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# THE COMPLETE NEW YORK STATE DWI DEFENSE GUIDE

A Comprehensive Resource for Understanding DWI Charges,  
Penalties, and Your Legal Rights

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# 1. Understanding New York DWI Law

New York State has some of the strictest DWI (Driving While Intoxicated) laws in the nation. These laws are codified in Section 1192 of the New York Vehicle and Traffic Law (VTL). Unlike some states that use the term "DUI" (Driving Under the Influence), New York uses specific terminology that defines different levels of impairment.

## Key Legal Concepts

### "Operating" vs. "Driving"

Under New York law, you don't have to be actively driving to be charged with DWI. The law requires only that you "operate" a motor vehicle, which means having the key in the ignition with the engine running, even if the vehicle is parked. This is an important distinction that catches many people by surprise.

### "Motor Vehicle" Defined

A motor vehicle includes cars, trucks, motorcycles, SUVs, and even boats (BWI - Boating While Intoxicated). It doesn't have to be on a traditional road—parking lots and private roads accessible to vehicular traffic qualify as "public highways" under the law.

### "Per Se" Intoxication

New York uses a "per se" standard for DWI, meaning that if your Blood Alcohol Content (BAC) is at or above the legal limit, you can be convicted regardless of whether you showed signs of impairment. The prosecution doesn't need to prove you were driving dangerously—the BAC number alone is sufficient evidence.

## Blood Alcohol Content (BAC) Standards

### Standard Drivers (Age 21+):

BAC Level	Classification	Type
0.00% - 0.05%	Legal to drive	(though you may still be impaired)
0.05% - 0.07%	DWAI	Traffic violation
0.08% or higher	DWI	Misdemeanor
0.18% or higher	Aggravated DWI	Enhanced misdemeanor

### Commercial Drivers (CDL Holders):

- 0.04% or higher: Commercial DWI when operating a commercial vehicle
- 0.08% or higher: Standard DWI when operating a personal vehicle
- Even a DWI conviction in a personal vehicle affects CDL status

- First offense results in 1-year CDL disqualification
- Second offense results in LIFETIME CDL disqualification

**Drivers Under Age 21 (Zero Tolerance Law):**

- 0.02% - 0.07%: Zero Tolerance violation with administrative penalties
- 0.08% or higher: Full DWI charges apply

## 2. Types of DWI Charges in New York

New York law establishes several distinct DWI-related offenses under VTL § 1192, each with different elements and penalties.

### 1. Driving While Ability Impaired (DWAI) - VTL § 1192(1)

**Definition:** Operating a motor vehicle while your ability to operate is impaired by alcohol consumption.

**BAC Range:** More than 0.05% but less than 0.08%, OR other evidence of impairment

**Classification:** Traffic violation (not a crime) for first offense

First Offense DWAI Penalties	
Fine	\$300-\$500
Jail	Up to 15 days
License Suspension	90 days
Surcharge	\$260
Criminal Record	No (traffic violation only)

### 2. Driving While Intoxicated (DWI) - VTL § 1192(2) & (3)

**Per Se DWI (§ 1192(2)):** Operating a motor vehicle with a BAC of 0.08% or higher.

**Common Law DWI (§ 1192(3)):** Operating a motor vehicle while in an intoxicated condition, based on officer observations regardless of BAC.

**Classification:** Unclassified misdemeanor

First Offense DWI Penalties	
Fine	\$500-\$1,000
Jail	Up to 1 year
License Revocation	Minimum 6 months
Surcharge	\$395
Ignition Interlock	Minimum 6-12 months
Driver Responsibility Assessment	\$250/year for 3 years

### 3. Aggravated DWI - VTL § 1192(2-a)

**Definition:** Operating a motor vehicle with a BAC of 0.18% or higher.

**Classification:** Unclassified misdemeanor with enhanced penalties

First Offense Aggravated DWI Penalties	
Fine	\$1,000-\$2,500
Jail	Up to 1 year
License Revocation	Minimum 1 year
Ignition Interlock	Minimum 12 months

### 4. DWAI/Drug and DWAI/Combination

**DWAI/Drug (§ 1192(4)):** Operating while impaired by any drug (legal or illegal), including marijuana, prescription medications, and over-the-counter drugs.

**DWAI/Combination (§ 1192(4-a)):** Operating while impaired by the combined influence of alcohol and drugs. Increasingly common charge.

Both carry the same penalties as standard DWI for first offense.

### 3. Penalties and Consequences

#### Second Offense DWI Penalties (Within 10 Years)

A second DWI within 10 years is significantly more serious and is classified as a **Class E Felony**.

