses in their background, or if they are on a probationary license, Class DJ or Class MJ or a learner's permit.

Was your client operating a commercial motor vehicle as defined by Transportation Law §2 (4) (a).

Does your client have a legal defense to the charge? What was the nature and extent of the conversation with the officer who issued the violation?

What documentary evidence such as phone bills can be introduced into evidence? What are requirements to be admissible? In Suffolk the abolition of the Department of Motor Vehicles Traffic Violations Bureau means much stricter evidentiary requirements.

The defense of these charges requires an in-depth review of the case.

SCTPVA

Plea bargaining is permitted but policy guidelines are complex.

Trending: §510-3(a) suspensions pending prosecution are now being granted upon arraignment. §510(3)(d) for 11-point speeding offenses, repeat cellphone/portable electronic device convictions, first offenses for §1225-d, §1225-c2a while operating a commercial motor vehicle. Previous practice of pre-arraignment suspensions ended by administrative order.

All eleven-point speeding summons must be answered in person on or before the return date.

§510(3)(d) post-conviction judicial hearing officer-imposed suspensions or revocations are usually at the request of the Agency prosecutors.

Revocations are far more serious than suspensions.

Client is not eligible for a restricted-use license 15 NYCRR Part 135.7(a)(8)

Defense counsel must be prepared to oppose application for §510 (3)(d) on the record unless it is a negotiated §510(3)(d) You must advise your client that that they will be NOT be granted a restricted-use license for the Agency discretionary license suspension.

Please see the Administrative Orders of The Administrative Judge of Suffolk County 52-16, 53-16 17-13 concerning incarceration of unrepresented defendants and bail applications of represented and unrepresented defendants. Annexed herein as **Exhibit E**. My practice has yet to involve a District Court transfer for the above reason.

Requests for supporting depositions at SCTPVA, CPL §100.25 or motion practice will have the case set down for trial without any plea bargaining.

The only offer on the day of trial in the vast majority of cases will be reduced fines as the prosecutor may request the maximum fines if your client is convicted at trial.

TRIAL PRACTICE

Adjournment of actual trial dates is much more difficult unless requested as far as possible in advance. Defense counsel must be prepared to arrive on time at the appointed hour and budget sufficient time. Morning trials may be concluded by 10:30 AM but there are no guarantees that you will be able appear or participate virtually in other courts on other matters that morning. You and your client will not be admitted into the Agency until the scheduled 9 AM or your scheduled trial time.

When cases are set for trial by counsel, the prosecutors will do their best to afford a reasonable choice of dates.

The Agency will conduct a trial in absentia conviction in absentia if you or your client is not present within 30 minutes to one hour of the scheduled trial time posted on the trial notice.

The Agency judicial hearing officers will only very rarely dismiss a case for the failure to the police officer to appear unless the officer fails to appear at least 3 or more occasions.

To vacate a **trial** conviction in absentia will require an appeal to the Appellate Term.

A successful motion to vacate a non-trial default may result in the case being restored to the trial calendar without a prospect of a standard plea bargain.

Defense counsel must have their clients appear in person for a scheduled trial at the Suffolk County Traffic and Parking Violations Agency unless waived in advance on the record with the consent of the prosecutors and

judicial hearing officer. Consent is now much less likely to be given.

The Suffolk County Traffic and Parking Violations Agency takes the position that the defendant must appear for trial even when represented by counsel.

The Suffolk County Traffic and Parking Violations Agency is an arm of the Suffolk County District Court.

The Agency relies upon CPL §340.50 which requires the defendant to appear personally unless defense counsel secures the advance approval of the People and the Court to waive their appearance.

Defense counsel can make a motion to the Court, which will be granted in the absence of an objection by the prosecution. This course of action will require a filing of a written and subscribed statement by the defendant with a waiver of the right to be present at the trial and authorizing their counsel to conduct a full trial.

The Court or the People could object and cause the denial of the motion.

Defense counsel has the option to file a motion, but must be aware that The Agency requires all motions to be served in person with 20 days' notice as a return date and an affirmation of service.

Should your client not wish to be present, provisions must be made in advance with the consent of The People and approved by the judicial hearing officer

You can conference your case well in advance of the trial date with a supervisor to seek to obtain the People's consent to waive your client's appearance.

You must then appear before the judicial hearing officer and seek their approval.

CAVEAT: The Agency prosecutors and judicial hearing officers are now far less likely to consent to waive the defendant's appearances at trial

Defense counsel should have a written signed waiver by the defendant that they waive their right to be personally present at trial and authorizing their

attorney to conduct their defense. The document should state the full range of fines, civil penalties, points, Driver Responsibility Assessment fees, driver license suspensions or revocations or even in rare cases, incarceration. The waiver should state they are aware that by not appearing they are giving up their right to testify. The waiver should also state that you are authorized to submit them to the jurisdiction of the court.

The defendant may not be able to or desire to appear for any number of reasons.

The vast majority of cases, except clients charged with §509(1) unlicensed operator represented by defense counsel proceed to disposition at The Agency without any requirement that the defendant appear.

When defense counsel has a compelling reason to request the defendant's appearance to be waived, there is a process to be followed well in advance of the trial date.

Therefore, it is important to be sure your retainer agreement is for disposition without a trial, an appeal or an appearance at DMV administrative hearings. Your written fee retainer agreement should reflect the amount of time and effort to bring a case to trial. Specifically, an 8:30 AM trial will likely not be concluded until 10:30 AM or later. A 1:30 PM will generally be finished at the earliest 3:30 PM. An 8 PM Thursday night trial may take until 11 PM or later.

The authority for the judicial hearing officer to conduct a trial is contained in CPL §350.20 and Vehicle and Traffic Law §1690.

The enabling legislation for the Agency is §1690 of the Vehicle & Traffic Law. There has been much legal debate about the nature and extent of the authority of the judicial hearing officer.

The adjudication of class B misdemeanors pursuant to statute and signed consent forms by judicial hearing officers was upheld. *People v. Davis*, 13 N.Y.3d17, 884 N.Y.S.2d 665 (2009).

The Court of Appeals upheld the authority of the Nassau County Traffic and Parking Violations Agency as an adjunct of the District Court to have

judicial hearing officers preside over selected traffic infractions. Matter of Dolce v. Nassau County Traffic and Parking Violations Agency, 7 N.Y. 3d 492, 859 N.Y.S 2d 663 (2006)

Defense counsel must be prepared for trial and have their client present unless an approval of waiver of appearance has been secured in advance of the trial date.

Defense counsel and their client, if required, should arrive at the appointed time for trial and be prepared to budget several hours in order to avoid the possibility of having a default conviction in absentia entered against your client.

THE ACTUAL SCTPVA TRIAL

CPL § 350.10

Opening statements are permitted at the discretion of the court. Opening statements are almost always waived in non-jury trials for non-alcohol related traffic infractions.

The evidence must be presented in the order follows the standard rules governing jury trials under CPL §260.30 (5) (6) (7).

Evidence must conform to CPLR §4518 for business records or risk being excluded from evidence to defend your client. Cellphone records are the common items that would have to conform to a certification from the service provider that it was kept in the regular course of business and the company had a duty to do so. The prosecution will routinely object and seek to exclude the records.

Summations are also surprisingly at the discretion of the Court §350.10 (3c). The practice is that the judicial hearing officer will permit summations.

It is important to sum up, because it is what clients expect of their lawyer.

Be sure to have a plan to disagree without being disagreeable with the judicial hearing officer to avoid prejudicing your client's case.

It is important to request the opportunity to sum up as our clients have been watching lawyers on TV and movies and give impassioned pleas for their

cases.

Clients have been conditioned to expect that their lawyer will speak up for their cause prior to the judicial hearing officer making a decision.

Peter Preiser's commentary for CPL§350.10 in McKinney's Consolidated Laws takes the position that there is a constitutional requirement to be able to give a summation. Herring v. New York, 422 U.S. 853, 95 S.Ct 2550, 45 L. Ed 593 (1975).

Prosecutors will regularly request the maximum fines which can be far more substantial when defending third or high speeding violations or uninsured charges.

Be sure to have handy your current Magill's Vehicle and Traffic Law Manual for Local Courts to be aware of fine ranges and points.

Repeated convictions for unlicensed operator for non-citizens or undocumented clients may pose incarceration risk with transfer to District Court which could lead to deportation.

Sentences of incarceration are now subject to review by a District Court Judge. Implementation may require four-week adjournment and transfer to District Court.

Clients will be subject to a separate DMV administrative hearing for license suspensions or revocation as persistent violators with an accumulation of 11 or more points or an excessive speed conviction of more than 41 MPH or more over the limit as an eleven-point violation under 15 NYCRR Part §131. Please review Part §131.4 for administrative actions by DMV.

It is possible that the DMV hearing could result in additional license sanctions of suspension or revocation.

The best practice is to make sure that your retainer agreement indicates that this a separate fee matter and does not include any appeal.

Your client should be advised after the disposition of the case to complete a point/insurance reduction safety course to be used as talking points as the hearing to demonstrate responsibility for their actions.

