

**DRIVING WHILE ABILITY IMPAIRED  
BY ALCOHOL  
(Traffic Infraction/Unclassified Misdemeanor<sup>1</sup>)  
VEHICLE & TRAFFIC LAW 1192(1)  
(Committed on or after July 1, 2003)  
(Revised January, 2008)<sup>2</sup>**

The \_\_\_\_\_ count is Driving While Ability Impaired.

Under our law, no person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol.

Some of the terms used in this law have their own special meaning. I will now give you the meaning of the following terms: "motor vehicle," "operate," and "impaired."

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular

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<sup>1</sup> If the defendant has within the previous ten years been convicted two or more times of a violation of any subdivision of Vehicle and Traffic Law § 1192, a conviction of "driving while ability impaired" is an unclassified misdemeanor. Vehicle and Traffic Law § 1193(1)(a). For the gradation of the offense for "special vehicles" see Vehicle and Traffic Law § 1193(1)(d).

<sup>2</sup> The purpose of the revision was to provide a clearer definition of "operates" by removing the language "for the purpose of placing it in operation" and replacing such language with "for the purpose of placing the vehicle in motion." See *People v Alamo*, 34 NY2d 453, 458 (1974); *People v Marriott*, 37 AD2d 868 (3d Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist.Ct., Suffolk, 1994). See also *People v. Prescott*, 95 NY2d 655, 662 (2001).

power.<sup>3</sup>

To OPERATE a motor vehicle means to drive it.

[NOTE: Add the following if there is an issue as to operation:

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.<sup>4</sup>]

A person's ability to operate a motor vehicle is IMPAIRED by the consumption of alcohol when that person's consumption of alcohol has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a vehicle as a reasonable and prudent driver.<sup>5</sup>

The law does not require any particular chemical or physical test to prove that a person's ability to operate a motor vehicle was impaired by the consumption of alcohol. To determine whether defendant's ability to operate a motor vehicle was impaired, you

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<sup>3</sup> The term "motor vehicle" is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge. The term "public highway" appearing in the definition of "motor vehicle" is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of "motor vehicle" is restricted to a vehicle operated or driven on a "public highway," the provisions of Vehicle and Traffic Law § 1192 expressly apply to "public highways, private roads open to motor vehicle traffic and any other parking lot." Vehicle and Traffic Law § 1192(7). (The term "parking lot" is also specially defined by Vehicle and Traffic Law § 1192[7]. See also *People v. Williams*, 66 N.Y.2d 659 [1985].) The definition of "motor vehicle" has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

<sup>4</sup>See cases cited in note 2.

<sup>5</sup>See *People v. Cruz*, 48 N.Y.2d 419, 427 (1979).

may consider all the surrounding facts and circumstances, including, for example:

the defendant's physical condition and appearance, balance and coordination, and manner of speech;

the presence or absence of an odor of alcohol;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety];

[the circumstances of any accident];

[the results of any test of the content of alcohol in the defendant's blood].

*[NOTE: If there is evidence of blood-alcohol content, add the following applicable paragraphs:*

[In this case, the device used to measure blood alcohol content was (specify). That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.<sup>6</sup>]

[Under our law, evidence that there was .05 of one per centum or less by weight of alcohol in the defendant's blood is prima facie evidence that the ability of the defendant to

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<sup>6</sup> This paragraph may be used only when the device employed is included on the Department of Health schedule (10 NYCRR § 59.4[b]) of those devices satisfying its criteria for reliability (10 NYCRR § 59.4[a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (*People v. Hampe*, 181 A.D.2d 238, 241 [3d Dept 1992]).

operate a motor vehicle was not impaired.<sup>7]</sup>

[Under our law, evidence that there was .07 of one per centum or more but less than .08 of one per centum by weight of alcohol in the defendant's blood is prima facie evidence that the ability of the defendant to operate a motor vehicle was impaired.<sup>8]</sup>

In considering the results of any test given to determine the alcohol content of defendant's blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.<sup>9</sup>

[Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.<sup>10]</sup>

[NOTE: If there was an improper refusal to submit to a test, add:  
Under our law, if a person has been given a clear and

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<sup>7</sup> Vehicle and Traffic Law § 1195(2)(a).

<sup>8</sup> Vehicle and Traffic Law § 1195(2)(c).

<sup>9</sup> *People v. Freeland*, 68 N.Y.2d 699 (1986).

<sup>10</sup> See *People v. Mertz*, 68 N.Y.2d 136, 148 (1986); *People v. Freeland*, 68 N.Y.2d 699, 701 (1986).

unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.<sup>11]</sup>

In order for you to find the defendant guilty of this offense/crime, the People are required to prove, from all of the evidence in the case beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), operated a motor vehicle; and
2. That the defendant did so while his/her ability to operate the motor vehicle was impaired by the consumption of alcohol.

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the offense/crime of Driving While Ability Impaired as charged in the \_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the offense/crime of Driving While Ability Impaired as charged in the \_\_\_ count.

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<sup>11</sup> See *People v. Thomas*, 46 N.Y.2d 100 (1978).