



DWI Attorney Larry Newman

## How to Win the New York DWI Refusal Case

# How to Win the New York DWI Refusal Case

or

## Everything You Always Wanted to Know about the New York DWI Refusal Case (but were afraid to ask)?

I grew up a child of the 1970s. My curiosity about a great many things fueled my reading materials. Many topics in those days were considered taboo and danger ridden, like sex. I was naturally curious. TV in those days was filled with wholesome images of idyllic family life but nothing about sex. Unlike today, no one was discussing or explaining the birds and the bees.

One of the first books I discovered in my dad's private dresser drawer was a copy of "Everything You Always Wanted to Know about Sex (but were afraid to ask)" by Doctor David Reuben. This book helped me to understand a great many sexual mysteries. It removed a lot of the myths, fears, and misconceptions I had about sex. It was truly an eye opener.

It is now, 2013 and I feel it is time that attorneys did the same to the criminal system of justice. My goal for this book is to take you behind the curtain of the New York DWI Refusal case. Having a lawyer's understanding and perspective of the process will hopefully bring you clarity and empower your options.

# Table of Contents

Chapter One: Rambo, Ali, and New York DWI Refusals

Chapter Two: The Seven Things I Love About DWI Refusal Cases

Chapter Three: The Seven Things I Hate About DWI Refusal Cases

Chapter Four: The Big D in DWI Refusals

Chapter Five: Overview of the Police DWI Investigation

Chapter Six: The Power of “AND” in New York Refusals

Chapter Seven: Using the Mental to Prove Sobriety

Chapter Eight: Police Opinion is a Matter of Degree

Chapter Nine: The Dreaded Instruction

Chapter Ten: The Grand Overview of the Refusal Case

Chapter Eleven: Taking Apart the Government’s Case

Chapter Twelve: The License is the Thing

# CHAPTER ONE

## Rambo, Ali, and New York DWI Refusals

When I think about defending a DWI refusal case the first word that comes to mind is **Attrition**. It is a war of attrition between you and the government. Wearing down your opponent has been a clever war and battle strategy for thousands of years.

The legendary boxer Mohammed Ali, and his “Rope a Dope” applied this same principle. He would “float like a butterfly and sting like a bee.” He would dance around the ring, allow the other fighters to wear themselves out throwing punch after punch, using the ropes to absorb his opponents blows, and then pounce on them.

“Ironically, Ali's preparation for the fight, which involved toughening himself up by allowing his sparring partners to pummel him, contributed to observers' sense that Ali was outmatched. When Foreman became tired from the beating he was delivering, Ali regrouped and ended up winning the match.”

**From Norman Mailer's, “The Rumble in the Jungle”**

One of my favorite screen characters is John Rambo. What makes Rambo so bad a... is not his fighting ability, it is his ability to survive. One of my favorite parts of the movie “First Blood” is when Colonel Trautman (Rambo's old leader) tells the sheriff about who and what he is dealing with after Rambo trounces (but doesn't kill) his men. It Rambo's ability to adapt to hostile terrain, to be resourceful, and most importantly outlast his opponents.

**Col. Trautman:** You don't seem to want to accept the fact that you're dealing with an expert in guerrilla warfare, with a man who's the best! With guns, with knives, with his bare hands! A man who's been trained to ignore pain! To ignore weather! To live off the land! To eat things that would make a billy goat puke! In Vietnam his job was to dispose of enemy personnel...to kill, period! Win by **attrition**... well Rambo was THE BEST!

**From Rambo, First Blood**

By this time you are probably thinking, how does a New York DWI refusal case align and succeed with a Rambo defense?

## **Your Ability to Defend the Refusal Case = Your Ability to Survive the Refusal Process**

To win a refusal case (disprove intoxication) you have to be willing to do what it takes. The prosecutors in most New York State counties are not just pleading them down to the non-criminal violation of VTL 1192 (1) DWAI (Driving While Ability Impaired).

