

# Seeing Double

## Representing a New York Driver in a New Jersey DWI Case

by James B. Sepowitz

**N**ew Jersey attorneys defending driving while intoxicated (DWI) cases must assess different variables and issues for each individual client, such as the client's employment, need for a license, driving history, companion traffic summonses, and the venue. When the client resides in another state, the attorney must also consider the potential penalties that may be imposed by that state's motor vehicles department resulting from a New Jersey DWI conviction. For DWI defense attorneys in North Jersey, the most commonly encountered out-of-state drivers are our neighbors to the east and north. Accordingly, this article will discuss practice tips and issues to consider when representing a New York-licensed driver on a New Jersey DWI.<sup>1</sup>

### New Jersey DWI Penalties

The most notable distinction between New Jersey and New York DWI offenses is that New Jersey infractions are motor vehicle offenses unless someone is injured or killed, while New York offenses are crimes: A first offense is a misdemeanor<sup>2</sup> and a second offense is a felony if committed within 10 years of the first.<sup>3</sup> Nonetheless, despite opting to classify DWI offenses as merely motor vehicle infractions, the New Jersey Legislature has enacted serious penalties for a DWI conviction.

A first DWI conviction in New Jersey carries a suspension of driving privileges for a period of seven to 12 months if the blood alcohol level (BAC) was .10 percent or above,<sup>4</sup> or three months if the BAC was below .10 percent, with a *per se* violation occurring at .08 percent or above.<sup>5</sup> Additionally, the defendant will be sentenced to attend 12 to 48 hours of drunk-driving classes through the Intoxicated Driver Resource Center (IDRC), pay court-imposed fines and surcharges totaling approximately \$600 to \$900, and pay a Motor Vehicle Commission (MVC) surcharge of \$1,000 a year for three years.<sup>6</sup>

These penalties are mandatory for all convicted DWI

offenders, whether residing in or out of New Jersey. However, out-of-state residents can attend the drunk-driving classes at a facility in their home state if approved by the IDRC.

Optional penalties, such as 30 days in jail, may be imposed for a first offense, but are rarely employed. A recent amendment to the DWI statute requires the installation of an ignition interlock device in the driver's vehicle for a period of six to 12 months upon restoration of driving privileges if the BAC of the driver is shown to be .15 percent or above, or if the driver refused to take the breath test.

A second DWI conviction carries the following mandatory penalties: a two-year suspension of driving privileges; 30 days community service; two to 90 days in jail, with the option of serving the jail sentence inpatient at the IDRC; installation of an ignition interlock device for a period of one to three years upon restoration of driving privileges; court-imposed fines and surcharges totaling approximately \$900 to \$1,400; and an MVC surcharge of \$1,000 a year for three years.

A third or subsequent DWI conviction will result in a mandatory suspension of driving privileges for 10 years; six months in the county jail; installation of an ignition interlock device for a period of one to three years upon restoration of driving privileges; approximately \$1,400 in court-imposed fines and surcharges; and an MVC surcharge of \$1,500 a year for three years.

Refusal convictions carry the same penalties as DWI convictions, except for the jail portion of the sentence. In addition, a conviction for refusal to submit to a breath test in New Jersey is recorded as a separate driving offense on the driver's motor vehicle abstract.

If these offenses take place in a school zone, most of the penalties are doubled.

### New York DWI Penalties

New York divides its DWI laws into three levels of impairment: 1) aggravated driving while intoxicated (BAC of .18 percent and

higher);<sup>7</sup> 2) driving while intoxicated (BAC of .08 percent or higher)<sup>8</sup> or driving while impaired by a drug;<sup>9</sup> and 3) driving while ability impaired (DWAI).<sup>10</sup>

Aggravated driving while intoxicated is a misdemeanor for the first offense, carrying a minimum one-year license revocation, up to one year in jail, and a fine of \$1,000 to \$2,500, along with other mandatory surcharges and assessments.<sup>11</sup> A second offense within five years is a Class E felony, mandating a minimum license revocation of 18 months, a jail sentence of five days to four years, and a fine of \$1,000 to \$5,000.<sup>12</sup> A third or subsequent offense within 10 years is a Class D felony, punishable by a minimum license revocation of 18 months with a possibility of permanent revocation, 10 days to seven years in jail, and a fine of \$2,000 to \$10,000.<sup>13</sup>

