2024 Annual Conference

Niagara Falls, New York

Handling a DWI Arraignment & Suspension Pending Prosecution

Date: Monday, September 23, 2024
Instructors:
Dennis Nave, Esq.
MCLE: 1.0 Professional Practice

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association

Presenter Bio

Dennis Nave has earned a reputation in the legal community as an aggressive and talented advocate for his clients. Those charged with DWI, Traffic, Criminal Charges, and License Matters seek him out because of his deep criminal law experience and firsthand knowledge of criminal court procedures, and understanding of New York States Department of Motor Vehicle rules and regulations.

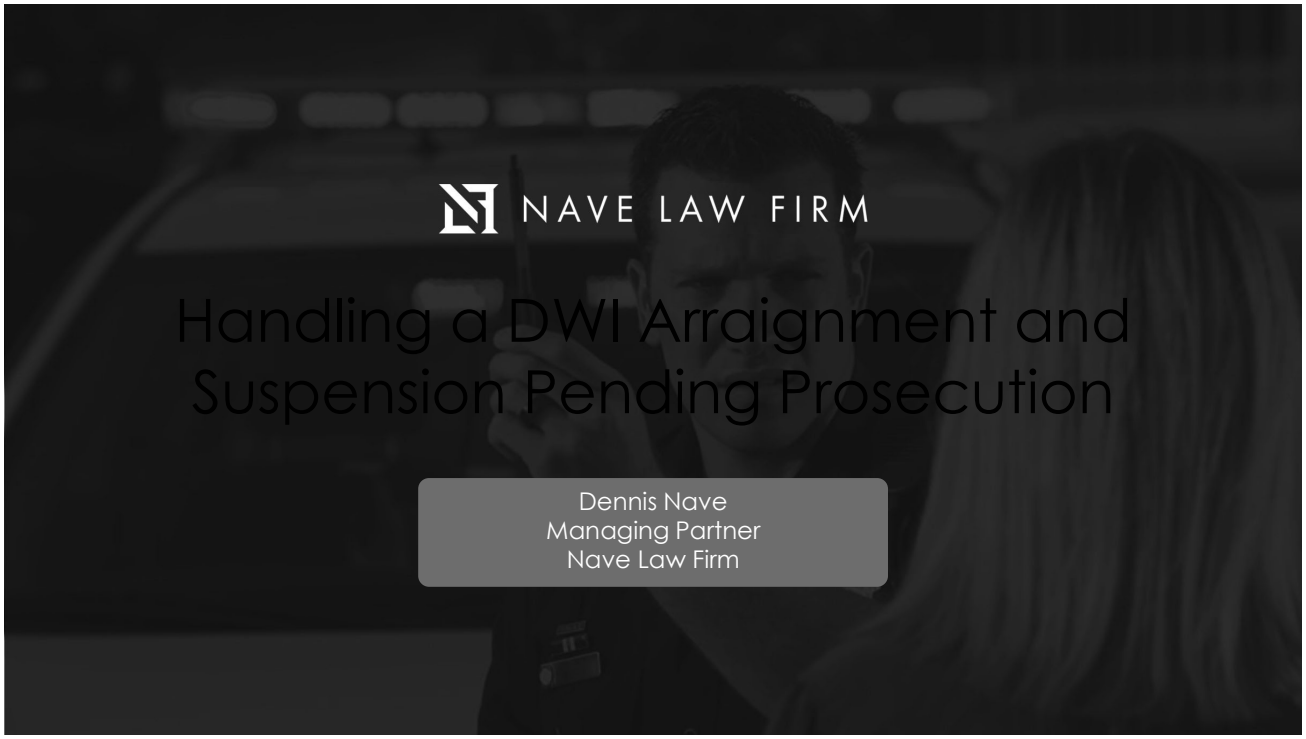
Mr. Nave is currently the founding and managing partner for Nave Law Firm, located at 231 Walton Street Syracuse, NY. He is a member of the Onondaga County Bar Association, New York State Association of Criminal Defense Lawyers, and the National College of DUI Defense. Along his path, he gained experience with the NYS Attorney General Office, Onondaga County District Attorney's office, and the largest DWI Defense firm at the time.

