

## DWI FAQ's

### Should a DWI suspect refuse to submit to a chemical / breath test?

There is no simple answer (or even necessarily a correct answer). The answer depends on many factors, such as whether there has been an accident involving serious physical injury or death, whether the DWI charge is a felony, whether the person is a repeat/multiple offender, whether the person needs to drive to earn a living, whether the test result is likely to be above the legal limit (.08), and whether there is a plea bargaining policy in the specific County with regard to test refusals and/or Blood Alcohol Content (BAC) limits.

While every case is different, depending on numerous factors, including those listed above, the following general rules represent our opinions on this issue:

*If there has been an accident involving serious physical injury or death -- **refuse the test***; in such situations, the civil consequences of a refusal are comparatively insignificant, and the police will most likely be able to force a chemical test, which will void the refusal for DMV purposes;

*If the DWI charge is a felony -- **refuse the test***; in such a situation, (1) the civil consequences of a refusal are comparatively insignificant, and the driver will generally receive a Court sentence that will cause his/her driving privileges to be revoked for at least as long as the refusal, and (b), if the case is litigated, a DWAI (Driving While Ability Impaired) verdict is more likely where there is a refusal, than where there is a chemical test result of .08 or more;

*If the DWI charge is a misdemeanor, and the person needs to drive to earn a living -- **take the test***; in such a situation, a refusal (i) will mandate that the person obtain a VTL §1192 conviction in order to obtain a conditional license, and (ii) the person will have to remain on the conditional license longer than if he or she had taken the test;

*If there is a plea bargaining policy/restriction in the County with regard to test refusals and/or BAC limits -- take the action that will be least likely to prevent a reduction to DWAI (which **usually means to take the test**)*;

*If the person credibly claims to have only consumed enough alcohol to produce a chemical test result of less than .08 (or possibly up to .12, depending on the County) -- **take the test***;

*If the person is a 1st offender -- **take the test (generally)***; in such a situation (a) if the person needs to drive, a refusal will mandate a VTL §1192 conviction to obtain a conditional license, a longer conditional license than if he/she had taken the test, and a civil penalty; (b) if the person does not need to drive, obtains an §1192 plea, and takes the DDP (but does not get a conditional license), a refusal increases the loss of license from approx. 2 months (the length of the DDP) to at least 6 months, and a civil penalty, (c) if the person does not need to drive, obtains a DWAI plea, and does not take the DDP, a refusal increases the loss of license from 90 days to at least 6 months, and a civil penalty, and (d) if the person does not need to drive, obtains a DWI plea, and does not take the DDP, a refusal adds a civil penalty;

*If the person is a 2nd offender, within 5 years, and the DWI charge is a misdemeanor-- **take the test***; in such a situation, most prosecutors require a plea to the DWI charge, and the person is not eligible for either the DDP or a conditional license; a refusal increases the loss of license from at least 6 months to at least 1 year, and adds a \$750 penalty;

*If the person is a 3rd offender within 10 years, and the DWI charge is a misdemeanor -- **take the test***; in such a situation, the person may be eligible for the DDP (but will be ineligible for a conditional license); if DDP eligible, a refusal increases the minimum loss of license from the length of the DDP to at least 18 months, and adds a civil penalty.

If the person is under 21, the same rules apply as for a person 21 years of age or older.

In sum, unless there has been an accident involving serious injury or death, and/or the DWI charge is a felony, and/or the BAC reading will be significantly higher than a .08, it is generally a good idea to submit to a chemical test. However, due to the numerous factors that are present when faced with this issue, you should speak to an attorney before making a final decision.