Promptness and suit of jacket and tie or other professional attire should be recommended except that all DMV hearings are currently audio only but having your client properly attired may help their demeanor and

performance.

Defense counsel should have your client obtain a copy of their lifetime driving record to be fully prepared for the hearing.

These functions were merged in former Suffolk TVB administrative adjudication unless your client was convicted by default §226.

SCTPVA APPEALS

Appeals must be filed with the Supreme Court, Appellate Term.

Notice of Appeal must be served on the prosecutors and the Agency within 30 days of the date of conviction.

New rules effective 1/1/20

http://www.nycourts.gov/courts/ad2/AppellateTerm_Rules_Highlights.shtml

Six months to perfect.

Email notifications of all court decisions on matters except oral argument effective 6/1/20.

An Affidavit of Errors must be served within 30 days of the Notice of Appeal CPL §460.10.

The best practice would be to serve the Affidavit of Errors with the Notice of Appeal or recommend a colleague experienced in these matters.

You must order the minutes from a list of providers from the Agency to transcribe the record and send a copy to you and The Agency.

The record must be settled upon notice by the judicial hearing officer, defense counsel and the Agency prosecutors.

Stays of driver license suspensions and revocations must be requested by an ancillary order to show cause in the Appellate Term which must be renewed by order to show cause, every 90 days upon good cause as per Vehicle and Traffic Law §1808(a).

A delay of the sentence of the fines and incarceration must also be the subject of an ancillary order to show cause CPL §460.50 which must be renewed every 120 days upon good cause.

The order to show cause should combine both requests for relief and be diaried for approximately 60 days for a follow-up order to show cause.

MISCELLANEOUS MENTIONS OF IMPORTANCE

§510-3 driver license suspensions for felony and misdemeanor drug convictions under Articles §220-221 of the Penal Law HAVE BEEN REPEALED.

The move over for stopped emergency vehicles law §1144-a is a two-point offense. Also includes stopped hazard vehicles, first responders, ambulances. If you see flashing lights, move over if it can be done safely.

This offense is frequently miscoded as a three-point violation for failure to yield right of way to emergency vehicle under §1144(a).

IID EMPLOYER VEHICLE EXCEPTION

8. Employer vehicle. Notwithstanding the provisions of subdivision one and paragraph (d) of subdivision nine of this section, if a person is required to operate a motor vehicle owned by said person's employer in the course and scope of his or her employment, the person may operate that vehicle without installation of an approved ignition interlock device only in the course and scope of such employment and only if the employer has been notified that the person's driving privilege has been restricted under the provisions of this article or the penal law and the person whose privilege has been so restricted has provided the court and probation department with written documentation indicating the employer has knowledge of the restriction imposed and has granted permission for the person to operate the employer's vehicle without the device only for business purposes. The person shall notify the court and the probation department of his or her intention to so operate the employer's vehicle. A motor vehicle owned by a business entity which business entity is all or partly owned or controlled by a person otherwise subject to the provisions of this article or the penal law is not a motor vehicle owned by the employer for purposes of the exemption provided in this subdivision. The provisions of this subdivision shall apply only to the operation of such vehicle in the scope of such employment.

MANDATORY IGNITION INTERLOCK DEVICE

Not mandated for Interim Probation CPL§390.30, Penal Law§ 65.10. Please see Ignition Interlock Conditions of Probation/Conditional Discharge and other related IID forms Annexed herein as **Exhibit F**.

Applies even if client is not granted to the ability to obtain and possess a post-conviction or post-revocation conditional license/privilege by terms and conditions of probation.

Suffolk County Department of Probation is the designated monitor for the ignition interlock program.

Which vehicles? Owned or operated by client.

Probation to determine which vehicles must have the device. May be estopped from denying operation of non-owned vehicle operated at time of arrest.

Must be installed within 10 business days of sentence or release from incarceration. Probation is to be furnished proof of installation within 3 business days.

Client doesn't own or operate a vehicle. May be exempted by acceptable letter/affidavit to Probation or even an attorney's letter which states "client has represented to their counsel"

Minimum term is twelve months or during the period of license revocation or up to discharge from probation or expiration of conditional discharge

COST to be paid by defendant

Installation is about \$200 with monthly service charges of about \$100.

The list of approved providers and fee schedules is available in Court and is subject to change

Only the sentencing judge can determine if the vendor must absorb the cost due to financial inability to pay.

The financial disclosure form is available in Court.

EMPLOYER'S VEHICLE EXCEPTION §1198(8)

Client must notify court/probation of intent to operate employer's vehicle within the scope of employment/business purposes only. Need written permission from employer and must be carried with client. Employer must acknowledge that the defendant has a conditional license and allows operation of the vehicle within the scope of employment without the ignition interlock. Please see Ignition Interlock Acknowledgement Form Employer Annexed as **Exhibit G**.

New Class of IID Crimes- Circumvention, Tampering, and misusing of IID and all are Class A misdemeanors.

Out of State issues-

When sentence of probation is transferable to home state, the conditions go with it.

Where probation is not transferable a CD is the sentence. IID is yet to be resolved.

How does it work? Suffolk County has required Class III with low light cameras to verify compliance. Nassau County is working on implementation of real time GPS.

Must exhale into device every 15 minutes or car lights flash and dim. Must pull over to do so.

§1193(10) DMV can correct any error by sentencing court to impose the period of suspension or revocation as required by law.

THE MEANEST NON-DWI TRAFFIC MISDEMEANORS BY REQUEST

LEAVING SCENE OF AN INCIDENT WITHOUT REPORTING-PERSONAL INJURY §600(2) - AND RECKLESS DRIVING §1212 NO RESTRICTED-USE LICENSE, UNAUTHORIZED SPEED CONTEST §1182 MANDATORY MINIMUM 6 MONTH REVOCATION FOR FIRST OFFENSE NO ELIGIBILITY FOR RESTRICTED-USE LICENSE

There is a mandatory revocation of a minimum of six months without eligibility for a restricted use license for §600(2) 15 NYCRR Part §135.7(a) (2). The key word is minimum.

§1212 CONVICTION FOR RECKLESS DRIVING: LICENSE REVOCATION NOT MANDATORY, BUT PRESENTS A SERIOUS RISK TO YOUR CLIENT OF LOSS OF LICENSE WITHOUT ELIGIBILITY FOR A RESTRICTED-USE LICENSE. CLIENT SHOULD BE SO ADVISED.

The collateral consequences of a conviction for reckless driving are a misdemeanor or criminal record, five (5) moving violation points as mandated by 15 NYCRR Part§131(4)(i) and as an unclassified misdemeanor as per Penal Law §65.00 (3)(d) a fine of \$100 up to \$300, sentence of probation for of up to 1 year and up to 30 days incarceration for a first offense within 18 months, a fine of \$100 to \$525 and up to 90 days on a second offense and 3 years probation, and \$100 to \$1125, 3 years probation and up to 180 days on a third offense.

There are several significant trap doors which defense counsel should be able to advise their client regarding possible license sanctions.

Vehicle & Traffic Law §510 or §1212 does not provide a mandatory revocation or suspension but conviction of a violation of §1212 may result in license sanctions.

Should consult with immigration counsel prior to disposition if representing a non-citizen.

Your client will be subject to a mandatory 60-day driver license suspension if the offense is committed during the probationary license period under §510-b (1)(2) within 6 months of passing your road test for license restoration following a revocation even if served with a conditional or restricted license.

Reckless driving §1212 is also defined as a serious traffic violation under §510-c (4) if committed by the holder of a Class DJ or MJ license or permit will be subject to a mandatory sixty-day license or permit suspension.

Should your client commit a reckless driving offense within six months of full license restoration for a probationary license suspension, the sanction will be a minimum six-month revocation for Class D license holders' §510-b (2) and a 60-day revocation of a Class DJ or MJ license or permit as per §510-c (1) (b)

Should your client be convicted of two other misdemeanors or speeds within

the eighteen-month period of the date of offense of the reckless driving case, it will trigger a mandatory revocation under Vehicle & Traffic Law §510(2)(a)(v). Your client will be deprived of the safety net of a restricted-use license or privilege. A revocation for reckless driving will result in a denial of an application for the 4 years preceding application for a restricted-use license for work, school and other purposes under §530(2) and 15 NYCRR Part §135.7(2).

A third reckless driving conviction in 18 months will result in a mandatory minimum 6-month revocation of the driver's license. A client in this situation will probably find the licensing consequences as the least of their problems.

Your client could be subject to a §510 Safety Hearing convened by the Department of Motor Vehicles by way of an administrative hearing to be held by a remote computer audio link §510(3) for the gross negligence of operating a motor vehicle or motorcycle in a manner of reckless disregard for the life or property of others. My office has had no feedback from safety hearings as a result of convictions for reckless driving which means the DMV is likely imposing a mandatory revocation. The Department of Motor Vehicles could impose a 31-day suspension if the five points will put your client over the 11-point limit for 18 months as per 15 NYCRR Part §131.4(c) (1). Your client will probably fare better on a persistent violation or points suspension than an individual hearing on the conviction. The administrative law judge will convene the hearing and investigate the particular conviction. The rules for these particular hearings are governed by 15 NYCRR Part §127. The administrative law judge could impose a discretionary license suspension or revocation based upon a review of the overall facts and circumstances.