Attorney Nave has been recognized as a Super Lawyer, a third-party rating service, as a Top Rated DWI Lawyer. Also, he has been received recognition as a Super Lawyer's prestigious rising star list, which recognizes no more than 2.5 percent of attorneys in each state.

Mr. Nave enjoys presenting and lecturing on DWI, Criminal Defense, and Defensive Driving. He has done so with the Madison County Tavern Association, the Onondaga County Water Authority, Whitman School of Management at Syracuse University, and for the Onondaga County Bar Association.

Mr. Nave attended the University of Rochester for undergraduate and then attended Syracuse University for his Juris Doctor and Master in Public Administration. He is currently admitted to practice in New York State and the Northern District of New York.

To contact Mr. Nave, his direct line is 315-200-1429 and email dnave@naveteam.com.



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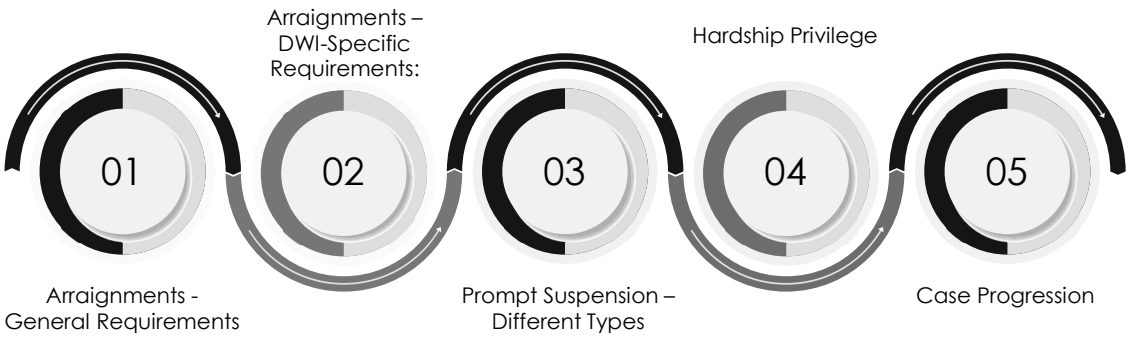
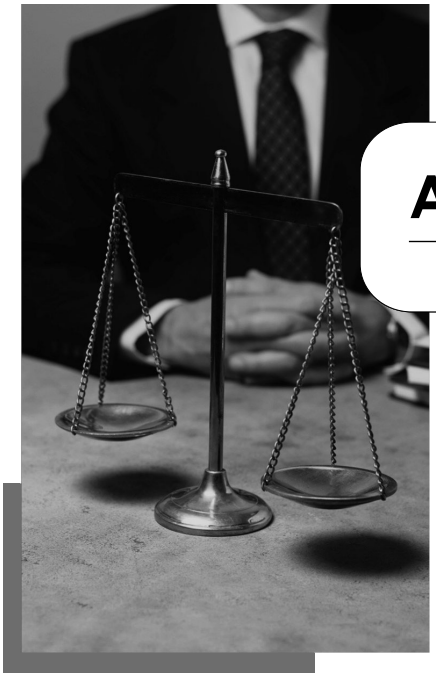
Outline:





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Arraignments - Generally

At an arraignment for a VTL offense, the Judge shall:

- Advise the defendant of their rights;
- Read the charges pending against the defendant, unless such reading is waived by the defendant or defense counsel;
- Allow the defendant to enter a plea;
- Determine if the offense is a "qualifying offense" for bail; and
- Allow for arguments regarding the facial sufficiency of information.