Second Offense (Class E Felony)	
Fine	\$1,000-\$5,000
Jail/Prison	Up to 4 years
License Revocation	Minimum 1 year (often 18 months)
Ignition Interlock	Minimum 12 months
Probation	Up to 5 years

#### Third Offense DWI Penalties (Within 10 Years)

A third DWI within 10 years is classified as a **Class D Felony** with even harsher penalties.

Third Offense (Class D Felony)	
Fine	\$2,000-\$10,000
Prison	Up to 7 years
License Revocation	Minimum 18 months (often permanent)

#### DMV Administrative Penalties (25-Year Lookback)

While criminal penalties are based on convictions within 10-15 years, the DMV has a longer lookback period. Three or more alcohol-related convictions or refusals within 25 years triggers:

- "5 and 5" penalty: 5-year license revocation followed by 5-year ignition interlock requirement
- No eligibility for conditional license during revocation
- Possible permanent license revocation

**Important: These are DMV administrative penalties separate from criminal court penalties.**

#### Total Cost of a First DWI

Expense Category	Estimated Cost
Attorney fees	\$5,000-\$10,000+
Fines and surcharges	\$1,645-\$2,145
Driver Responsibility Assessment	\$750 (over 3 years)
Ignition interlock device	\$1,200-\$1,800/year
License reinstatement	\$125-\$175
Alcohol programs	\$275-\$500
Insurance increase (5 years)	\$10,000-\$20,000
Towing and impound	\$300-\$600
<b>TOTAL ESTIMATED COST</b>	<b>\$15,000-\$30,000+</b>



## 4. The DWI Arrest Process

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Understanding what happens during a DWI arrest can help you protect your rights and make informed decisions.

### Step 1: The Traffic Stop

Police must have reasonable suspicion to pull you over. Common reasons include traffic violations, erratic driving, accidents, or DWI checkpoints.

#### Your Rights During the Stop:

- You must provide license, registration, and insurance
- You should be polite and cooperative
- You do NOT have to answer incriminating questions
- You do NOT have to perform field sobriety tests

### Step 2: Field Investigation

The officer will ask questions like "Have you been drinking?" and "How much have you had to drink?" You are not required to answer these questions.

***Polite response:*** "I'd prefer not to answer questions without an attorney present."

### Step 3: Preliminary Breath Test (PBT)

This is a portable breathalyzer used roadside. Results are NOT admissible in court as proof of BAC. You can refuse without penalty (unlike the post-arrest chemical test).

### Step 4: Arrest and Transport

If the officer has probable cause, you will be arrested and transported to the police station. Your vehicle will be impounded. You'll be read your Miranda rights.

### Step 5: Chemical Testing at the Station

By driving in New York, you've given "implied consent" to chemical testing. The officer will read you chemical test warnings explaining that refusal will result in license revocation.

**Test Options: Breath Test (most common), Blood Test, or Urine Test (rarely used)**

## Step 6: Processing and Release

At the station: personal information recorded, fingerprinted (if felony or prior convictions), photographed, property inventory. You'll be held until sober (usually 4-8 hours) or until arraignment.

### What You'll Receive:

- Tickets/Desk Appearance Ticket with court date
- Temporary license (if you took chemical test)
- License suspension notice (if you refused)

## 5. Field Sobriety Tests

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**IMPORTANT: Field sobriety tests are VOLUNTARY in New York State. You can politely decline without legal penalty.**

Field sobriety tests (FSTs) are physical and cognitive tests administered by police during a DWI investigation. Understanding these tests and their limitations is critical to your defense.

### The Three Standardized Field Sobriety Tests

#### 1. Horizontal Gaze Nystagmus (HGN) Test

The officer holds a pen or finger 12-15 inches from your face and moves it horizontally. You're instructed to follow it with your eyes without moving your head.

##### Problems with HGN:

- Many medical conditions cause nystagmus (inner ear problems, neurological conditions)
- Medications, eye fatigue, and contact lenses affect results
- Requires precise administration (rarely done correctly)

#### 2. Walk-and-Turn Test

Walk heel-to-toe along a straight line for 9 steps, turn in a specific way, and walk back 9 steps.

##### Problems with Walk-and-Turn:

- Requires a straight line (often none exists)
- Uneven pavement, gravel, grass make it impossible
- Footwear matters (heels, boots, dress shoes)
- People over 65, overweight, or with injuries have difficulty
- Sober people fail regularly

#### 3. One-Leg Stand Test

Stand on one leg with the other foot approximately 6 inches off the ground, arms at sides, counting out loud for 30 seconds.

##### Problems with One-Leg Stand:

- Requires good balance (many sober people cannot do this)
- Age, weight, and injuries affect performance
- 30 seconds is a very long time to balance on one leg

**If you choose to decline field sobriety tests, be polite:**

*"Officer, I'd prefer not to perform any field tests. I'd like to speak with an attorney."*

## 6. Chemical Testing: Your Rights and Options

Chemical testing is the most critical decision you'll face during a DWI arrest. Understanding New York's Implied Consent Law and your options is essential.