AGGRAVATED DWAI §1192-2(a)

Aggravated DWI is defined as the Blood Alcohol level of .18% or more, the Legislature also restricts plea bargaining policies to plead to §2-a(2) or (3) and no other disposition is authorized unless of course the District Attorney determines it is not warranted and the court agrees. Anyone convicted of an offense will be required to attend the Drinking Driver Program although a requirement may be waived upon the application of the District Attorney if a defendant demonstrated that they have been required to enter and complete an alcohol and drug program.

The penalties for a violation of §1192 2-a as a misdemeanor are punishable by a fine of \$1,000 up to \$2,500 and up to a year a minimum license revocation of one year enhanced to 18 months with prior misdemeanor convictions within 10 years of §1192 offenses. A conviction for §2-a or §4(a) will, of course, serve as a predicate for a felony prosecution within ten years of the date of conviction.

Your client may not be granted a conditional license during the minimum one-year revocation depending upon the conditions of probation and the sentencing Judge until granted a POST revocation conditional license or PRCL (“Perkle”) with the interlock device installed on their vehicle.

There are stricter penalties for aggravated DWI when operating a taxicab or livery and is carrying a passenger for compensation or a truck with gross vehicle weighing more than 18,000 lbs. and not more than 26,000 lbs. but not a commercial vehicle shall be a Class E Felony under §1192(5)(d). A violation of subdivision 2(a) of aggravated DWI operating a commercial motor vehicle or any motor vehicle that is required to be registered under Schedule F of subdivision 7 of §401 is also a Class E Felony. A violation of aggravated DWI and operating a school bus at least one student passenger is a Class D Felony. A violation of 2(a) of operating a motor vehicle more than 18,000 lbs. with flammable gas, radioactive materials or explosives is a Class D Felony.

§1192-4a DWAI OR DWI WITH ANY DRUGS OR DRUGS IN COMBINATION WITH

§1192-4a is driving while ability impaired by drugs to the combined influence of drugs or of alcohol or any drug or drugs. Penalties same for Regular §1192 (2)(3)(4) A motion challenging the sufficiency of the misdemeanor information charging this offense failed in People v. Richard Schell, 18 Misc3d 972,849 N.Y.S.2d 882(2008 Slip Op 28027)

§1198-a MANDATORY SCREENING AND ASSESSMENT SUBSTANCE ABUSE ASSESSMENT BY OASAS

§1198-a details the criteria for special procedures disposition alcohol and substance abuse assessment. When the assessment is required, your client has to go to an Office of Alcohol and Substance Abuse Services (OASAS) Agency for anyone charged with less than .15 for a first offense is mandatory screening or a chemical test refusal. Upon arraignment or discretion of the court prior to sentencing, mandatory assessment formal

Alcohol Substance Abuse by an OASAS Agency. Please see Suffolk County list of approved outpatient providers.
https://oasas.ny.gov/providerdirectory/index.cfm#search_results.

Mandatory assessment as warranted by results of screening, a person with priors within 5 years or .15% BAC (blood alcohol content) or more.

BASIC DWI AND REFUSAL CIVIL PENALTIES AND SURCHARGES AND CRIME VICTIMS' ASSISTANCE CHARGES.

The civil penalty is \$500 with a minimum one-year revocation for a Chemical Test Refusal for a first offense and \$750 for subsequent refusal or with a prior offense within five years unless Zero Tolerance §1192-a or §1194-a(3) was the first offense.

DWAI surcharge \$255

DWI misdemeanor \$395

DWI/VTL Felony \$520

THE REDUCED ROLE OF RELIEF FROM DISABILITIES (RFD).

Relief cannot be used for commercial driver to obtain commercial privileges for a restricted-use or conditional license. Please see Application for Relief **Exhibit H**.

A system of permanent license revocations VTL §1193 defined as five years for anyone who has a combination of three or more DWI convictions with a Chemical Test Refusal finding of a four-year period. Also four more DWI convictions or Chemical Test Refusals within an eight-year period will also have their licenses permanently revoked under §1192(12) (a). Relief from Disabilities is helpful for waiver of five-year revocation and mandatory to waive 8-year revocation. No conditional or restricted license for 8-year permanent revocation.

Basically, limited to Class E taxicab, livery, coach, limousine, van, wheelchair accessible van or truck or tow truck

FOR PERMANENT REVOCATIONS

Incumbent upon defense counsel to make application for Relief from Disabilities upon the record in these cases, as it may be required for DMV to terminate the revocation although not binding on DMV see VTL §1193. Caveat: Part§136 has no role for Relief from Disabilities.

LICENSED PROFESSIONALS

When representing licensed professionals, defense counsel on the record should request RFD, as their clients may be subject to professional disciplinary actions as a result of the DWAI/DWI conviction. RFD for misdemeanor/felony must go through the Department of Probation with PSI. Probation may frequently recommend deferring approval pending completion of counseling or probation. Counsel can visit the website for Office of The Licensed Professionals @ www.opnysed.gov and should request copy of the professional license renewal application. Note: Be sure to advise any licensed professional to promptly report any conviction as required by their professional licensing authority

OUT OF STATE DWI COMMITTED BY A NEW YORK LICENSED DRIVER COLLATERAL CONSEQUENCE

REVOCATION OF LICENSE §1192 (8)

An out of state DWI or DWAI conviction will result in the collateral consequence of a revocation of client's New York State license. Out of State DWI conviction no longer automatically

Deemed a violation of §1192(1). Mirror image rule will apply, if a misdemeanor or felony in New Jersey will be treated the same in NYS. Minimum misdemeanor and felony revocation periods will apply and perhaps serve as a felony predicate.

Your client may be eligible for a conditional license and Drinking Driver Program.

AGGRAVATED UNLICENSED OPERATION 1ST CLASS E

FELONY

Driving in violation of permanent revocation of §1193 (2) (b) (12). .

IMPAIRED DRIVER PROGRAM (IDP)

§1192(10) will require nearly all defendants charged under §1192(2) (3) (4) (4-a), to attend the IDP or go for NYS OASAS (Office of Alcohol Substance Abuse Services) counseling/treatment. As a practical matter, most defendants are now sentenced to three years' probation on many first offenses which in Suffolk County mandates treatment by an OASAS licensed treatment provider or agency.

METHOD FOR REFERRAL FOR FOLLOW UP COUNSELING

INTRODUCTION

The likelihood that many first offenders will now be sentenced to court ordered probation has reduced, but not eliminated, the importance of discussing the referral for those cases which will be reduced to §1192(1) or sentenced on plea to misdemeanor, as charged, to a conditional discharge.

The mandatory screening and treatment referrals to an OASAS agency will encompass many first offenders, which will most likely be recommended or mandated for treatment.

The system for referral for counseling or referral phase was based upon a matrix using standardized screening tests. Reliance upon the Blood Alcohol Content Reading (BAC) is no longer the main criteria for referral. The current matrix system looks toward whether the participant in the program was a repeat DWI offender within the past ten years, whether the individual attended the Drinking Driver Program while in an intoxicated condition and admitting that they have an alcohol problem. The commission of a subsequent DWI offense while enrolled in the Program is the basis for expulsion.

The BAC is out as an emphasized diagnostic tool.

The Research Institute on Additional Self-Inventory (RIASI) Questionnaire has taken over for the BAC.

The referral procedure including second evaluations can be appealed

to the Program Director, to District Safety Office in Westbury, to the DMV Appeals Board, CPLR Article §78.

Expulsion for failure to attend classes or complete treatment or referral phase results in revocation of conditional license and reinstatement of underlying suspension or revocation. Violations of Conditional Discharge or Declarations of Delinquency will be issued by sentencing court.

Practice Tip: It is very important that at the initial interview an extensive amount of time be spent with your client, even a first offender where it is likely that the case will be reduced to lesser charge or sentenced to a conditional discharge on a plea to a misdemeanor, in accordance with plea bargaining guidelines or policies, to inform of the possibility of referral for follow up counseling at a considerable amount of time and expense while continued in conditional license status. Failure to complete all phases of the DDP could result in a violation of Conditional Discharge. Since more first offenders will be sentenced to probation, it will be less of an issue, but deserves discussion for those few charges being reduced to driving while ability impaired by alcohol §1192(1).

Should the court find that the suspension pending prosecution involves an extreme hardship; the court may grant a hardship privilege.

Extreme hardship is defined in Vehicle and Traffic Law §1193 as

“Inability to obtain alternative means of travel to or from the licensee’s employment, or to and from necessary medical treatment for the licensee or a member of licensee’s household, or licensee is a matriculating student enrolled in an accredited school, college or university and if such travel is necessary for the completion of an educational degree or certificate.”

The burden of proving extreme hardship rests upon your client who may present material and relevant evidence. Please note that it cannot be based solely upon the testimony of the licensee or your client. While an adjournment may be granted upon arraignment to present proof of extreme hardship, it is to be limited to three business days solely for this purpose.