Are YOU willing to commit to the following?

- ✓ You must be able to survive without a driver's license for an indeterminate period of time.
- ✓ You must weather the storms and costs of administrative hearings, a suppression hearing, pre-trial motions, and pre-trial conferences.
- ✓ You and your attorney must visit the site of your driving and arrest for the map (or the police report) is certainly not the territory.
- ✓ You must relive the driving, and the arrest in detail to your attorney.
- ✓ You must provide your clothing, your shoes, your medical records, and your health history. They all may provide keys to your defense.
- ✓ You must provide your attorney with as much detailed information about you and the night as possible.
- ✓ Ultimately, you must be willing to put yourself and your case to trial.

In the end I believe that New York DWI Refusals are highly defensible cases. This means that given enough effort and time the large majority of cases can result in successful outcomes.

## The Importance of Jury Instructions

When defending any criminal case we must always begin with the end in mind. What is it specifically that the prosecution must prove beyond a reasonable doubt. Every New York State charge (Crime/Offense) has a very specific jury instruction.

Understanding what the law demands as proof of a crime and breaking it down into its individual parts (elements) allows for a focused defense. Throughout this book I will be referring to the New York State Jury Instructions. Jury instructions are also called charges to the jury. They are read by the judge to the jury. The judge's role is to GIVE and INSTRUCT the law. The jurors' role is to FIND the FACTS and APPLY the law as GIVEN. The jury also receives a written copy of these instructions to follow.

The instructions inform the jury about what the law is, and what the definitions of specific legal terms are. Terms like intoxication and impairment have varying definitions culturally but state to state they are specifically defined by law.

The instructions also inform the jury about what types of evidence they should look at and consider in making their ultimate determination of guilt or innocence. The instructions provide explanation and structure to their job as jurors.

# CHAPTER TWO

## Seven Things I Love About NYS DWI Refusals

1. There is usually only one “criminal” misdemeanor charge. It is New York State VTL 1192 (3), also called “common law” DWI.
2. The government, the prosecutor, aka the DA has to use opinion testimony to prove you were in fact intoxicated, not merely impaired.
3. Intoxication and impairment are really a matter of degree, and highly subjective.
4. The government cannot prove their case against you by any forensic (blood and/or breath) scientific evidence. They do not have a BAC (blood alcohol concentration) number to wave about and prove your alleged consumption. The jury and/or judge does not receive into evidence official and certified blood alcohol concentration documents with numbers and data to study and ponder over.
5. The New York State jury instruction for VTL 1192 (3) is weighted in your favor.

The standard New York Jury Instruction for “common law” DWI Intoxication VTL 1192 (3) is:

A person is in an **INTOXICATED** condition when such person has consumed alcohol to the extent that he or she is incapable, to a **substantial extent**, of employing the physical **and** mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver.(emphasis added)

### NYS Jury Instruction

For the misdemeanor common law intoxication charge the government must prove the following **four** things:

1. Incapacity (unable)
2. to a substantial extent
3. both mentally **and** physically

4. to operate (drive) a car as a reasonable and prudent driver

These legal hurdles are neither easy or simple to surmount with merely police opinion evidence.

6. To prove or disprove this charge of Intoxication the jury and/or judge can look at the following based upon the New York State jury instructions:

To determine whether the defendant was intoxicated you may consider **all** the surrounding facts and circumstances, including, for example:

- the defendant's physical condition
- appearance
- balance
- coordination
- manner of speech
- the presence or absence of an odor of alcohol
- the manner in which the defendant operated the motor vehicle
- opinion testimony regarding the defendant's sobriety
- the circumstances of any accident

7. You can see the potential strengths and weaknesses of your DWI refusal case before the trial through the criminal court suppression hearing, and the DMV license refusal hearing. Your defense attorney can see **what** the law enforcement officers will testify to and about at these hearings. Your defense attorney will also see **how** the officers testify. This testimony may only be partly based upon discovery documents ie. police reports, so hearings will form a strong foundation to anchor your defense.