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Supporting Deposition

When charged by a simple information, the defendant is entitled to have filed in the court and served upon them "a supporting deposition of the complainant police officer or public servant, containing allegations of fact, based either upon personal knowledge or upon information and belief, providing reasonable cause to believe that the defendant committed the offense or offenses charged." CPL § 100.25(2).

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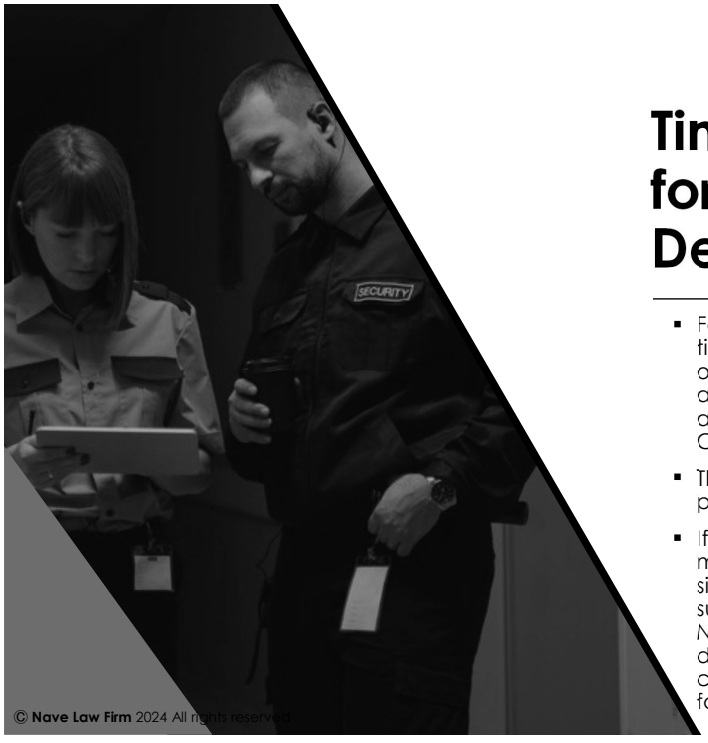
Service of Supporting Depositions

- Once a defendant requests a supporting deposition, the court must order law enforcement "to serve a copy of such supporting deposition upon the defendant or his attorney… **and** to file such supporting deposition with proof of service thereof." CPL § 100.25(2).
  - **Discussion:** Considering the wording of the statute, should service on defendant at the time of the arrest be deemed sufficient?
- It is important to note that the law enforcement officer must themselves serve the supporting deposition upon defense counsel.
- This requirement is **not** satisfied where the court simply includes a copy of the supporting deposition in the court file and the court subsequently sends a copy to defense counsel. *People v. Garcha*, 79 Misc.3d 128(A) (2nd Dep't 2023).



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Timeliness of a Request for a Supporting Deposition

- For a request for a supporting deposition to be timely, the request must be made before the entry of a guilty plea and before the commencement of a trial thereon, but not later than thirty (30) days after the defendant is directed to appear in court. CPL § 100.25(2).
- The officer has thirty (30) days from the request to provide the supporting deposition.
- If a timely request for a supporting deposition is made, the failure to supply one renders the simplified information **insufficient on its face** and subjects it to **dismissal** upon motion. *People v. Nuccio*, 78 N.Y.2d 102, 104(1991). **However**, the dismissal is **without prejudice**, and thus "prosecution can be renewed on a facially sufficient information following such a dismissal." *Id.* at 104.

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710.30 Notice

- When the People intend to offer evidence of the defendant's alleged statements to an officer, they must serve the notice within **fifteen (15) days** of the arraignment. CPL § 710.30.
- A 710.30 Notice **must** include, **with particularity**:
  - the date/time/location of statements; **and**
  - the sum and substance of such statements.
- A 710.30 notice must state, **with specificity**, the evidence that the People intend to offer. CPL § 710.30(1); *People v. Lopez*, 84 N.Y.2d 425, 428 (1994).
  - Therefore, simply stating, for example, "see police reports and body-worn camera footage" is insufficient.