Defense counsel should be prepared to have their client testify to the lack of alternative affordable means of transportation. *People v. Bridgman*, 163 Misc. 2d 118, 622 N.Y.S.2d 431 (Canandaigua City. Ct. 1995)

The court will require testimony in open court and a letter from their employer stating that public transportation schedules are incompatible or not available in order to maintain the services of a valued employee. The client should also be prepared to testify that they would be unable to obtain transportation from co-workers who live in the area. Your client should call the local taxicab company, LIRR, and Suffolk County Transit for schedules and fares to be able to tell the court that cab, train or bus fare is too expensive, inconvenient, and would constitute an extreme hardship.

It is also important that your client let you know their *exact* hours of employment, length of their commute, and the exact address of the place of employment. This is required for the Department of Motor Vehicles form that must be completed by the court, which is annexed as **Exhibit I**.

It is also good practice to have a spouse, significant other or family member available to testify that due to care giving obligations, employment, or both, they are unavailable to take your client to and from their place of employment. The formula for success is an employer letter, live witness, plus your client meeting the statutory requirements for a hardship privilege if the bench is so inclined to grant.

Extreme hardship privileges are designed for people who travel from point A to point B, such as factory or office workers who do not travel during the day incident to their employment. Over the road truck drivers and outside sales people are not specifically covered by the hardship privilege. Professionals who commute from one office to another may be afforded a hardship privilege to commute from home to one or more offices.

Caveat: The requirement for proof of “extreme hardship” remains discretionary with the court. The Court may require an employer’s letter as a condition of granting a hardship privilege. You should ask your client if the request for the letter, which results in the disclosure of the offense to an employer, would be damaging to their career prospects. This is especially true if they work for a large corporation. Your client should be prepared for the possibility that the application may be denied.

The self-employed when applying for a hardship privilege warrant a close examination of whether your client has sufficient income to afford alternate transportation and whether the hearing will open a can of worms regarding their income. Remember the prompt suspension is for 30 days a temporary sanction. You may also risk alienating The Court towards your client. Sometimes a strategic waiver is in the long-term best interest of your client.

Defense counsel must weigh all factors such as age, income, occupation and the underlying facts of the case against your client as to the prospects for success. You may wish to waive if your client makes more money than the Judge.

The next step is that the Department of Motor Vehicles will notify your client of eligibility for a pre-conviction conditional license, or PCL (pickle). The “prompt suspension” is for 30 days from arraignment, at which time your client may have been granted a hardship privilege, and may be eligible for a pre-conviction conditional license.

THE PRE-CONVICTION CONDITIONAL LICENSE §1193(7) (d)

You want to put your client in a “pickle or PCL”. You should advise your client by letter after the hardship hearing that they will be notified by the Department of Motor Vehicles in approximately two weeks of their eligibility for a pre-conviction conditional license that will afford broader privileges than the extreme hardship privilege.

The eligibility letter for a pre-conviction conditional license issued by the Department of Motor Vehicles will state that your client may apply 30 days from their arraignment.

Your client must appear at any local office of the Department of Motor Vehicles and make application for the pre-conviction conditional license by paying the \$85 fee that will be applied toward a post-conviction conditional license. Your client may be required to schedule an appointment online

The pre-conviction license will afford your client greater privileges than the hardship privilege. A holder of a Class A, B or C Commercial Drivers License (CDL) will NOT have their Class A, B or C CDL privileges restored,

since the adoption on 9/30/05 of federal law and regulations by the Motor Carrier Act of 1999, §49 U.S.C.A. 101 et seq. that bar recognition of any conditional license issued by any state.

The suspension pending prosecution will terminate upon the plea of guilty to a lesser-included alcohol related driving charge or most likely now, the charge itself. The completion of community service is required prior to a plea to a reduced charge in Suffolk County. Counsel should expect multiple court appearances will be necessary to resolve the case. The hardship hearing does not apply where your client is alleged to have refused to submit to a chemical test.

Pre-conviction conditional licenses have two further distinct advantages. A violation of the hardship privilege can be §511-2 and a PCL violation is a traffic infraction under §509-3,

The other good reason is that the surrender of a pre-conviction license is preferred by The Court to grant a twenty-day stay as prima facie evidence that your client has a valid license.

Practice Tip: Send your client an instructional letter after the Hardship Hearing concerning pre-convictional conditional license, community service completion and importance of faxing completed hours to your office and the American Red Cross, payment of fine, balance of your fee, and general court requirement of surrender of pre-conviction license for 20 day stay.

ZERO TOLERANCE LAW §1192-a. Counts towards multiple alcohol or drug-related driving offenses during the record retention period of three years. During retention period will count toward “three strikes” rule under Part §136.

ZERO Tolerance is administrative action only without criminal charges. Should your underage client be arrested, the zero tolerance does not apply.

The administrative finding of operation of a motor vehicle after having consumed alcohol by any driver less than 21 years of age with a blood alcohol concentration of between .02% and .07% as a first offense will mandate a six-month suspension of an operator’s license.

A person falling into this category is to be detained and not arrested. It is

strictly an administrative procedure. Please see DMV “plain language” brochure

At a recent lecture at the Suffolk County Criminal Bar Association conducted by Peter Gerstanzang, Esq. suggested that defense attorneys advise their clients in these situations at all times to submit to the test rather than refuse. The police are empowered to charge the client under §1194-a as a zero-tolerance refusal but, it appears to be more likely that a regular misdemeanor charge will be filed and put your client into the criminal justice system. Absent criminal charges, your client faces, at least, the loss of their license for one year without eligibility for a conditional license under §1194-a. Generally speaking, if the police officer suspects that your client has merely consumed alcohol and otherwise performs satisfactorily on standard field sobriety tests, it is likely that will be only charged under this section. It is also extremely unlikely that the client will call their parents, who in turn will contact you while they are being detained.

The regular rules for Impaired Driver Program eligibility criteria apply **except a person with a Zero Tolerance REFUSAL finding is NEVER eligible for conditional license and IDP.**

The Department of Motor Vehicles has somewhat liberalized the rules for these administrative hearings, which may give defense counsel a greater opportunity to have these dismissed for non-appearance or failure to meet all statutory elements. Please see 15 NYCRR Part §127, which incorporates by reference the Traffic Violations Bureau rules (15 NYCRR Part §124) that govern conduct of the hearing. These hearings are also conducted audio only telephone.

A first offense §1192-a will result in a six-month suspension of operator’s license and will be eligible for a conditional license.

A second or subsequent offense can lead to the revocation of a driver’s license for a minimum of one year or until the driver reaches age 21, which ever is longer.

A low reading of .03% will not result in an automatic dismissal when arguing the degree of accuracy of the breath-testing instrument. Counsel was confronted with 2 police officers certified as “breath” technicians at a hearing in Nassau County.

§1192-a is within the exclusive jurisdiction of DMV administrative process

People v. Pesantes, 10 Misc. 3rd 676, 809 N.Y.S. 2d 859 (2005). The New York County case allowed the prosecution of *other* charges arising out of this incident.

Practice Tip: The underlying summonses will ordinarily be returnable at Suffolk TPVA or a local town/village court. Be sure address the violations and if not retained to defend the charges, it should be spelled out in your retainer agreement.

ZERO TOLERANCE PENALTIES

<http://www.nydmv.state.ny.us/broch/c39.htm>

The penalties are a SIX-MONTH license suspension, \$100 license reapplication fee, and \$125 civil penalty for a first offense. Second and subsequent offenses will result in a minimum revocation period of one year, or until age 21, whichever is longer with the same civil penalties.

A person under 21 whom refuses to submit to a chemical test can be charged under §1192(3) and will be suspended pending a hearing.

Should the chemical test refusal hearing be held and result in a finding against your client, a minimum revocation of one year would be in place.

The rules for the hearing are somewhat different and are set forth in §1194-a. A negative inference can be drawn from your client remaining silent.

The Impaired Driver Program eligibility rules apply, including to have participated in the program within the previous 5-year rule shall serve as a disqualifying factor.

The finding is removed from the driving record after 3 years, or when the driver reaches age 21, whichever is longer.

§1194-a CHEMICAL TEST REFUSAL HEARING ZERO TOLERANCE

ZERO TOLERANCE REFUSAL §1194-a

Distinguishing factors: No criminal charge of §1192 is filed. There is no prompt suspension of license pending a hearing. Client is **NOT eligible for a conditional license to serve the minimum period of a mandatory one-year revocation, therefore must serve a minimum of one year without a license.**

The regular rules apply of chemical test/safety hearing of 15 NYCRR Part §127. The issues to focus upon is whether the police officer had reasonable grounds for the traffic stop and was the client given sufficient warning in clear and unequivocal language of the consequences of the refusal. The administrative law judge may draw a negative inference to be drawn from respondent exercising right not to testify.

The hearing will be to determine 7 basic issues: (1) if the chemical test was properly offered; (2) did such person operate the motor vehicle; (3) was there a valid request to submit to the chemical test by the police officer in accordance with provisions of §1194; (4) was such person less than 21 years of age at the time of operation of motor vehicle; (5) was the chemical test properly administered in accordance with §1195; (6) did the test find that such person had driven after consuming alcohol as defined in §1192 of this article; (7) did the police officer make a lawful stop.