Ordinary, or non-aggravated, DWI convictions have the same classifications and essentially the same penalties as aggravated DWI convictions, except a first offense carries a minimum six-month license revocation and subsequent offenses carry a minimum one-year license revocation. Meanwhile, a first or second DWAI conviction is merely a violation (or traffic infraction) and not a crime,<sup>14</sup> and frequently utilized for plea bargaining purposes for DWI charges. A first DWAI conviction carries a 90-day license suspension, a second within five years of another DWI-related offense carries a minimum six-month revocation, and a DWAI conviction within 10 years of two DWI-related offenses is a misdemeanor with a minimum one-year revocation.

Unlike in New Jersey, breath test refusal charges in New York are not prosecuted in conjunction with the DWI prosecution because the refusal charge is merely administrative and handled through the New York Department of Motor Vehicles (DMV). Notwithstanding, the defendant's

license will be revoked immediately upon the refusal and, if upheld at the hearing, cannot be restored for at least a year, even on a first offense.<sup>15</sup> Nonetheless, it does not appear that a refusal conviction in New Jersey will result in a loss of driving privileges in New York.

If a New York driver is convicted of an out-of-state DWI offense and the conviction is reported to the New York DMV through the Interstate Driver License Compact, then the New York DMV will revoke that driver's privileges for a minimum period of 90 days.<sup>16</sup> If the driver is under 21, the length of the suspension will be a minimum of one year.<sup>17</sup>

Since New York and New Jersey are both members of the interstate compact, a New York driver convicted of a New Jersey DWI should expect to receive a license revocation of at least 90 days, whether or not the driver has prior convictions and no matter the length of the period of suspension in New Jersey. However, the New York revocation will not take effect immediately. Rather, because of the delay in reporting and administrative processing, the New York revocation will not take effect for weeks or even months after the New Jersey conviction. When the order of revocation from the New York DMV finally arrives, it should be accompanied by information on how to apply for a conditional license.

### **Conditional Licenses and Restoration of New York Driving Privileges**

Unlike New Jersey license suspensions, New York suspensions or revocations for DWI convictions are not absolute. If a New York driver is convicted of a DWI-related offense, he or she can participate in the New York State Drinking Driving Program (DDP) and apply for a conditional license that allows for driving to and from work, school, treatment classes, medical appointments, etc.<sup>18</sup>

The costs for the license and program are relatively reasonable. The program consists of a minimum of 15 hours of instructional classes in seven weekly sessions to promote drug and alcohol rehabilitation.<sup>19</sup>

In order to be eligible for the conditional license, the applicant must not have been convicted of a DWI-related offense in the past five years or previously participated in the program in the past five years.<sup>20</sup> If any of the terms of the conditional license are violated, including failure to complete the DDP, the conditional license shall be revoked by the DMV.<sup>21</sup>

It is important to advise clients that the DDP will not give credit for the time spent at the New Jersey IDRC classes. However, the New Jersey IDRC obligation may be considered fulfilled through the DDP classes.

When New York driving privileges are suspended for an alcohol-related offense, they are not automatically restored when the period of suspension expires, even if a conditional license was obtained. As does New Jersey, New York requires the payment of a restoration fee (currently \$50) to the DMV Driver Improvement Adjudication Unit, as well as a notice of completion from the DDP.

### **Calculating Prior Offenses in New Jersey**

When a client advises his or her attorney of a prior DWI conviction, it is helpful to order a driving record to determine the number of priors and the date of the offenses. The date of the offenses is particularly significant because of the 10-year step down provision for sentencing purposes under N.J.S.A. 39:4-50(a). An abstract of driving record can be ordered from the New York DMV by filling out DMV Form MV-15 and paying a fee of \$10.<sup>22</sup> If a client has previously been licensed in New Jersey or the prior offense took place in

New Jersey, it may also be prudent to order an abstract from the New Jersey MVC, as the MVC frequently creates abstracts for out-of-state drivers who are convicted of motor vehicle infractions in New Jersey.