# CHAPTER THREE

## Seven Things I Hate about New York Refusals

1. They are labor intensive, and require attention to all the nitty gritty details. Going over and through the arrest in minute detail and reading between the lines takes time.
2. They usually require lots of hearings, motions, and ultimately a trial. These are the kind of cases where playing offense is the best defense.
3. The criminal court hearings, and DMV administrative license hearings will usually take place at different locations, and at different times.
4. The DMV administrative hearings cannot be re-scheduled easily or without penalty to the criminal case. Having an attorney prepared and ready at the first scheduled refusal hearing gets the case off to a great start.
5. The client must usually be able to survive long periods of time with no form of driver's license and/or privileges.
6. The prosecution is entitled to an extremely damning jury instruction on your consciousness of guilt for refusing to take the breath test.
7. Your client will have absolutely no driving privileges for one year if you are too successful (all charges dismissed).

# CHAPTER FOUR

## Why the Big “D” in DWI Rules the Day

Assessing the potential strengths, and weaknesses of a NYS DWI Refusal case

DWI refusal cases always begin and end with the letter “D.” The first place everyone involved will focus will be the driving. For any Judge and Prosecutor viewing a DWI the driving is public enemy number one. That is why if there was an accident, and if there was alcohol and/or drugs involved, it is automatically assumed to be due to intoxication.

Driving is always the number one element in even a breath/blood test DWI but most especially with a DWI refusal case. The reason for this is everyone’s secondary focus in DWI cases is on “the Number.”

Judges, prosecutors, and jurors all want to know, “what was the BAC number?” Was it high? Was it low? Was it double the legal limit? Just how “drunk” were they? With the DWI refusal we have NO number, so we are left to focus upon what we do have: Driving and Behavior.

### **What kind or type of driving behavior do we have in this refusal case?**

There are 24 commonly observed driving patterns that signal to the police nighttime impaired motorists. These come from the National Highway Traffic Safety Administration booklet- “The Visual Detection of DWI Motorists” (DOT HS 808 677).

Some of the impaired or bad patterns of driving behavior are weaving, straddling lanes, swerving, turning wide radius, drifting, almost hitting cars or railings, stopping abruptly, accelerating rapidly, decelerating rapidly, very slow speed, and/or a slow response to traffic signals and/or the police officer’s signals.

### **Can your bad driving behavior be attributed to other reasons?**

You can be a bad driver, a tired driver, or a distracted driver and display any of these erratic patterns without any alcohol in your system. Was there another non alcohol related reason for your poor driving behavior? Could it have been a lack of sleep, being overly worked/tired, having a cold, sickness and/or an allergy? These conditions can all contribute to bad driving behavior. Sometimes I have used the Big Mac defense. My client was eating while driving. Thank G-d there is no law against that yet but it can be highly distracting to eat a burger, fries, and a shake while navigating a car.

### **What if we have perfect or pretty good driving pattern?**

I believe that if you have a good "D" in a DWI refusal case you are half-way home. Imagine if you will the district attorney presenting a drunk driving case to a judge or jury with NO drunk driving pattern. That's a good one, a drunk driving case and criminal charge with NO bad driving.

Remember in DWI arrests the police first have to stop a car for PC (probable cause), ie. a valid reason. If the reason for the stop is an equipment violation (broken lights, muffler, registration) then we have absolutely NO bad (drunk) driving. If the reason is speeding or not using a turn signal then fast driving or failure to signal maybe a violation but it is NOT necessarily drunk driving

After looking at the driving behavior in a DWI Refusal case the second place I try to stake my claim of sobriety is on my client's mental state. Alcohol hits the mind (the brain) before it gets to the other parts of the body. As they say, alcohol goes to your head. Studies from Germany have shown that within six minutes of consumption alcohol begins to affect brain function. Alcohol is also known to be most damaging to this area of the body over time with alcoholic brains being diminished in size.