Please note that a negative inference shall NOT be drawn from the operator exercising the right not to testify, unlike zero tolerance with a refusal. The Administrative Law Judge is entitled to dismiss the proceeding in the event the police officer fails to appear. §1194-a (2) (vi) (c).

The operator is entitled to request an adjournment of this hearing. A second or subsequent request will result in a suspension of the operator's license or privilege at the time of the hearing. §1194-a (2) (vi) (c).

Regular Refusals

Practice Tip: When the refusal hearing is adjourned and the criminal case is concluded by plea, decision or verdict before the refusal hearing is rescheduled, some thought must be given to waiving the hearing approximately 20 days after the disposition. A signed original waiver should be obtained from your client on the date of the disposition of the criminal case and diarized plus 20 days. A letter with original, completed Waiver of Hearing with the case number affixed and Notice of Hearing should be sent to the DMV Division of Safety and Business Hearings 6 Empire State Plaza, Albany, NY 12228.

Caveat-may not wish to waive if client is convicted of a reduced charge and the license or privilege is only suspended. Definitely not waive if the underlying criminal charge was dismissed or your client was acquitted.

The Department of Motor Vehicles will require your client to serve the one-year period of revocation with a conditional license, if eligible, for their refusal.

Should defense counsel choose to submit their client's signed written waiver to DMV immediately after your client has received a conditional use license, you can reduce the length of time the license may be kept conditional. Please note, that the hearing can be decided against your client even if the officer fails to show as long as the required Report of Refusal is complete on its face. Counsel is entitled to challenge the document for any critical omissions or mistakes. See *Gray vs. Adducci*, 73 N.Y.2d 741, 536 N.Y.S.2d, 40, 532 N.E.2d 1268 (1988). *Gray* has NOT been applied to zero tolerance refusals of §1194-a.

Refusal Hearing or other DMV Safety Hearing THE LIMITATION OF CROSS –EXAMINATION BY DEFENSE COUNSEL

The ALJ has wide discretion to limit cross-examination, but not unfettered and scope of inquiry as per 15 NYCRR Part§127.4(b).

REFUSAL AND THE COMMERCIAL DRIVER OPERATING ANY VEHICLE

The commercial driver is in a particularly disadvantaged situation in that a refusal to submit to the chemical test *operating any vehicle* will result in a *mandatory minimum 18 month revocation* of their CDL VTL§ 1194(2) (d) (1) (c) regardless of a conviction on the underlying criminal charge, and *effective 9/30/05, they will not be eligible for a pre conviction license in CDL class or post conviction Relief From Disabilities.*

You must speak to your client and make a judgment as to the impact of a possible misdemeanor conviction in the event your client has a reading in excess of the blood alcohol level cutoff in your county.

A misdemeanor conviction would serve as a predicate for a felony prosecution, and this must be weighed against the driver's ability to withstand the deprivation of their license for an extended period of time during the disposition of the case.

Your client is not eligible for a pre-conviction license if they fail to meet the requirements of §1196 or can be suspended pending prosecution

§510(3).

Two chemical test refusals while operating **ANY** vehicle will result in a permanent CDL revocation. 1194(2) (d) (1) (c)

DWI AND THE COMMERCIAL DRIVER'S LICENSE RELIEF FROM DISABILITIES (RFD) R.I.P for CDL CLASS A & B drivers as a result of adoption of federal legislation, RFD except in certain instances for Class E operators.

§1196(7) (g) amended effective not withstanding any certificate of relief a conditional license shall not be valid to operate a commercial motor vehicle. A change in federal law rules and regulations has ended the use of RFD.

ENHANCED PENALTIES FOR CDL DRIVERS

Leaving the scene personal injury accident §600(2) or property damage incident without reporting §600(1)
§1192(1), §1192(2) §1192(4)

Felony involved the use of any vehicle inside or outside of NYS
Operation of a CMV while suspended or revoked or cancelled
Refusal to submit to the chemical test *operating any vehicle* will result in a *mandatory minimum 18-month revocation* of their CDL

Subsequent repeat offenses result in permanent CDL revocation of 10 years
Please see DMV Memo dated 9/30/05 annexed as **Exhibit J.**
I know its 14 years old, but it is still relevant.

DWI MISDEMEANOR CONVICTIONS- ENHANCED SENTENCING

§1193 1-A REQUIRES A SENTENCE OF 5 DAYS
INCARCERATION OR 30 DAYS OF COMMUNITY SERVICE FOR
§1192(2) (3) CONVICTED ONCE FOR VTL§1192(2) (3) WITHIN FIVE
YEARS OF INSTANT OFFENSE.
THE THIRD TIME AROUND WITHIN FIVE YEARS REQUIRES 10
DAYS OR 60-DAY COMMUNITY SERVICE.

DWI Lifetime License Revocation-not the same as permanent revocation

When twice convicted of misdemeanor or felony §1192 with a motor vehicle accident that resulted in physical injury as defined in Penal Law §10.00 even if the defendant is the only party injured.

The denial of license application is subject to an administrative appeal and judicial review. A recent appeal resulted in a determination that DMV was to hold a Safety Hearing to determine if sufficient proof of physical injury to constitute the “two strikes” rule.

OUT OF STATE LICENSEES

Client is eligible for hardship privilege and pre-conviction conditional privilege. Client must submit a copy of a certified abstract of driving record from home state to DMV. It is a good idea to submit the pre-conviction conditional privilege attachment as prima facie evidence of a valid New York State driving privilege and eligibility for a post conviction conditional privilege.

An out-of-state driver convicted of a DWI in New York faces likely reciprocal action in home state of license. Best practice is to contact home state licensing authority to determine ramifications of plea and sentence in local criminal court. You may want to visit the website of the home state licensing authority to download the information or find the best telephone contact number. It is recommended “bookmark” these sites in “favorite places” for quick reference.

Suspension pending prosecution now results in the home state of licensing being notified at an earlier date of the action taken by New York State rather than after the disposition of the charge.

Your client should be advised that action by the home state of licensing would likely be forthcoming.

IMPAIRED CONVICTION AS A MISDEMEANOR

Impaired conviction after two previous convictions of any subdivision of §1192 within 10 years becomes a misdemeanor. Watch for special pleading requirements.

CONDITIONAL/RESTRICTED USE LICENSES

- a) Distinguished
- b) Eligibility

- c) Violations committed while in possession of a conditional or restricted use license
- d) Virtually all violations committed while in conditional/restricted use status are serious and will result in a mandatory revocation if your client is still in conditional/restricted use status at the time of conviction.

AGGRAVATED UNLICENSED OPERATION VARIOUS DEGREES

When your client is charged with §511(2) prior to November 1, 1993 and after November 30, 1985, a plea to a §511(1) (a) will be a traffic infraction from October 1, 1985 to October 31, 1993. Therefore, for a client charged with a §511(2) prior to November 1, 1993, and after November 30, 1985, a plea to a §511.1(a) will result in a violation conviction, and therefore is an acceptable disposition. Always seek a reduction to unlicensed operator (§509-1), or facilitating aggravated unlicensed operation in the third degree (§511-a (1) as traffic infractions. Collateral consequences of reduced traffic infraction pleas are: increased insurance premiums, possible exposure to DMV Safety Hearings and **adverse impact on application for license or privileges.**

STRATEGIES FOR REPRESENTING REVOKED DRIVERS

Defense counsel should seek, where possible, to have your client's revocation cleared prior to disposition of the pending charges. You can break the cycle of repeat offenses. It is a service not only to your client and their family, but to society as well. There is little danger we will put ourselves out of business. You will have a client who is a friend for life.

The immediate question arises can this license be restored in a reasonable time or is the client "terminal" or "DNR"-**Do Not Relicense?"**

Major hurdles include: unsatisfied judgments for property damage as a result of uninsured motor vehicle accidents, lengthy lapse of insurance coverage suspensions, child support or New York State tax arrears suspensions, satisfactory evidence of alcohol evaluation/rehabilitation, mandatory minimum waiting periods of revocation, substantial assessed fines and civil penalties or numerous unanswered summonses involving aggravated unlicensed operation, uninsured operation, and speeding.

"Triage" should be done to avoid spinning your wheels while your client racks up more violations. This can be a sure invitation to guest status in Riverhead. A "no jail promise" in those cases where your client can't or

won't clear the revocation should be considered. Try to plead to one incident or the oldest incidents to enhance eventual approval of driver's license application. Remember the "three-year rule".

When taking dispositions for newly re-licensed clients, defense counsel should seek to avoid, where possible, pleas of guilty to traffic misdemeanors, speeds (§1180) and operating without insurance (§319-1). The best plea is often to §511-a (1) facilitating aggravated unlicensed operation of a motor vehicle in the third degree as a violation and not a crime. Caveat: Consult with immigration counsel if adverse impact on non-citizen.

Clients with 3 or more alcohol/drug related driving incidents on their record will be ineligible for at least 5 years in addition to the statutory revocation period and may be subject to permanent revocation.

