

To Refuse, or Not to Refuse, That is the Question: Practical Points for the DWI Practitioner



Bakshi



Leta

By Sunil Bakshi & Joseph A. Leta

It is an all too familiar scenario. It is late at night, you are at home enjoying a nice sleep and your phone rings. On the other end of the line is your obviously shaken client, telling you that he/she is in police custody on a DWI stop and is being asked to submit to a chemical test in the form of a Breathalyzer. Out of a sleepy haze, you quickly gather your thoughts recognizing that the police officer is not going to afford you too much time with your client, as a result of the shrinking window of opportunity for the police officer to obtain a breath sample and result.

While you can never be 100 percent sure of whether the choice to refuse or not to refuse is the correct one, knowing a checklist of issues to analyze in consideration of statutory and common law is what this article sets out to accomplish. While not exhaustive, we try to pinpoint the various factors a practitioner should "flag" when presented with the dreaded "late night" phone call.

To assist the practitioner in rendering the advice, one must understand DWI Law and what one is trying to accomplish by the decision to refuse or not. While we will not get into the basis for pre-trial motions and other reasons the charges could be dismissed at or before trial, the focus of this article is how you can improve your client's chances of having the best result in a particular scenario. At the onset, it is imperative that you have knowledge of the DWI laws of the State of New York. You should know that both DWI and Aggravated DWI are criminal offenses (See *McKinney's N.Y. V.T.L.* §§1192(2), (2-a), and (3)) with large fines and surcharges associated with them and lengthy revocations of driving privileges. Also, the sentencing parameters are more stiff with these types of convictions. Furthermore, your client will now be forced to install a costly ignition interlock device on any car that they own, operate or have available in their household.

(See *McKinney's N.Y. V.T.L.* §§1193(1)(b)(2), 1198) This device can be ordered for up to one (1) year by the court. (*Id.*) Not only is this costly, but also quite embarrassing. On the other hand, an impaired conviction (See *McKinney's N.Y. V.T.L.* §1192(1)) is not a crime, the fines are much lower, the suspension period is shorter, and the ignition interlock device is not mandatory. The impaired is also not a predicate offense for a subsequent DWI arrest. To make the situation more complex, with multiple prior alcohol related driving convictions, subsequent relicensure requires heightened consideration.

Therefore, in order to increase the probability of avoiding a DWI conviction, the attorney's objective is to analyze your client's potential Blood Alcohol Level if he or she were to submit to a chemical or blood test. Many times a refusal can save a client who would have a very high reading from a misdemeanor conviction. The refusal also drastically decreases your client's chances of incarceration or probation. However, the refusal advice may not be appropriate in some circumstances where your client has had a minimal amount of alcohol throughout the course of the day or night. It is this "gray" area where the lawyer has the most difficulty rendering the correct advice. We hope that this article will provide a discussion of some of the issues the lawyer should consider when faced with "the late night call."

As you all know, there are negative consequences associated with refusing a chemical test. I tell my clients to think of the refusal as a separate prosecution undertaken by DMV which has consequences *in addition* to any court-imposed sanctions. Refusing the Breathalyzer triggers an administrative hearing through the DMV, held shortly after arraignment, where the ultimate issue centers around whether or not one knowingly opted to refuse the Breathalyzer test. (See *McKinney's N.Y. V.T.L.* §1194(2)(c)). Should an Administrative Law Judge find a valid refusal, they can then revoke your client's driving privileges for one year on the first refusal and 18 months on the second

refusal. (See *McKinney's N.Y. V.T.L.* §1194(2)(d)(1)). There are also civil penalties in addition to the license revocation, which the client would not face if they submitted to a chemical test. (See *McKinney's N.Y. V.T.L.* §1194(2)(d)(2)). Furthermore, at arraignment your client must surrender their driver's license, and they will not qualify for a Hardship License, which they could have qualified for if they took the test no matter how high the result. Have your client be prepared with

a ride home from court!! Your client may not have a valid driver's license from the date of arraignment until conviction. This can be a dire consequence to your client if he/she needs to drive to work everyday. Finally, there are other factors to consider such as the fact that a the negative inference can be drawn by a refusal should the matter proceed to trial.