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Facial Sufficiency of Information

An information is facially sufficient when:

01

It meets the requirements of CPL § 100.15 (specifically, it must specify the court; be subscribed verified by complainant; designate offenses charged; contain the alleged facts; etc.)

02

the information, and supporting depositions, provide reasonable cause to believe the offense was committed; and

03

non-hearsay allegations and/or supporting depositions establish each element.

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Prompt Suspension - Pending Prosecution

Under VTL § 1193(2)(e)(7)(a), also known as the "prompt suspension law," courts shall suspend the defendant's driver's license pending prosecution if:

they are charged with DWI, Aggravated DWI, or DWAI Combined Influence;	they are alleged to have had a BAC of .08% or greater at the time of their arrest; AND	the accusatory instrument is facially sufficient.

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Suspension Pending Prosecution - Certified Chemical Breath Test Results Required

Pursuant to *Pringle v. Wolfe*, 88 N.Y.2d 426(1996), a court may not suspend the defendant's driver's license unless it possesses the results of the chemical test in certified, documented form, pursuant to CPLR § 4518(c).

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Requirement of an Original Signature – *People v. Bodendorf*

- In *People v. Bodendorf*, 52 Misc.3d 551 (LaGrange Town Court, 2016) the Court considered whether a Breath Alcohol Analysis Record must bear the original signature of the person who certified it.
- The defendant was accused of Aggravated DWI and DWI Common Law. When the People requested that the court suspend the defendant's driver's license pending prosecution, the defendant objected because the Breath Alcohol Analysis Record that had been filed with the court did not bear an original signature.
  - The defendant argued that an original certification was necessary to satisfy the minimum due process requirements set forth in *Pringle*.
- However, neither the defense nor the People brought forth case law which directly answered whether a Breath Alcohol Analysis Record must bear the original signature of the person who certified it.

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People v. Bodendorf – Analysis

- Because *Pringle* expressly required that the certification be provided pursuant to CPLR § 4518(c), the answer to this question would turn on whether that statute could be deemed to permit the use of a photocopied signature.
- Under the context of the best evidence rule, the court found that CPLR § 4539 expressly allows for the introduction of photocopies as opposed to an original. Additionally, CPLR § 4540 expressly permits the use of a facsimile signature to authenticate certain official government records. **However**, the court noted that these statutes only deal with issues of authentication and best evidence, and do not address the business records exception to the hearsay rule contained in CPLR § 4518(c).

People v. Bodendorf – Decision

- The Court noted that, unlike CPLR § 4539 and § 4540, the business record exception contained in CPLR § 4518(c) does **not** expressly authorize the use of a facsimile or photocopied signature.
- **Due to the absence of express statutory authority, the Court held that an original signature is required on a Breath Alcohol Analysis Record.**
- **Therefore**, without the *original* signature, the Court **cannot** suspend the defendant's license pending prosecution.

Pringle Hearings

- After the Court of Appeals' decision in *Pringle v. Wolfe,* defendants are now entitled to a suspension hearing, also known as a "*Pringle* hearing."
- In order to suspend the defendant's license at these hearings, the court must find that:
    1. the accusatory instrument is sufficient on its face; **AND**
    2. there exists **reasonable cause** to believe that the defendant had a BAC of .08% or greater at the time of their arrest.

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Pringle Hearings – Defendant's Rights

Under *Pringle*, defendants are entitled to rebut the court's findings before the court may suspend their license.

- Furthermore, defendants are also entitled to a "reasonable request for a short adjournment if necessary to marshal evidence to rebut the prima facie showing of reasonable cause."