### New York's Implied Consent Law

By operating a motor vehicle in New York, you've given "implied consent" to submit to chemical testing if lawfully arrested for DWI. This doesn't mean you **MUST** take the test—it means refusal carries separate penalties.

### The Difficult Choice: Take the Test or Refuse?

#### Reasons to TAKE the Chemical Test:

- If you had very little to drink, a low BAC helps your defense
- To avoid automatic 1-year license revocation for refusal
- Professional license holders—refusal may look worse to licensing boards

#### Reasons to REFUSE the Chemical Test:

- If you know you're significantly over the limit
- Eliminates direct BAC evidence against you
- Removes "per se" DWI charge (§ 1192(2))

### Refusal Consequences

Refusal Consequence	Penalty
License revocation (first refusal)	1 year
License revocation (CDL holders)	18 months
Second refusal within 5 years	18 months revocation
Civil penalty	\$500
Can be mentioned at trial	Yes

### DMV Refusal Hearing

You have the right to challenge your refusal revocation at a DMV hearing. DMV automatically schedules this hearing and you'll be notified at your arraignment. DMV must hold the hearing within 15 days of your refusal, or the suspension will be lifted until the hearing occurs.

**Winning a refusal hearing restores your license even if criminal case proceeds.**

## 7. License Suspension and DMV Proceedings

A DWI arrest triggers TWO separate legal proceedings: criminal court and DMV administrative proceedings. Both can result in license suspension or revocation.

**You need to defend BOTH proceedings. Winning one doesn't automatically win the other.**

### If You Took the Chemical Test and Failed (BAC 0.08%+)

#### At Arraignment:

- Your physical license will be taken by the court
- Your license will be suspended pending prosecution
- You receive NO driving privileges for the first 30 days

#### First 30 Days - Hardship Privilege Only:

The ONLY driving privilege available during the first 30 days is a "hardship privilege" from the judge. This requires a hearing where you must prove extreme hardship. If granted, it's very limited.

#### After 30 Days - Pre-Conviction Conditional License:

- You may apply for a pre-conviction conditional license
- Pay application fee (\$75)
- You do NOT need to enroll in Impaired Driver Program (IDP) for pre-conviction conditional license
- Allows driving for work, school, medical care, and court-ordered programs

### Conditional License Privileges

What You CAN Drive For	What You CANNOT Drive For
Travel to and from work	Personal errands
Travel to and from school	Social activities
Medical care for you or family	Shopping
IDP classes	Recreational purposes
Court-ordered programs	Visiting friends/family

### Ignition Interlock Device (IID)

New York requires ignition interlock devices for most DWI convictions. The device is installed in your vehicle; you must blow into it before the car starts. It costs \$100-\$150/month for installation and monitoring.



## 8. Leandra's Law: DWI with Child Passengers

Leandra's Law, passed in 2009 and named after 11-year-old Leandra Rosado who was killed in a DWI crash, imposes severe penalties for DWI when a child under 16 is in the vehicle.

**AUTOMATIC FELONY CHARGE:** If you're arrested for DWI with a child under 16 in your vehicle, you face a Class E Felony—even for a first offense.

Leandra's Law Penalties (Class E Felony)	
Prison	Up to 4 years
Fine	\$1,000-\$5,000
License Revocation	Minimum 1 year
Probation	Up to 5 years
Ignition Interlock	Required
Criminal Record	Permanent felony

### Additional Consequences

#### Child Protective Services Investigation:

- A Leandra's Law arrest automatically triggers CPS investigation
- Potential removal of children from home
- Family court proceedings separate from criminal case
- Possible impact on custody and visitation rights

**Do not face Leandra's Law charges without experienced legal counsel. The stakes are too high.**

## 9. Common DWI Defenses

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An experienced DWI attorney has numerous strategies to defend your case. The best defense depends on the specific facts.

### 1. Challenging the Traffic Stop

Police must have reasonable suspicion to stop your vehicle. If the stop was illegal, all evidence obtained after gets suppressed—including field sobriety test results, chemical test results, and your statements. **Result: Case dismissed.**

### 2. Challenging Field Sobriety Tests

FSTs can be challenged based on improper administration, medical conditions, environmental factors, and subjective scoring. Strategy: Demonstrate that poor FST performance was due to factors other than intoxication.