A prior DWAI conviction in New York is generally considered a prior DWI conviction in New Jersey to enhance the penalties of a subsequent offense.<sup>24</sup> However, if it can be shown that the DWAI conviction was solely based on a BAC reading of below .08 percent, then, arguably, the DWAI cannot count as a prior.

A conviction of a violation of a law of a substantially similar nature in another jurisdiction....shall constitute a prior conviction under this subsection unless the defendant can demonstrate by clear and convincing evidence that the conviction in the other jurisdiction was based exclusively upon a violation of a proscribed blood alcohol concentration of less than 0.08%.<sup>24</sup>

A DWAI can be based upon a reading of .05 to .07 percent. However, since most DWAI convictions involve readings of .08 percent or above and were pleaded down, this can be a difficult burden to meet.

Because repeat offenders do not seem to be afraid of breaking the rules, an attorney may also encounter a New York-licensed driver charged with a DWI in New Jersey while still under suspension for a prior New York DWI. Should this be the case, the client will face dou-

ble exposure to the enhanced sentencing penalties under both N.J.S.A. 39:4-50(a) (DWI) and N.J.S.A. 39:3-40(f)(2) (driving while on the revoked list).<sup>25</sup> If the client was properly driving with a conditional license, however, the additional penalties under N.J.S.A. 39:3-40(f)(2) will not apply.

### Conclusion

When representing a New York-licensed driver in New Jersey, a practitioner needs to look beyond the laws of the Garden State. In addition to knowledge of New Jersey DWI law and procedure, it is vital to have a basic comprehension of New York's DWI practices and the further penalties and consequences that the client may face when returning to the Empire State after sentencing. ◊

### Endnotes

1. It would also be prudent, even recommended, to advise the client to simultaneously consult with a New York attorney experienced in defending such matters to fully understand the range of the New York consequences and to coordinate with on the defense strategy, if necessary, given those consequences.
2. N.Y.V.T.L. § 1193(1)(b).
3. N.Y.V.T.L. § 1193(1)(c).
4. N.J.S.A. 39:4-50(a)(1)(ii).
5. N.J.S.A. 39:4-50(a)(1)(i).
6. N.J.S.A. 39:4-50(a)(1).
7. N.Y.V.T.L. § 1192(2-a).
8. N.Y.V.T.L. §§ 1192(2) & 1192(3).
9. N.Y.V.T.L. § 1192(4).

10. N.Y.V.T.L. § 1192(1). A DWAI is a lesser included offense of DWI.
11. N.Y.V.T.L. § 1193(1)(b).
12. N.Y.V.T.L. § 1193(1)(c)(i).
13. N.Y.V.T.L. § 1193(1)(c)(ii).
14. N.Y.V.T.L. § 1193(1)(a).
15. N.Y.V.T.L. § 1194(2).
16. N.Y.V.T.L. § 1193(2)(b)(8).
17. N.Y.V.T.L. § 1193(2)(b)(6) & (7).
18. N.Y.V.T.L. § 1196(7)(a).
19. N.Y.V.T.L. § 1196(1).
20. N.Y.V.T.L. § 1196(4). Additional disqualifications exist in the New York regulations, such as a poor driving record. N.Y. Comp. Codes R. & Regs. Tit. 15, § 134.7.
21. N.Y.V.T.L. § 1196(7)(f).
22. The form is available online through the New York State DMV's website at [www.nydmv.state.ny.us/forms/mv15.pdf](http://www.nydmv.state.ny.us/forms/mv15.pdf).
23. See *State v. Regan*, 209 N.J. Super. 596 (App. Div. 1986) (prior DWAI considered as prior violation for sentencing purposes under N.J.S.A. 39:4-50); *D.M.V. v. Lawrence*, 194 N.J. Super. 1 (App. Div. 1983) (N.J.S.A. 39:4-50 and N.Y.V.T.L. 1192(1) found to be of a "substantially similar nature").
24. N.J.S.A. 39:4-50(a).
25. See *State v. Colley*, 397 N.J. Super. 214 (App. Div. 2007).

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