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Pringle Hearings – The People's Role

- The People are not considered to be a party at *Pringle* hearings, and therefore only have a limited role.
- Under *Matter of Schermerhorn v. Becker*, 63 A.D.3d 843 (3d Dept., 2009), the People are only permitted to do the following at *Pringle* hearings:
  - remind the court of the prompt suspension law;
  - offer the defendant's chemical test result; and
  - challenge any attempts by the defendant to "markedly expand" the scope and purpose of the hearing.
- Finally, under *Schermerhorn*, the People are **not** required to be a participant in *Pringle* hearings.

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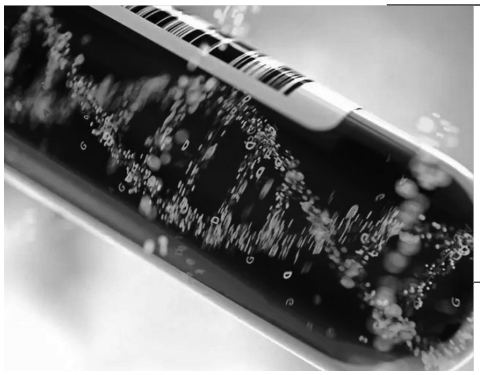
Suspension Pending Prosecution Based Upon Prior Conviction within 5 Years or Vehicular Crime Where There Is No BAC



Under either one of these circumstances, the defendant's driver's license shall be suspended pending prosecution even where there is no proof of their BAC.

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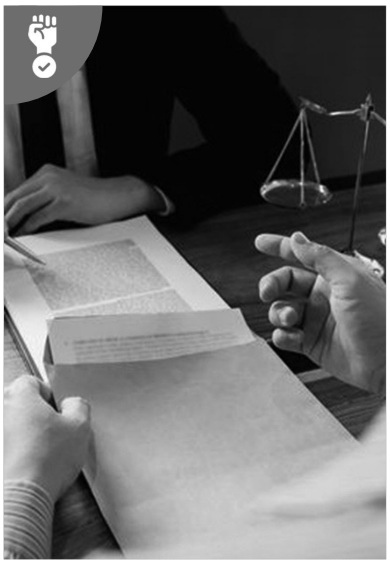
Suspension Pending Prosecution Based Upon Prior Conviction or Vehicular Crime – Required Findings

To suspend the defendant's license under VTL § 1193(2)(e)(1), the Court must find that:

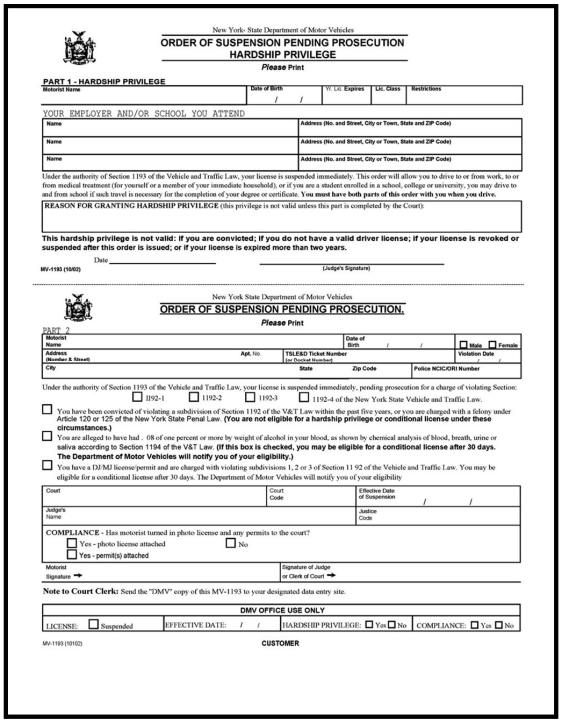
1. the accusatory instrument is facially sufficient;
2. there exists reasonable cause to believe that the holder operated a motor vehicle in violation of VTL § 1192(2), (2-a), (3), (4) or (4-a); AND
3. there exists reasonable cause to believe either:
    i. the defendant had been convicted of any violation under VTL § 1192 within the last 5 years; OR
    ii. the defendant committed Vehicular Assault or Vehicular Homicide.