COLLATERAL CONSEQUENCES MISDEMEANOR CONVICTION OF §511

Client may suffer possible jeopardy to non-citizen if multiple misdemeanor convictions. Always consult with a colleague with experience in immigration matters. Client who is a U. S. citizen will have answer yes on credit applications, juror questionnaires, and license renewal and employment applications

Three Vehicle and Traffic Law misdemeanors committed within an 18 month period is a mandatory revocation or VTL misdemeanors in combination with two other speeds or two VTL misdemeanors and a speed will result in a mandatory minimum 6 month revocation VTL§510(2)(iv).

A revocation involving a §511 conviction carries with it the further jeopardy that the minimum period of revocation may be extended beyond 6 months as the Department of Motor Vehicles is entitled to review the driving record for the past three years in accordance with the Commissioner's Rules and Regulations 15 NYCRR PART §136.1 The DMV is entitled to consider all incidents, such as reportable motor vehicle accidents, driving while suspended or revoked, whether or not they result in convictions for those offenses committed within three years from the date of application.

Note: A Department of Motor Vehicles Safety Hearing is possible when your client is convicted of aggravated unlicensed operation, facilitating aggravated unlicensed operation or unlicensed violation or any VTL offense in the District Court or other jurisdiction outside of The Department Motor Vehicles Traffic Violations Bureau. A hearing will determine whether any further action should be taken against your client. Experience has shown that these hearings are not convened in every case and your client is better served with a violation conviction whenever possible.

PART §136 DENIALS OF LICENSE APPLICATION NON-ALCOHOL/DRUG RELATED

Experience has shown that with more than two incidents of operating a motor vehicle while suspended within a three-year period from the date of application, it is extremely unlikely that their license application will be approved. The only cure is the passage of time, which will allow the Department of Motor Vehicles to no longer consider certain portions of their driving record. The Department of Motor Vehicles scores or weighs negative units for safety factors as defined in 15 NYCRR Part §136.1 The denial of application letter is commonly called a “Part §136 letter” that is annexed as **Exhibit K**.

The administrative appeals process is protracted and the Department of Motor Vehicles seems reluctant to find unusual, extenuating and compelling circumstances as the success rate is significantly less than 1%. The appeal starts with Driver Improvement, DMV Appeals Board and CPLR Article §78.

An alternative to an administrative appeal of the denial is to seek to reopen convictions had in courts of law.

All TVB convictions are not subject to appeal after thirty days unless allegations of criminal impersonation and unauthorized use of license and registration can be proved to the satisfaction of the Commissioner.

THINK Y.O. WHERE APPLICABLE AGES 16-LESS THAN 19 CPL §720.10

If your client is to be convicted of any VTL misdemeanor (for example; §306(e), §340, §355, §392§511, §512, §600(2) §1182§§1212, §1192(2), (2-a) (3), (4) (4-a) Y. O. requires PSI.

HOW TO WIN A RADAR OR LASER SPEEDING TRIAL

Answer: Keep trying cases and hope the officer fails to appear which is unlikely at SCTPVA or your keen listening skills and powers of persuasion will prevail. Read *People v. Olsen*, 22 N.Y. 2d 230, 292 N.Y.S. 2d 420 (1968) Visual or independent speed estimate testimony by a properly qualified police officer is sufficient in and of itself to sustain a conviction for speeding. Thoroughly review the summons for any possible defects.

Determine the background of the officer who issued the violation. Listening, concentration and preparation are essential skills.

Note: the evidentiary standard at SCTPVA is proof beyond a reasonable doubt.

I will use a trial note notebook of a 3-ring loose-leaf binder with copies of the uniform traffic tickets. An atlas page or map of the location of the incident supporting depositions, Agency notices, client's driving record and loose-leaf sheets with my notes as to the preliminary issues, if any to be raised, key elements of proof, anticipated issues upon cross-examination, summation and sentencing.

This allows ready reference and allows defense counsel to avoid rifling through a file folder which can be distracting.

DEFENDING UNOBSERVED MOVING VIOLATION INFRACTIONS INVOLVING MOTOR VEHICLE ACCIDENTS

When defending unobserved infractions the defense lawyer should be prepared to cite *Crawford v. Washington*, 541 US 36, 124 SC 1354, 154 L.Ed. 2d, 170, (2004) and *People v. Pacer*, 6 N.Y. 3d 504, 814 N.Y.S.2d 575, (2006 Slip Op. 02291) for the principle that the defendants, are entitled to confront and cross examine the witnesses against them.

A seminal case is *People v. Genovese*, 156 Misc. 2d 569, 593 N.Y.S.2d 925 (Town of Mendon 1992) where a Town Justice declined to find the defendant guilty of a violation of §1160(a) or improper right turn because the officer did not witness the violation.

There is contrary authority of *People v. Boback*, 23 N.Y. 2d 189, 295 N.Y.S.2d 912. (1968) That officers can issue summonses for unobserved

infractions based upon information and belief can be distinguished. The decision upholding the conviction relied upon the availability of discovery devices to defendants such as bills of particulars. The Traffic Violations Bureau does not permit supporting depositions or bills of particulars under 15 NYCCR Part §124. The decisions predate the advent of administrative adjudication of traffic infractions pursuant to §225 et seq.

Farkas v. State, 96 Misc. 2d. 784, 409 N.Y.S.2d 696 (Ct. Cl. 1978) was a malicious prosecution suit arising out the issuance of a uniform traffic ticket issued outside the administrative adjudication system in a local town or village justice court governed by the Criminal Procedure Law.

While it is far from certain that defense counsel may be successful with these points of view at least at the hearing stage, you will present a well thought out professional and researched argument.

Practice Tip: Always try to obtain a copy of the police accident report MV-104A to be able to anticipate officer's testimony which will be based mostly upon this document.

The police report may contain the witness statements or even your client's signed statement which served as the basis for the charges.

Defense counsel should also request a copy of the police accident report once retained when defending charges of §600(1) leaving the scene of a property damage incident.

TRAFFIC VIOLATIONS BUREAU APPEALS

You must use Appeals Form AA-33. <https://dmv.ny.gov/forms/aa33.pdf> Form can now be partially completed on line in PDF form.

You must send in \$10 per conviction being appealed and you will be sent a single notice advising you that you have 30 days as measured by a United States Postal Service postmark to submit the \$50 transcript deposit to the provider. Failure to do so within 30 days may result in the transcript not being part of the record and the early dismissal of your appeal.

The routine granting of extensions of time to submit final arguments from the 30 days from the date of the transcript cover letter is being discouraged.

The new and improved transcript deposit letter limits submissions of

insurance coverage letters to within 30 days of date of letter. You client must submit a signed letter as to why the documentation was not reasonably available on the date of hearing.

Practice Tip: The Appeals Board requires you to set forth briefly the basis for the appeal and request for Delay of Order. Please be sure to check the box for stays/delays of order on the Appeals Form Caveat: initial argument should be as general as possible lest the transcript does not support your contentions. When the client was convicted pro se, couch your arguments in terms of "client has represented to counsel". When appealing case that you tried, it is best to phrase as to the best of counsel's recollection. Recollection can be faulty and embarrassing.

Always order the transcript in order to preserve the opportunity to challenge the underlying conviction as well as the penalty in any administrative appeal. Failure to produce the transcript, a very event, could result in the dismissal of the charge or a new hearing.

The issue of relative credibility of witnesses is in the vast majority of cases solely within the province ALJ and had the best opportunity, in theory, to observe conflicting witnesses in person review to determine credibility issues. Credibility issues are left strictly up to ALJ who heard case and had the best opportunity to observe conflicting witnesses in person. Matter of Luzon v. State Dept. of Motor Vehicles Appeals Bd., 209 A.D.2d 618, 619 N.Y.S.2d 654 (1994), Matter of Molina v. Hassidim, 109 A.D.2d 783, 486 N.Y.S. 2d 91(2 Dept 1985) (Matter of Berenhaus v. Ward, 70 N.Y.2d 436, 522 N.Y.S.2d 478 (1987

Very important to try make your clients understand this concept. *You can still argue on appeal that the testimony on the record does not support the conclusions and findings.*

Possible winning administrative appeal issues are jurisdictional and legal arguments. Counsel had two appeals turned down on cases, which were squarely within the incorporated Village of Lake Grove. Better strategy is to **consider** a request for a transfer to village justice court and have your retainer agreement provide for an additional fee.

Should the transcript be unable to be produced, the case may be dismissed unless the violation is classified as a required appearance or serious in nature as defined by 15 NYCRR Part §123.5. The more serious cases are remanded

for a new hearing.

You can request from the Appeals Board a copy of the case analysis. This will provide a window into their reasoning and guide you in future appeals for a preview of the Department of Motor Vehicles position on any prospective Article§78 action.

SAFETY HEARING APPEALS

Appeal period is within (60) sixty days of the date of penalty order as per VTL§261(2). Please see Appeals Form AA-33A, <https://dmv.ny.gov/forms/aa33a.pdf> which can be partially completed online. **The best course of action is to always order the transcript unless** you have prepared and the client signed a detailed waiver allowing you to only contest the penalty. You always want to preserve your client's rights to further challenge the finding and the discretionary or permissive penalty.