# CHAPTER FIVE

## Overview of the Police DWI Investigation

**The Police Investigation of a DWI case is a process with many stages. How you perform at each and every stage builds or diminishes your defense of sobriety.**

### **1. The STOP of a Car is the first decision point in their police investigation.**

The police may follow you for some time before deciding to stop you. They may want to gather more information, and they may want to note multiple driving infractions. This determination must be balanced with their public responsibility to remove unsafe drivers from the roadway as quickly as possible.

**The first test of your sobriety is not a field side sobriety test, it is the STOP of the car.**

How fast or slow did you respond to their emergency lights and/or siren. How did you pull your car over? Did you move it to a safe location? Did you park parallel to the curb?

### **2. The officer's first contact with you physically, and mentally at roadside sets the stage of their DWI investigation.**

Police have to be excellent psychologists. They have to read people, and to read them quickly. Pulling over a motorist is the most dangerous thing a police officer does. They have no idea who they are stopping. You are an unknown to them, and because of that you are suspect. They will be watching your movements, listening to your words, and assessing you for danger. Every question they ask, and every direction they give is taking them away from or towards an arrest decision. Legally at this stage in their investigation they can command that you get out of your car.

The police begin to use “divided attention” tests in their first contact with you. Which are questions that have an associated mental task and a physical task. Such as, can I have your driver's license and registration? You must now remember both parts of the question, and retrieve these documents. Alcohol affects the ability to divide the mind's attention and perform multiple tasks like these.

### **3. How you exit the car is a demonstration of your balance and coordination.**

Those that need assistance in getting out of their car are not starting off on a good foot, no pun intended. If you can get out of your car or truck unassisted, stand up straight, and walk normally that is another indication of sobriety.

### **4. The next part of their investigation will usually involve the infamous standardized field side police sobriety tests.**

Once you are out of the car you may or may not have decided to do their tests. Legally you don't have to do them. There are only three standardized tests. The word or term standardized is very important here because non-standardized sobriety testing is completely without guidelines, without research, and without basis. It is winging it and winging it don't cut with proving a legal case beyond a reasonable doubt. Tests in reciting the alphabet, touching your nose, touching your fingers, and the other variants are completely made up nonsense. This type of police stuff must be fun but kinda like the kid game "do as I say but not as I do," difficult to win.

#### **The ONLY STANDARDIZED FIELD SIDE SOBRIETY TESTS are:**

- 1. The walk and turn**
- 2. The stand on one leg**
- 3. HGN (horizontal gaze nystagmus)**

#### **What does Standardized testing mean?**

Standardized means they must be given, instructed, demonstrated, and scored in a specific way to be valid, and accurate. Every officer, trooper, and deputy must follow these protocols. These tests were designed, commissioned, and approved after years of research and thousands of lab hours. The police can't just make stuff up. The tests were designed by the NHTSA (National Highway Traffic Safety Administration) to be used by law enforcement in all fifty states. The purpose of the tests is not to gauge whether a person is drunk, impaired, or intoxicated. The tests were created to reveal drivers with a BAC (blood alcohol concentration) of .10 or more.

#### **The police will usually just note pass or fail as to their tests.**

How much or how little you were able to follow police directions, and do what was instructed in the way that they wanted is highly subjective. Bringing out every detail of your performance may score points as to your sobriety. The police standard for stating that you failed is very low. Just two mistakes on any test is a fail. Considering that some tests have over hundred things to do right, maybe your performance of 90% should be considered by those about to judge your sobriety in a court of law.

## **5. The police DWI arrest decision**

At each and every stage in the investigation process they are assessing, gathering, recording, and most importantly deciding what they will charge, and when they will charge it. How long did it take them to make the arrest decision (time from stop to arrest)? What did they ask or do within that time period? Was their investigation thorough and complete?