Suspension Pending Prosecution Based Upon Prior Conviction or Vehicular Crime – Defendant's Rights

As with all prompt suspensions pending prosecution, if the court makes the required findings, the defendant is entitled to make a statement and present evidence to rebut them. VTL § 1193(2)(e)(1)(b).

Order of Suspension Pending Prosecution Form



New York State Department of Motor Vehicles

ORDER OF SUSPENSION PENDING PROSECUTION
HARDSHIP PRIVILEGE

Please Print

PART 1 - HARDSHIP PRIVILEGE

Motorist Name	Date of Birth / /	Lic. Expires	Lic. Class	Restrictions

YOUR EMPLOYER AND/OR SCHOOL YOU ATTEND

Name	Address (No. and Street, City or Town, State and ZIP Code)
Name	Address (No. and Street, City or Town, State and ZIP Code)
Name	Address (No. and Street, City or Town, State and ZIP Code)

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately. This order will allow you to drive to or from work, to or from medical treatment (for yourself or a member of your immediate household), or if you are a student enrolled in a school, college or university, you may drive to and from school if such travel is necessary for the completion of your degree or certificate. **You must have both parts of this order with you when you drive.**

REASON FOR GRANTING HARDSHIP PRIVILEGE (this privilege is not valid unless this part is completed by the Court):

This hardship privilege is not valid: if you are convicted; if you do not have a valid driver license; if your license is revoked or suspended after this order is issued; or if your license is expired more than two years.

Date _____ _____
(Judge's Signature)

MV-1193 (10/02)

New York State Department of Motor Vehicles

ORDER OF SUSPENSION PENDING PROSECUTION.

Please Print

PART 2

Motorist Name	Date of Birth / /	☐ Male ☐ Female
Address (Number & Street) Apt. No.	TSLE&D Ticket Number (or Docket Number)	Violation Date / /
City	State Zip Code	Police NCIC/ORI Number

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately, pending prosecution for a charge of violating Section:
☐ 1192-1 ☐ 1192-2 ☐ 1192-3 ☐ 1192-4 of the New York State Vehicle and Traffic Law.

☐ You have been convicted of violating a subdivision of Section 1192 of the V&T Law within the past five years, or you are charged with a felony under Article 120 or 125 of the New York State Penal Law. **(You are not eligible for a hardship privilege or conditional license under these circumstances.)**

☐ You are alleged to have had . 08 of one percent or more by weight of alcohol in your blood, as shown by chemical analysis of blood, breath, urine or saliva according to Section 1194 of the V&T Law. **(If this box is checked, you may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility.)**

☐ You have a DJ/MJ license/permit and are charged with violating subdivisions 1, 2 or 3 of Section 11 92 of the Vehicle and Traffic Law. You may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility

Court	Court Code	Effective Date of Suspension / /
Judge's Name		Justice Code

COMPLIANCE - Has motorist turned in photo license and any permits to the court?
☐ Yes - photo license attached ☐ No
☐ Yes - permit(s) attached

Motorist Signature →	Signature of Judge or Clerk of Court →

Note to Court Clerk: Send the "DMV" copy of this MV-1193 to your designated data entry site.

DMV OFFICE USE ONLY

LICENSE: ☐ Suspended	EFFECTIVE DATE: / /	HARDSHIP PRIVILEGE: ☐ Yes ☐ No	COMPLIANCE: ☐ Yes ☐ No