This applies to Zero Tolerance, Refusals, repair/inspection/dealer hearings, fatal accidents, Part§132 etc. The same rules regarding relative credibility of witnesses as TVB appeals. Counsel will argue substantial evidence but stands the best chance of success on the issue of excessive punishment. Please see text under CPLR Article §78 below.

When the administrative appeal is denied, send your client an “exit letter” advising of right to judicial review and emphasize the four-month limitation period, and that you will not undertake representation unless retained pursuant to a separate written fee agreement.

CPLR ARTICLE §78-Judicial Review

An Article §78 action must be commenced within four months of the date of letter of denial of an administrative appeal from the NYS DMV Appeals Board. Caveat: Some other administrative determinations may be governed by shorter periods of limitation.

Temporary Restraining Orders to be issued against DMV suspensions or revocations of driver's licenses or privileges or business licenses cannot be granted unless the Assistant Attorney General (AAG) consents in writing or Court approves after hearing on notice to AAG and appearance by an AAG at the hearing.

This proceeding has a narrow scope of review of substantial

evidence, and where applicable, excessive discretionary punishment that shock's one conscience.

Practice Tips: AAG will usually require counsel to ARGUE THE REQUEST FOR A STAY BEFORE A STATE SUPREME COURT JUDGE EVEN IF the client was granted Stay of Enforcement during administrative appeal. The issue is considered de novo.

You have to be prepared to convince the Court of the likelihood of success upon the merits.

Be sure to argue issue of substantial evidence in your brief, even if, you are only pinning your best hopes on contesting the question of an excessive discretionary punishment.

Set a realistic fee pursuant with a Letter of Engagement, if applicable and a detailed fee agreement and expect a substantial amount of disbursements.

The Supreme Court, Special Term, usually transfers all excessive punishment/substantial evidence questions to the Appellate Division CPLR §7804(g). Challenges to denials of license applications will not be transferred or if no hearing was held.

Important note: Counsel was required in a recent CPLR Article §78 action appear before a Supreme Court Justice to argue the transfer wherein

normally the attorney would only appear to argue the temporary restraining order and the case was transferred on papers.

Please note the Appellate Division, Second Department will routinely award the State statutory costs to be by client to the prevailing party, which usually is a minimum of approximately \$400. Your client is responsible. Please be sure to advise client at the outset and include this contingency in your detailed written fee agreement.

Experience has shown that it may difficult, but possible to reverse the appeals decision of the DMV Appeals Board on the issue of substantial evidence because so many of the elements of the officer's testimony are considered "credibility issues". Speeding convictions were upheld after judicial review: Neiman v. State Dept. of Motor Vehicles Appeals Board, 265 A. D. 2d 558, 697 N.Y.S. 2d 310, (2 Dept. 1999) DeOliveira v. New York State Dept. of Motor Vehicles, 706 N.Y.S. 2d 173, (2 Dept. 2000)

Mataragas v. New York State Department of Motor Vehicles, et al, 6 A.D. 3d 537, 774 N.Y.S.409 (2 Dept 2004), Koenigsberg v. State Of New York Department of Motor Vehicles Appeals Board, 8 A.D.3d 383, 777 N.Y.S. 2d 745 (2 Dept 2004), Clarke v. Martinez, 14 A.D.3d 612, 789 N.Y.S. 2d 207 (2d Dept 2005) Matter of Hall v. Swartz, 61 A.D. 3d 868, 877 N.Y.S.2d 410, (2 Dept.,2009), Matter of Kobel v. State of N.Y. Department of Motor Vehicles Appeals Board, 85 A.D.3rd 916(2 Dept. 2011) Colao v. New York State Dept. of Motor Vehicles Appeals Bd.,92 A.D.3d,939 N.Y.S.2d 49(1 Dept. 2012),Molinsky v. New York State Dept. of Motor Vehicles,105 A.D. 3d 960, 962 N.Y.S. 2d 710 (2 Dept. 2013), Forman v New York State Dept. of Motor Vehicles, 110 A.D.3d 1075, 973 N.Y.S. 2d 780 (2 Dept. 2013).

Koenigsberg, Clarke and Kobel made references to a laser device reading without addressing the question of whether laser is can be judicially recognized as reliable absent independent expert testimony. You may have more success on the issue of excessive discretionary punishment.

It was error to transfer Article §78 action to from Supreme Court Special Term to Appellate Division to determine the issue of vacatur of a plea of guilty. Matter of Yezek v. State of N.Y. Dept. of Motor Vehicles Appeals Board, 62 AD3 1017, 879 N.Y.S.2d 571, (2 Dept 2009).

COMMERCIAL DRIVER'S LICENSE NON-DWI OFFENSES

Is it a serious traffic violation? Please See Vehicle and Traffic Law §510-a (4).

Was your client operating a commercial motor vehicle (CMV) as defined by §501-a when the violation was allegedly committed? The electronic uniform traffic ticket or simplified information has a circle which may be filled in to indicate "CDL Veh".

The serious traffic violations are defined by VTL §510-a (4): (i) speeding 15 or more miles per hour over the limit, (ii) reckless driving, (iii) improper or erratic lane change, (iv) following too closely, (v) or relates to any traffic infraction other than parking, stopping and standing, and arises in connection with a fatal accident. Hand held mobile phone and portable electronic device violations

ADDITIONAL CATEGORIES OF SERIOUS CDL TRAFFIC VIOLATIONS

- 1) Operating a CMV without first obtaining as CDL.
- 2) Operating a CMV without a CDL in driver's possession, which is a dismissible charge prior to the return or court, dates, provided proof is filed with law enforcement AND the Court.
- 3) Operating a CMV without proper class/endorsement for specific CMV being operated or for passengers or type of cargo transported.

MANDATORY SUSPENSION OF COMMERCIAL DRIVERS' LICENSES §510-a (3)

Your client will suffer a mandatory suspension period of (sixty) 60 days for the conviction during any three-year period of two serious traffic violations in separate incidents.

Sixty days for a first violation of §1171 and §1176 involving railroad crossings. 120 days for a second and one-year for a third violation committed within a 3-year period.

One hundred and twenty days (120) for any three serious traffic violations in separate incidents.

Ninety days for operating in violation of an out-of-service order.

Practice Tip: When negotiating a disposition of a speeding or other charge while operating a commercial motor vehicle, where feasible, avoid §1129(a), §1128(a), §1180, speeding 15 or more over the limit. Try to use §1110(a) for two-point violation dispositions. Please see 15 NYCRR Part §131.3.

The DMV point system for moving violations and criteria for safety hearings for suspensions or revocations are set forth in 15 NYCRR Part §131.

When is a violation of §1110(a) not a two points violation? When it is

a HOV lane occupancy violation only between Exits 49 and 57 according to §131.3(7)(viii). This explains the “andorian” sign ‘HOV lane violation fine and/or points’. A plea of guilty to the no points offense will appear on the driving record.

Caveat: Treat as two-point offense and try to get dismissed or amended to §1202-b2

SUSPENSION OF LICENSE FOR BEING MORE THAN FOUR MONTHS BEHIND IN CHILD SUPPORT OBLIGATIONS
SUSPENSION OF LICENSE FOR BEING MORE THAN \$10,000 IN PAST DUE LIABILITIES ON STATE INCOME TAXES.

Delinquents will have 60 days to arrange payment.

Client fails to pay or make arrangements their license/privilege will be suspended until the debt is paid or a payment plan is established.

Your client may be eligible for a restricted-use license.

SUSPENSIONS OF LICENSE FOR CONVICTIONS OF VIOLATIONS OF THE ALCOHOLIC BEVERAGE CONTROL LAW §65-b (5)

ABC §65-b (5) Offenses for one under age of twenty-one years old purchase or attempt to purchase an alcoholic beverage through fraudulent means. The suspensions are mandatory if NYS license was used, otherwise discretionary with court. Suspensions range from three months to one year, or up to age 21, whichever is longer. Client may be eligible for restricted use license.

OTHER ASPECTS OF PROBATION

Interim Probation Criminal Procedure Law §390.30 (6) one-year Suffolk District Court those cases that prevents a reduction with community service. Can keep pre-conviction license. *Be sure to advise your client if rearrested while on Interim Probation, the new DWI will be prosecuted as a felony even though the sentencing has been adjourned for one year.*

Problem; if client revoked for a minimum of one year for a refusal to submit to a chemical test, consider being retained to file administrative appeal and request a stay that is discretionary. **IMPORTANT:** *Be sure to advise your client in writing to submit an application to Albany one month prior to expiration of minimum waiting period if the application for a stay is denied.* <http://www.nydmv.state.ny.us/forms/mv44.pdf>.

This will allow DMV in Albany to consider waiving the permit, 5 hour class and road test, which will speed, pardon the expression, your client's return of license by at least two months.