Lastly, believe it or not, if your client is acquitted on the underlying DWI, but knowingly refused the Breathalyzer test, he will not qualify for a conditional license during his revocation from the DMV for refusing. While this seems patently unfair, this is a consequence you must be aware of.

Knowing all of the facts and risks of the decision to refuse or not to refuse is only half of the battle. You must now elicit facts from your client to speculate as to their blood alcohol level, knowing that your client may have had a few cocktails, causing you to question the

accuracy of the facts which he or she presents. Taking all of those factors into consideration, there are several areas of inquiry for the lawyer:

- **JURISDICTION:** Find out where your client was stopped. There may be some variance among jurisdictions as to how DWI matters are ultimately resolved. Some jurisdictions have higher thresholds to allow the impaired after trial, while others are more strict.
- **FACTS OF THE INSTANT CASE:** Find out the general facts and circumstances surrounding the arrest. Can the person tell you why they were pulled over? Was there an accident? If so, was anyone injured? Was the person asleep at the wheel? Are there any other "aggravating" factors present?
- **DEMEANOR:** Find out the person's demeanor with the police officer. Were they being cooperative or were they giving the officer a hard time?

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His or her demeanor and attitude will factor into the decision for a possible plea or trial. Also, gauge your client's speech pattern. Can you understand him or her or is their speech slurred?

- **AMOUNT CONSUMED:** Tell your client that honesty is imperative for this question. Ask the police officer if you could have a private call with your client and find out how much the person was drinking. If privacy is not possible, (as may be the case for some police agencies) you must explain to the person that they can not say they were drinking alcohol while the officer is listening. Phrase these questions for yes/no responses. Even a number blurted out can be inferred by the officers that the person consumed that number of drinks. Make sure to find out over what time period the person was drinking. Also, what type of alcohol was being consumed. Finally, determine when the person had their last drink. If the last drink was several hours ago, their blood alcohol level may be going down, as opposed to someone who took several shots right before being pulled over.
- **CHARACTERISTICS OF DEFENDANT:** If you have not physically observed your client before, find out some factors about their body weight and size. In our experience a smaller woman will blow higher than larger man with the same amount of alcohol ingested. Furthermore, find out if your client is over the age of 21 or not. This could have a drastic effect on their relicensing.
- **PRIOR RECORD:** Find out if your client has had any prior DWI convictions. If your client was convicted of an alcohol related driving offense within the past five years (measured as of the date of completion of the Drinking Driver Program (DDP) after the first offense to the date of the new violation for subsequent DDP participation), they will not qualify for any limited license until after their revocation period is up.
- **ENGAGE THE POLICE OFFICER:** In our experience we like to see if the officer will get on the phone with us and discuss the case. The officer can give you a more accurate picture of what is really going on. Furthermore, the officer can sometimes offer you some valuable information as to whether or not the client passed any field sobriety tests and what the result was on the Alcosensor, the road side field sobriety test. As a caveat though, the Alcosensor is not indicative of actual Blood Alcohol content. In our experience we have found the Alcosensor result to be .02-.03 points lower than the actual test. However, we have noticed scenarios where the Alcosensor was much lower than the actual chemical test. We caution the reader who relies on the Alcosensor to guesstimate the Blood Alcohol result.

Ultimately, keep in mind that all of these questions will only help you better speculate as to what the end result will be. This list is not exhaustive, and I am certain that many practitioners could add additional considerations. Your ultimate responsibility is to notify your client of the risks associated with refusing or not refusing (albeit when they are possibly under the influence of alcohol). This requires the lawyer to act swiftly taking into consideration a myriad of factors including the lawyer's own "gut" feeling. [B]