MV-1193 (10/02) **CUSTOMER**

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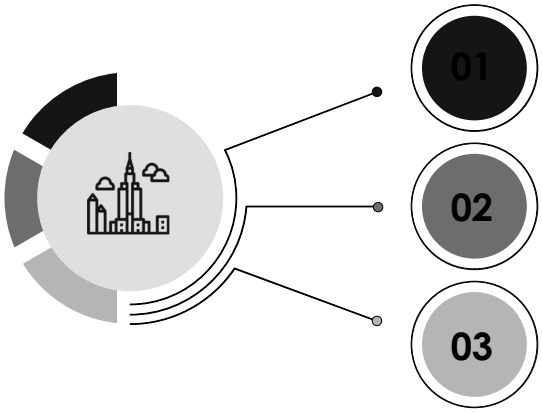
Hardship Privileges

Under VTL § 1193(2)(e)(7), if the court suspends the defendant's driver's license pending prosecution and finds that the suspension will result in "**extreme hardship**," the court may grant a hardship privilege.

Hardship Privileges – Defining "Extreme Hardship"

"Extreme hardship" is defined as "the inability to obtain alternative means of travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate." VTL § 1193(2)(e)(7)(e).

Hardship Privileges – Proving "Extreme Hardship"



The burden of proving "extreme hardship" is placed upon the defendant. VTL § 1193(2)(e)(7)(e).

A finding of extreme hardship cannot be based solely on the defendant's testimony. Therefore, the defendant should bring or submit proof of where they live, work, attend school, etc.

In addition, defendants will typically provide a third-party affidavit confirming that the defendant cannot otherwise easily acquire transportation to and from these locations.

Hardship Hearings

Where the defendant requests a "hardship hearing," the arraignment should be adjourned no more than three business days if the sole purpose of the adjournment is to allow the defendant to present evidence of extreme hardship. VTL § 1193(2)(e)(7)(e).

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Hardship Privileges – Eligibility

Defendants are **NOT** eligible for hardship privileges if:

1. They have a DWI conviction in the last five years;

2. Their arrest resulted from a refusal to submit to a chemical test; or

3. Their license is suspended because they are being charged with Vehicular Assault or Vehicular Homicide in connection with the current incident.

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Hardship Privileges – Out-of-State Licensees

- The Court in *People v. Reick*, 33 Misc.3d 774 (N.Y. City Crim. Ct., 2011) held that hardship privileges may be granted to out-of-state licensees.
- However, it should be noted that courts may not take away an out-of-state licensee's physical driver's license.

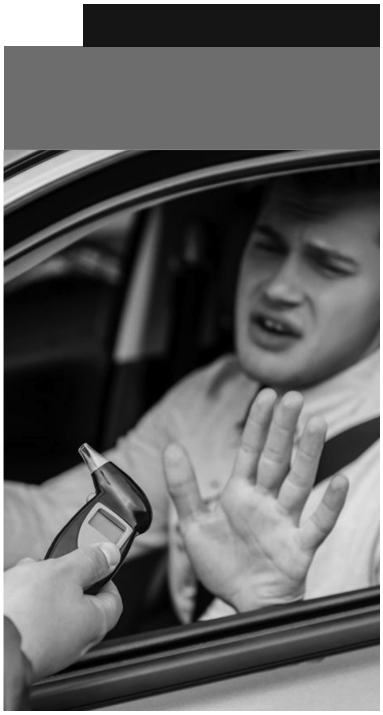
Hardship Privileges - Permissions

If the hardship privileges are granted, the defendant shall be permitted to travel:

- to and from their place of employment;
- to and from any necessary medical treatment for themselves and/or anyone in their household; and
- to and from an accredited school, college, or university if necessary for the completion of the defendant's educational degree or certificate.

DWI Refusals – License Suspensions

- In the case of a refusal, at arraignment the court is required to temporarily suspend the defendant's driving privileges pending the outcome of the refusal hearing. VTL § 1194(2)(b)(3).
- If the DMV fails to provide for such a hearing within 15 days after the defendant is arraigned, the defendant's privileges will be automatically reinstated by the DMV pending the refusal hearing. VTL § 1194(2)(c).



