

# YOUR LEGAL NEEDS

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LAW OFFICE OF  
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Newsletter

## ANOTHER REASON NOT TO DRINK AND DRIVE

As of November 1, 2006, a new law became effective in New York, relative to drinking and driving. Over the last several years, drinking and driving has been a fertile subject for legislative change. As a result of pressure coming from the government itself and from groups such as MADD and SADD, laws regarding drinking and driving have become tougher and the penalties for violations have increased. The blood alcohol content level, (commonly known as the BAC), that formed the base level for a charge of driving while intoxicated was lowered several years ago from .10% to .08%. More recently, in addition to fines that one is subjected to for a plea or conviction for Driving While Intoxicated, (DWI) or Driving While Ability Impaired by Alcohol or Drugs, (DWAI), the Department of Motor Vehicles regulations now requires the collection of a Driver Responsibility Assessment of \$250.00 per year for three years. As of November 1, 2006, the legislature created a new crime known as Aggravated Driving While Intoxicated, (for our purposes, ADWI).

ADWI was created to enhance the penalty for driving when a person's BAC is very high. ADWI is charged when the driver's BAC is determined to be greater than .18%. Unlike DWI or DWAI, ADWI requires a chemical test in order for the district attorney to prosecute the case. The same law that created ADWI increased the fines and driver license penalties for people who refuse to submit to a chemical test, usually done with a machine called a breathalyzer. When you are pulled over for driving while intoxicated, the police officer is required to give you a list of warnings concerning your submitting to a chemical test to measure your blood alcohol level, including what happens if you refuse to submit to such a test. If you refuse to submit to the chemical test, your refusal is referred to the Department of Motor Vehicles, (not the courts), while your DWI case is prosecuted in the local criminal court. If you refuse the chemical test, the district attorney does not have a chemical test to use in its prosecution for DWI and must prove

intoxication solely based on eyewitness testimony and field sobriety tests given by the police. This may seem to be an advantage for the defendant, but in reality jury's tend to take the testimony of the officer(s) as a sufficient basis to convict. Any refusal to submit to the test is referred to DMV. Though you are entitled to a hearing, the likelihood of it being determined that you had a legitimate reason to refuse the chemical test is remote at best. You face fines and license penalties solely for refusing to submit to the chemical test, in addition to the fines and penalties for a conviction or guilty plea in court. Usually this will result in greater penalties than if you just submitted to the test.

Refusing to take the chemical test makes it impossible to be prosecuted for ADWI as the statute requires a chemical test. Increased fines and license restrictions were instituted in conjunction with the new law, in an attempt to make the penalties for an ADWI conviction, (which requires a chemical test) to be equivalent to the penalties for what would at best be a DWI conviction, (because no test is available) plus the penalties for refusing to take the chemical test. The laws and regulations were not thoroughly reviewed and compared enough to satisfy this purpose in all situations, resulting in certain situations where it may be advisable to refuse a chemical test, because in the long run your penalties will not be as harsh. The Legislature may figure this out, or more likely the local district attorneys will advance a proposal to fix the discrepancy. Still, the situations where it may be advisable to refuse are limited, ironically, to persons who have prior convictions as opposed to first offenders. For the first offender, submitting to the chemical test is more likely to be the proper choice and should result in lower fines and/or license penalties. In any event, the threshold for intoxication and impairment is now lower and the penalties are increasing, thus using a designated driver or simply calling a taxi, is your safest bet.

### PRESERVING YOUR RIGHT TO SUE

Over the last few decades, American society has become enamored with litigation. There are some people that think this is a good thing, (many of whom are members of the legal profession), but most people believe that the Court system is being overburdened and abused by people and their lawyers, who are more than happy to sue over the smallest thing. Though both federal and state laws are in place to discourage what is defined as "frivolous litigation", which could result in significant fines being assessed against the litigants and their lawyers, the Courts seem somewhat hesitant to designate a matter to be frivolous. Instead, the Court will choose to dismiss the case and get it off the calendar but not assess the fines that are available. There are however, many instances where a person has to sue in order to protect his or her rights. It is important that when you do have a legitimate claim to pursue, that you take the necessary steps to protect your ability to proceed with the claim.

First and foremost, if you believe you have a relevant claim, it is imperative that you seek the advice of an attorney who has experience in the area of the law that you will be dealing with. The law is so vast that no one in the legal profession can possibly be proficient in every type of law. Fortunately between the internet and the phone book you can at least get an idea as to the attorneys in the area who hold themselves out to be proficient in any particular area of law. Be wary however as this should be just a starting point. Just because someone holds themselves out as an expert in an area of the law does not mean that they are. Like all lawyers, I handle certain types of matters but not others. When I receive a call for a matter that I do not handle, I will give the person the name(s) of someone I know that may be helpful. If it is a matter I can handle, I will discuss it briefly over the phone and if I believe there is a legitimate claim, have the client come into the office for a consultation.

It is important that you not only choose an attorney who is experienced in the relevant area of law, but that you seek that advice in a timely manner. All litigation matters are subject to a statute of limitations, or in other words, time limits within which you must commence your lawsuit. If you do not commence your action on time, you are out of luck, no matter how good of a case you have. In certain types of cases there are what are called conditions precedent that you must follow BEFORE you can sue, and these also must be performed within various time limits. The most common example of this is the necessity of filing what is called a Notice of Claim prior to being able to sue a municipality. As these time limits can be very short, it is imperative that you seek legal advice as soon as you believe you have a claim. Only by being diligent and seeking advice in a timely fashion will you be able to retain an attorney who can then prepare, file and serve the paperwork necessary to commence the necessary litigation. Even if you are unsure about whether you have a legitimate claim, it is imperative that you simply call my office and get a legal opinion so that you know your options and the time in which you will be required to act. Only then will you be able to appropriately preserve your right to sue.



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