# CHAPTER SIX

## The Power of “AND” in New York Refusals

### The power of just three little letters.

When looking over the jury instruction for a common law NYS DWI refusal, VTL 1192 (3) one word stands out to me. The word is “AND” and under our case law (remember NYS is a common law state) the definition of intoxication is defined, interpreted, and applied as "physical **and** mental" incapacity to operate a car as a reasonably prudent driver.

After years of attending DWI/DUI conferences in other states I am more attune to subtle differences in legal definitions. In Texas, their legal definition of DWI is physical **OR** mental. So in that state either or is a lower hurdle for the prosecution. They can prove one or the other to make out an intoxication case.

To me in the defense of NYS DWI the word "and" has great power and significance. The prosecution's burden goes to BOTH mental and physical behavior. They must prove both mental incapacity **and** physical incapacity legally. I can challenge them as to both these elements in hearings and at trial, the mental and the physical. Maybe my client is uncoordinated, imbalanced, and has two left feet but is mentally sharp, alert, and coherent.

The two prominent cases (without BACs) on how to define "intoxication" in NYS DWI are *People v. Cruz*, 48 NY 2nd 419, and *People v. Bradford*, 408 NYS 2nd 1013. Both these show how the Courts apply this legal standard "to and in" the real world of mental and physical human behavior.

If the prosecution is without a BAC (blood alcohol concentration) from blood or breath a NYS DWI will need to be proved strictly by the driver's behavior.

Three key elements have resulted in NOT GUILTY convictions in New York DWI Refusal Cases:

1. The motorists were **reckless in their driving** that either caused an accident or had the substantial likelihood to

AND

2. The motorists **lacked physical coordination** (unable to balance, unable to walk steadily)

AND

3. The motorists **displayed a lack of a rational mental state** (could not answer questions intelligibly)

I believe that demonstrating a driver's rational mental state is a critical factor in disproving intoxicated operation. This mental state defense is an opening for a plea to the reduced (non-criminal) impaired driving (VTL 1192 (1) DWAI Driving While Ability Impaired offense.



# CHAPTER SEVEN

## Using the Mental to Prove Sobriety

**What comprises a “good” ie. sober mental state in those that have drank and drove?**

I believe that the place to begin in a DWI refusal is by proving mental “coherency.” Coherency is a big word with many layers of subtext. In studying hundreds of cases of impaired and intoxicated drivers I have noted two dominant patterns or processes.

1. Was their thinking in proper quantity, tempo (flow rate), and form (logical coherence)?
2. Did they demonstrate thought that seemed to be retarded or inhibited?

**In examining the thought patterns of drivers I look at three primary areas:**

- Was their thinking **Clear**?

**Coherent versus incoherent**, cloudy, confused, and/or vague versus specific

- Was their thinking **relevant and/or logical**?

Logical versus illogical statements, **relevant and/or irrelevant** statements **to the topic** being discussed.

- Was their rate of mental **flow** normal for the situation?

Mental flow is probably the most subjective of the three areas because people all respond or react differently under stress. The stress of being pulled over by the police, being questioned and/or interrogated, being threatened with arrest, and being in custody can be suffocating experiences. Was your response slow, normal or rapid? What was your **reaction to questions**?

**Ultimately, were your responses to Police questions, Police instructions, and Police directions appropriate?**

# CHAPTER EIGHT

## Police Opinion is Largely a Matter of Degree

### The Refusal DWI Success or Failure is Largely a Matter of Degree

Now we are at the crux, the crossroads of the DWI refusal case, it is all a matter of DEGREE.

What are the real difference (s) between an **impaired person** (DWAI) and an **intoxicated person** (DWI)?

Where and when does highly impaired then become intoxication?

Sometimes the police and people use the terms interchangeably. If NYS did not have a lower level offense called Ability Impaired I think that the large majority of people would not see or understand any difference at all.