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DWI Refusals – Obligations of the Courts

Courts must forward the following information to the DMV within 48 hours of the arraignment:

1. the refusal report;
2. the notice of hearing; and
3. the temporary suspension.

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Bail

01 DWI, Aggravated DWI, DWAI Drugs, and DWAI Combined Influence are **NOT** considered "qualifying offenses" for the purposes of bail. This also applies to the felony-level offenses of these charges, as these offenses are non-violent. CPL § 510.10(4).

02 However, certain Penal Law crimes, such as Vehicular Manslaughter and Vehicular Assault, are bail eligible.

03 Typically, courts **cannot** impose bail where a defendant incurs another DWI while their case is pending. **However**, the one **exception** to this rule is where the defendant is charged with a Felony DWI and committed another Felony DWI while at liberty. CPL § 530.60(2)(b).

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Right to Discovery

01 Where the defendant is in custody during the pendency of the case, the People have **twenty (20) days** to perform their **initial discovery obligations**. CPL § 245.10(1)(a)(i).

02 Where the defendant is **not** in custody during the pendency of the case, the People have **thirty-five (35) days** to perform their **initial discovery obligations**. CPL § 245.10(1)(a)(ii).

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Speedy Trial Timeline - CPL § 30.30

- In **misdemeanor** cases, the People must file a Certificate of Compliance with their discovery obligations, and declare their readiness for trial, within **ninety (90) days** from the commencement of the criminal action. CPL §§ 30.30 and 245.50.
- In **felony** cases, the People must file a Certificate of Compliance with their discovery obligations, and declare their readiness for trial, within **six (6) months** from the commencement of the criminal action. CPL §§ 30.30 and 245.50.
- A criminal action is "commenced" by the filing of an accusatory instrument with a criminal court. CPL § 100.05.

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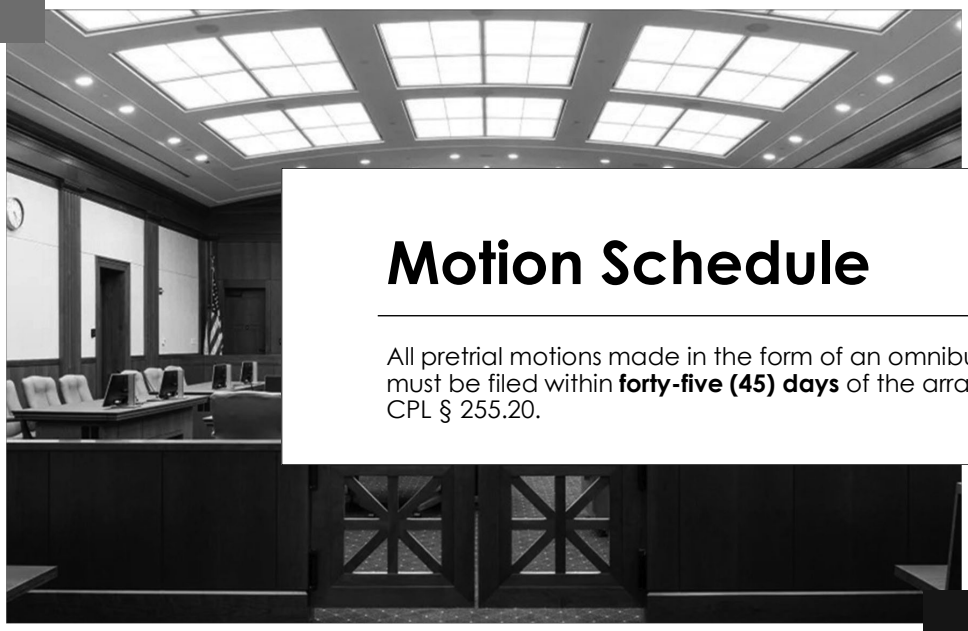

Motion Schedule

All pretrial motions made in the form of an omnibus motion must be filed within **forty-five (45) days** of the arraignment. CPL § 255.20.

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