### 3. Challenging Breathalyzer Results

**Common challenges include:**

- Machine calibration issues—must be properly calibrated per NY regulations
- 15-minute observation period violation
- Mouth alcohol from recent drinking, GERD, or dental work
- Medical conditions (diabetes, hypoglycemia)
- Operator error or training deficiencies

### 4. Rising Blood Alcohol Defense

Your BAC continues to rise for 30-90 minutes after your last drink. You may have been UNDER 0.08% while driving but OVER 0.08% by the time you were tested. A toxicologist can perform retrograde extrapolation to calculate what your BAC likely was at the time you were actually driving.

### 5. No Probable Cause for Arrest

Police need probable cause to arrest you. Odor of alcohol alone, admission of drinking, or poor performance on one field test may not be enough. Without lawful arrest, all evidence gets suppressed.

## 6. You Weren't Driving

Prosecution must prove you were operating the vehicle while intoxicated. Defenses include: keys not in ignition, engine not running, sleeping in parked car, or someone else was driving.

## 10. What to Do If You're Arrested

The actions you take immediately after arrest can significantly impact your case outcome.

### During the Arrest

DO	DON'T
Be polite and respectful	Argue with police
Provide license, registration, insurance	Answer incriminating questions
Ask for an attorney	Volunteer information
Remember details about the stop	Consent to vehicle searches
Note environmental conditions	Discuss case with anyone but attorney

### Immediately After Release - Within 24 Hours

#### 1. Contact an experienced DWI attorney IMMEDIATELY

Time is critical for evidence preservation. Early action can prevent mistakes.

#### 2. Document everything while memory is fresh

- What you ate and drank (amounts, timing)
- Where you were and when
- How you felt (tired, sick, anxious?)
- Field sobriety test conditions (weather, lighting, surface)
- Officer's statements and behavior

#### 3. Preserve evidence

- Receipts with timestamps
- Witness contact information
- Photos of arrest location

### What NOT to Do

- Don't discuss your case on social media—prosecutors monitor it
- Don't discuss with anyone except your attorney
- Don't miss court dates—failure to appear results in arrest warrant
- Don't drive on suspended license—separate criminal charge

- Don't ignore the case hoping it goes away

## 11. Frequently Asked Questions

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**Q: Will I go to jail for my first DWI?**

A: For a first-time standard DWI, jail time is possible but not mandatory. Most first-time offenders receive conditional discharge, probation, fines, and license suspension. An experienced attorney can usually negotiate to avoid jail for first offenders.

**Q: How much will a DWI cost me?**

A: Total cost of a first DWI: \$15,000-\$30,000 over 3-5 years. This includes attorney fees (\$5,000-\$10,000+), fines and surcharges (\$1,645-\$2,145), ignition interlock (\$1,200-\$1,800/year), and insurance increases (\$10,000-\$20,000 over 5 years).

**Q: Can I get my DWI reduced to a lesser charge?**

A: Yes, charge reduction is common, especially for first-time offenders. Common reductions include DWI → DWAI (converts misdemeanor to traffic violation with no criminal record) and Aggravated DWI → Standard DWI.

**Q: Can I refuse field sobriety tests?**

A: Yes. Field sobriety tests are completely voluntary in New York State. You can politely decline without legal penalty. This is DIFFERENT from chemical test refusal, which carries license penalties.

**Q: Will I lose my professional license?**

A: It depends on your profession. High-risk professions include commercial drivers (almost certain CDL loss), pilots, physicians, nurses, lawyers, and teachers. Consult with an attorney about notification requirements.

**Q: Can I travel to Canada with a DWI?**

A: No, not easily. Canada considers DWI a serious criminal offense and denies entry. Options include Temporary Resident Permit, Criminal Rehabilitation application (eligible 5 years after sentence), or waiting 10 years.

**Q: Should I hire a lawyer for a first-time DWI?**

A: Yes, absolutely. The consequences are too serious: up to 1 year jail, permanent criminal record, \$15,000-\$30,000 in costs, and potential job loss. An experienced DWI attorney can get charges reduced or dismissed, negotiate to avoid jail, and protect your record and career.

## Contact Ed Palermo for a Free Consultation

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*Available 24/7 - Because DWI arrests don't only happen during business hours*

## Key Takeaways

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- **Act immediately** - Contact an attorney within 24-48 hours
- **Preserve evidence** - Document everything while memory is fresh
- **Know your deadlines** - DMV hearing scheduled automatically, court dates critical
- **Don't discuss your case** - Except with your attorney
- **Stay off social media** - Posts can be used against you
- **Never miss court** - Failure to appear makes everything worse

**Remember:** You have rights—use them. The prosecution must prove their case beyond reasonable doubt. Many DWI cases have strong defenses. An experienced attorney makes all the difference.

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*This guide provides general information about New York State DWI law and is not legal advice. Every case is unique. Nothing in this guide creates an attorney-client relationship. For specific legal advice about your situation, consult with an experienced DWI defense attorney.*

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