### In my mind, where is this DWI/DWAI threshold?

NYS law says it is when the motorist is IN-capable (to a substantial extent) of mental and physical operation of a car as a reasonably prudent (careful) person. Subjectively it will take into consideration **all your behavior** on the date of your arrest. The prosecutor through their police witnesses will paint out and reveal strictly all that you did and said that demonstrates and proves intoxicated behavior. Your attorney will then have an opportunity to cross examine on each of those areas. The goal is to bring out weaknesses, bias, and inconsistencies in the police's opinion of your intoxication.

### The Somewhat “Low” Legal Standard of Proof of a DWAI (Driving While Ability Impaired)

I feel that the lesser included offense of DWAI is the goal with many refusal cases for the following three reasons:

1. Impairment under NYS law has a low legal standard of **any extent**.
2. Practically, without a conviction to a DW (VTL 1192) offense you will be unable to take the DMV DDP (Drinking Driver Program), and then get a Conditional Driver's License.

3. DWAI is a non-criminal (traffic violation, and is not considered a criminal conviction

A person's ability to operate a motor vehicle is **IMPAIRED** by the consumption of alcohol when that person's consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

**NYS Jury Instruction on DWAI**

A jury is told to consider the following to make a determination of guilt or innocence under NYS jury instructions for DWAI:

You may consider all the surrounding facts and circumstances, including, for example:

- the defendant's physical condition and appearance,
- balance and coordination,
- manner of speech;
- the presence or absence of an odor of alcohol;
- the manner in which the defendant operated the motor vehicle;
- opinion testimony regarding the defendant's sobriety;
- the circumstances of any accident

# CHAPTER NINE

## The Dreaded Instruction of Guilt

### The Damning Consciousness of Guilt Jury Instruction

If your DWI refusal case proceeds to a trial then the jury will get an instruction from the Judge that they may infer a **Consciousness of Guilt** from your choice to not take the chemical test. This may not be the real reason that you decided to not take their test but it is a damning instruction nevertheless.

If there was an improper refusal to submit to a test, add:  
Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is **no innocent explanation** for such refusal, then the jury **may**, but is not required to, **infer** that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.

### NYS Jury Instruction on Consciousness of Guilt

### Your Choice: Bench Trial versus Jury Trial

To counteract the effects of a guilt instruction on a jury's mindset I sometimes feel it is a better strategy to have a bench (judge) trial. A judge will generally be less affected by this instruction and will also understand the legal differences between a DWI and DWAI. Jury instructions and legal definitions can sometimes be confusing for jurors.

Your lawyer does not make the Judge versus Jury Trial decision. A client **MUST** make this decision, and sign a waiver of jury trial form.

# CHAPTER TEN

## The Grand Overview of the Refusal Case

### The Overall Timeline of a New York State DWI Refusal Case

- ✓ **Initial Appearance and Suspension of Driving Privileges**  
Court date set on UTT (Uniform Traffic Ticket)
  
- ✓ **Demand for Discovery (Evidence) and Bill of Particulars**  
This occurs after your attorney enters their notice of appearance with the Court. The prosecution has fifteen days to respond although depending on the county this may take more or less time.
  
- ✓ **DMV Administrative Refusal Hearing and License Revocation**  
This occurs within fifteen days of the initial criminal court appearance.
  
- ✓ **Pre-Trial Conference between Judge, Prosecutor, and Your Attorney**  
This generally occurs within four to six weeks of the initial court appearance.
  
- ✓ **Filing of Omnibus Motion (Suppression Pre-Trial Motions)**  
All pre-trial motions MUST be filed within forty five days of the initial criminal court appearance.
  
- ✓ **Suppression Hearing**  
This may occur with one to two months of the filing of the Omnibus Motion.
  
- ✓ **Pre-Trial Conference between Judge, Prosecutor, and Your Attorney**  
This may occur anytime after the filing of the Omnibus Motion and/or the Suppression hearing.
  
- ✓ **Trial (Bench or Jury)**  
This may occur one to two months following the suppression hearing.