Client may be eligible to apply online. <http://dmv.ny.gov/tickets/restore-license-after-revocation> which accelerates approval

**SUFFOLK COUNTY CIVIL FORFEITURE LAW SUFFOLK
COUNTY CODE CHAPTER §420 ARTICLE IV**
<https://ecode360.com/14945224>

The key provisions require: prior misdemeanor VTL§1192(2) (3)(4) Navigation Law or VTL§1192-a conviction. Property not limited to motor vehicles or vessels.

County Attorney must commence forfeiture action within 180 days after the commission of the offense or property seizure and as defined by CPLR§ 304.

Early release is only available if court orders release in the interests of justice.

District Court will be the venue for a mandatory hearing of the probable cause and affirmative defenses. Please see annexed Notice of Hearing as **Exhibit L**.

County Attorney will prove probable cause on papers as business records CPLR §4518 rather than live testimony of arresting officer.

Affirmative Defenses by non-owner are lack of knowledge and consent for permissive use of the motor vehicle to be operated while under the influence. You must also plead hardship.

Inquiry will be made by County Attorney as to number of registered vehicles in household and to who registered, sets of ignition keys and their location and who is the de facto owner/principal operator.

Your client will be cross-examined as to who uses which vehicles for what purposes, and who has possession and control of the ignition key.

County Attorney is required to notify all victims of pending action.

Either side may appeal the finding by filing an appeal for judicial review of the administrative decision by CPLR Article §78. Be sure to have a separate written fee agreement.

You will appear before a JHO in First District Court or Riverhead

Hearing to determine whether the vehicle should be returned, or a bond or security posted for the return, or a restraining order against the property to bar its sale or transfer or use of an interlock device

Defense counsel should amend written fee agreement for defense of the criminal charge to provide for additional fee for conducting a legal impediment hearing/interest of justice/motion in criminal court and defense of civil forfeiture action in civil court.

County Attorney must prove the subject property is subject to forfeiture by clear and convincing evidence. Civil forfeiture action is to be brought in Supreme Court.

A prompt hearing will be scheduled upon notice to all titled, registrants on file w/NYSDMV.

Practice Tips: Bring your Notary stamp and obtain photo id and make and retain a copy of the document, when notarizing signatures on the Stipulation of Settlement, General Release and other dockets. Vehicles if released conditionally requiring installation of ignition interlock device, \$500 deposit prior to release and must be installed within one business day or deposit forfeited and vehicle resealed. If your case requires an interpreter, be sure to check in early and so inform the Part. Applies to §1212 charges and §509-1.
<http://www.co.suffolk.ny.us/legis/Resos2008/i1481-08.htm>,
<http://www.co.suffolk.ny.us/legis/Resos2007/i2101-07.htm>

VIOLATIONS OF CONDITIONAL DISCHARGE

Violations of Conditional Discharge are being issued for failure to attend/complete all phases of the Impaired Driver Program (IDP). To defend a failure to attend the key question is eligibility. Yes, even without eligibility for conditional license can be required to attend IDP. IDP eligibility is governed by §1196(4) whereas Conditional License eligibility is controlled by §1196(7).

Practice Tip: Advise client by "exit letter" that IDP is mandatory and failure to attend/complete will result in Violation of CD. Please amend retainer agreement to provide for additional fee for representation as post judgment proceeding.

**DMV WEBSITE-[HTTP://WWW.NYDMV.STATE.NY.US](http://www.nydmv.state.ny.us) OR
NYDMV.COM**

A wealth of information is available from your desktop. You can download forms from your computer. They are in alphabetical order and start with the Appeals Form for TVB.

Your clients can pay certain suspension termination fees, Driver Responsibility Assessments, TVB fines including suspension termination fees, and civil penalties as well as renew, in certain instances, license and registrations.

You may wish to consult with other states' websites as a preliminary investigative tool.

WEBCRIMS COURT APPEARANCE WEBSITE

You can confirm future scheduled court dates in District Court at www.courts.state.ny.us. Type in "webcrims" in search or click on e-courts and add to list of favorite places. Improved content allows counsel to click on docket number and obtain a display of the charges listed on the docket as it would appear on the court calendar. Caveat: Not 100% reliable if another individual has the same name. You can click on defendant detail to learn the date of the offense, if applicable and whether your client was the owner of the vehicle. Please note that only the year of birth is displayed. You can request e-mail alerts about your case. ***Y.O eligible dockets will not***

appear on webcrims. You can sign up for eTrak with email notifications, calendar and other updates.

“YOUNGER LAW” CLASS DJ OR JUNIOR LICENSES VTL§501(3)-GRADUATED LICENSING-VERY IMPORTANT VTL ISSUE IN SUFFOLK. <http://www.nydmv.state.ny.us/license.htm#drivingage>

Applies to newly licensed drivers under age 18 without completion of drivers' education class. Completion of driver's education upon attaining age 17, will allow conversion to class D. Client must make application for Class D by mail or appear at DMV unless MV-285, showing completion of Driver's Education course submitted to DMV examiner at time of road test, then DMV will automatically issue and mail Class D License.

Holder can drive only during limited hours for specified purposes of work and school during limited hours. The violation may also be committed during your client's six-month probationary license period. Conviction in combination with other probationary offense triggers mandatory sixty-day license suspension.

There are more stringent restrictions on new drivers starting with all Learners' Permits.

A new class of limited junior license has been created for those who pass their road test within six months of obtaining their permit.

All DJ/MJ licenses and permits, no more than two passengers under 21 unless accompanied by parent, guardian, or driving instructor except when immediate family members occupy the vehicle.

Supervising driver must be the only front seat passenger and must be a validly licensed person over 21.

All passengers riding with a DJ driver must wear seat belts or child safety seats.

SUSPENSIONS AND REVOCATIONS OF CLASS DJ/MJ LICENSES

AND PERMITS VTL §510-c

Is the offense a serious traffic violation? Defined as §600 (1) §601, (Leaving the scene of an incident without reporting) §1111 (red light), §1170 (railroad crossings) §1172 (stop sign) §1174 (school bus), §1180 more than ten miles over the limit, §1182 (unauthorized speed contest), §1229-c3a no seat belt use by a child under 16. §1225-c, improper cellphone use, §1225-d operate while using a portable electronic device.

Put on more serious footing than probationary licenses with sixty-day suspension for a serious traffic violation or any two violations. Also a minimum sixty day revocation if a serious traffic violation or other two offenses in combination committed after restoration of license for sixty day suspension while in possession of this class license/permit. Suspensions and revocation issued under this section are dead time towards 6-month waiting period for less limited DJ license.

Insurance Surcharges-Insurance Law§2335(6)

Clients should be advised that no point offenses of unlicensed/facilitating/unregistered convictions would result in substantial insurance surcharges. Try to bundle dispositions in to single offense with higher fine.

ACCIDENT REEXAMINATION-ELDER LAW §506

<http://www.nydmv.state.ny.us/license.htm#drivermed>

Any driver with three reportable accidents within six months may be re-examined.

25-65-year-old drivers with three accidents within 6-9 months will receive a questionnaire.

Under 25 and over 65 three accidents within 9 months will be reexamined.

Once designated for §506 unlikely they will be able pass a road test.

Who can report unsafe drivers with physical or mental conditions?

No anonymous e-mails, Internet reports, telephone or letter without your

name and signature.

Typically, police accident and physician reports may trigger §506 Traffic stops which give rise to a conclusion by the officer that the driver should be retested.

DRIVER RESPONSIBILITY ASSESSMENT FEE VTL§304(a)§1199
<http://www.nydmv.state.ny.us/drp.htm>

The accumulation of six or more moving violation points accumulated within an eighteen-month period as defined by the date of violation will result in a minimum \$300 license renewal surcharge @\$100 per year. The motorist will be charged and additional \$25 per point license or privilege renewal surcharge. Point/Insurance Reduction Program or generically a driver safety course can't be credited to avoid Assessment and applies to out of state drivers.

DRA NEW MATH- DMV Counsel's Office position

DMV interprets the law provide that the 18-month period runs from the date of the first *violation which caused* the motorist to have accumulated 6 or more points

What should defense counsel do? Always advise your client that they are or may be subject to a mandatory Driver Responsibility Assessment fee as determined by the DMV. This should be included in all written authorizations/affidavits and exit letters. Clients can pay on line as shown above.

Exit letters should recommend payment in a single installment if in a financial position to do, to avoid the possibility of a suspension for failure to pay the subsequent annual installments over a 3-year period.

The DMV has given clients notice to pay at least the first installment 30 days after the date of their TVB conviction or their license will be suspended pending payment. Notices from other jurisdictions will typically allow 30 days from the date of the DMV notice to calculate effective date of suspension. Can be paid online upon notice.
<http://www.dmv.ny.gov/DriverResp/default.html>

Applies to chemical test refusals including Boating While Intoxicated or impaired under Navigation Law §49 and snowmobiles at \$250 per year for three years.

VASEAN'S LAW-Tougher penalties for Drunk Drivers in Fatal Accidents

Class D Felony (2 1/3-7) and do not have to prove criminal negligence for Vehicular Manslaughter in the Second Degree.

Tougher Penalties for VTL §600(2) now as a Class A misdemeanor with subsequent violations to be charged as a Class E Felony.

2022 DMV UPDATE

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