# CHAPTER ELEVEN

## Taking Apart the Government's Case

### Taking Apart the Government's Refusal Case

Taking apart a prosecutor's case is a slow methodical process. Every case has its specific issues. Some cases share some common ground. I will first go over common ground issues and points of attack.

1. The Police have NO Baseline to measure (or judge) you by.

The police officer does not know "your" normal. They have no prior knowledge to judge your nervousness or appearance. S/he will not know how you normally look, walk, talk, or speak. What do your eyes normally look like? Do you have a short leg? Do you have a speech impediment? Do you have allergies? Do you sleep well at night or are you suffering from sleep deprivation?

2. Many of their intoxication behavior related observations could be due to other reasons.

Judges sometimes use the term that they found police testimony to be unequivocal. Unequivocal is just a fancy way of saying that something can have more than one interpretation or meaning. The observation of bloodshot, watery eyes could be related to alcohol consumption but it could also be related to a recent fight, or time of night, or an allergy, or tiredness.

**The administrative license hearing and a suppression hearing are both opportunities to cross examine the police officer concerning their "opinion" evidence.**

### The Lazy Eye Case

I recently had a lazy eye case DWI Refusal Case. My client informed the officer multiple times he had a lazy eye. Naturally this should have placed the officer on guard or at least influenced him to re-think giving one of the standardized field tests, the HGN test.

The HGN relies upon a normal, healthy, and fully functioning pair of eyes. In fact the manual, the U.S. Department of Transportation Standardized Manual (DWI Detection and Standardized Field Sobriety Testing) states that before giving this test they should ask questions about eye disorders or problems. People that have issues with their eye anatomy, eye physiology, or have an eye disease may not be the best candidate for this particular test.

They (the police) should check for equal tracking of the eyes. These are police NOT doctors, optometrists, or ophthalmologists.

### **What if Three Failed Field Tests Becomes Only One or Two?**

The work up and preparation of this case included lots of cross examination in this area. Think about it, three main standardized tests, what if I topple one of the three? Then I am left with two tests. These other two tests that are strictly dependent on muscle coordination and balance. How many of us have two left feet? How many of us can perform physically under pressure at the roadside? These are the main base of their opinion, their foundation for proving not just impairment BUT intoxication.

### **The How to "Nuts and Bolts" of Being Picky**

Here is my cross examination of this lazy eye section. I love when the police get into anatomy, science, and biology. My past experience and training as a Chiropractic Physician come into play with many DWI and personal injury cases. You want to diagnosis conditions get a degree, lots of training, pass some boards, and get a license otherwise go home.

### **MY Lazy Eye Cross Outline:**

What is your training and certification in diagnosing eye conditions?

You asked him if he has any medical condition?

Did you follow all the pre-procedures before giving him the HGN test?

Did you Check for equal pupil size?

Resting nystagmus?

Equal tracking (following an object together)?

This is the check for medical impairment?

Medical disorders?

In your report You stated he didn't have a lazy eye

Medically you can't always see a lazy eye?

Lazy eye is really a lazy brain?

The eye and the brain are not working together properly?

After he stated it to you twice?

You were trained in diagnosis of lazy eye (of course not, he is a cop not a doctor)?

Can you always see a lazy eye (he thought he could)?

Isn't it a visual disturbance problem?

A lazy eye is a brain disorder?

The eye can appear normal (he didn't know this or reflect this in his report) ?

In your training and certification in HGN are you aware of the types of lazy eye?

Lazy Eye and Strabismus are not the same condition?

A person who has a crossed or turned eye (strabismus) has a "lazy eye?"

But lazy eye (amblyopia) and strabismus are not the same condition?

Amblyopia does not equal a visual/apparent misalignment?

Strabismus can cause amblyopia?

Amblyopia can result from a constant unilateral strabismus (i.e., either the right or left eye turns all of the time)?

**NOTE: While a large eye turn or deviation (strabismus) is easily spotted by the layman, amblyopia without strabismus or associated with a small deviation is usually not noticed by parents or pediatricians.**

If the eyes do not track together it may indicate an underlying medical disorder?

This underlying disorder can cause the nystagmus that is present?

### **Where Do We Go From Here?**

It (the cross outline) goes on past here but you get the idea. A specific focused attack upon their faulty investigation, and it's issues (weaknesses) can yield a weak intoxication opinion overall. As in, goodbye testimony about the HGN test. If the driving is terrible I have more to overcome but with fairly good driving or NO bad driving well I am getting there.



# CHAPTER TWELVE

## The License is the Thing

### The Driver's License Issues in a New York DWI Refusal Case

The **“suspension”** pending prosecution in a DWI refusal case occurs at the initial appearance if you refused to take a chemical test of your breath or blood.

If the person charged with a DWI is a New York State license holder then their license is physically taken from them. If the person is from another country or state (referred to as a foreign license holder) then their license is photocopied, and their **privilege** to drive within the State of New York is suspended.

You will be scheduled by the criminal court for a DMV administrative license hearing in front of an administrative law judge (ALJ) within fifteen days. If you do not show up to this hearing your license to drive will be **“revoked”** for one year. Revoked means cancelled.

Under New York VTL 1194 (2) (c) the DMV Refusal hearing is limited to four main areas legally. The police have the burden of proof at this hearing. Their burden of proof is at the substantial evidence level. Substantial evidence is a bit less than the preponderance of evidence used in civil cases. Preponderance means showing evidence “a little bit more likely than not” that something is true. They (the police) must demonstrate this low substantial standard by their testimony in four areas:

1. They had **reasonable grounds (PC)** to believe that such person had been driving in violation of any subdivision of VTL 1192?
2. That they made a **lawful arrest** for common law DWI under New York VTL 1192 (3)?
3. That they gave **sufficient warning**, in clear and unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made.
4. That such person refused to submit to such chemical test or any portion thereof and that the **refusal was persistent?**

If you refused to take a chemical test you will not be granted any conditional privileges or hardship privileges to drive in NYS without a plea or a conviction to one of the drinking related charges under VTL 1192. A plea of guilty to a charge or a conviction of guilty to a charge are the exact same thing legally.

If you were ultimately acquitted of the DWI charge your refusal administratively would still stand to block any hopes of a conditional license privilege for one year barring your demonstration at a DMV refusal hearing that the refusal warnings were not properly given and/or the police failed to meet their burden of proof.

Originally, born and raised in Brooklyn, NY. My father was a NYS corrections officer, and my mother a waitress. I now live in Ithaca, NY with my wife (of 24 years), and four kids. I have a B.S. in Human Biology, Doctorates in Law and Chiropractic, and a Post Graduate in Acupuncture. I practiced as a Chiropractic Physician in Florida from 1986 to 1995. I graduated law school in 1997, and went on to practice trial law in FL, NY, NJ, and PA. I love practicing criminal defense and injury law within the Finger Lakes Region of New York State.

Over 95% of the cases that I take on are New York DWI defense cases. I am certified as a breath tester by the Department of Transportation, the guidelines of the International Association of Chiefs of Police (IACP), and the National Highway Traffic Safety Administration (NHTSA). I am certified in Field Sobriety Tests, and an active member of the National College of DUI Defense (NCDD). My online materials include over 400 blog posts, dozens of articles, and over 330 informative videos on my youtube channel.

I have co-authored *Strategies for Defending DWI Cases in New York*, in both 2011 and 2013. These are West Thomson legal manuals on New York State DWI defense, and focus on the best practices for other lawyers handling a New York DWI case. Included in *Strategies for Defending DWI Cases in New York* are materials I provide clients, such as my fee agreement and ways to avoid misdemeanor probation. I was selected by Super Lawyers as a Upstate New York 2013 Rising Star in DWI/DUI Defense based on my experience, contributions, and professional standing.

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