

**AGGRAVATED DRIVING WHILE INTOXICATED**  
**(Combination Drugs/Alcohol, With a Child)**  
**(E Felony)**  
**VEHICLE & TRAFFIC LAW 1192(2-a)(b)**  
**(Committed on or after December 18, 2009)**

The \_\_\_\_\_ count is Aggravated Driving While Intoxicated.

Under our law, no person shall operate a motor vehicle<sup>1</sup> while the person's ability to operate such a motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs while a child who is fifteen years of age or less is a passenger in such motor vehicle.

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," "impaired" and "drug."

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 power.<sup>2</sup>

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<sup>1</sup> At this point, the statute continues "in violation of subdivision two, three, four or four-a of this section while a child who is fifteen years of age or less is a passenger in such motor vehicle." This charge addresses a violation of subdivision four-a.

<sup>2</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.

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>3]</sup>

The word DRUG includes (*specify*).<sup>4</sup>

A person's ability to operate a motor vehicle is IMPAIRED by the combined influence of drugs or of alcohol and a drug or drugs when a combination of drugs or of alcohol and a drug or drugs 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 a combination of drugs or of alcohol and a drug or drugs. To determine whether the defendant's ability to operate a motor vehicle was impaired, you 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;

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<sup>3</sup> See *People v. Alamo*, 34 N.Y.2d 453, 458 (1974); *People v. Marriott*, 37 A.D.2d 868 (3<sup>rd</sup> Dept. 1971); *People v. O'Connor*, 159 Misc.2d 1072, 1074-1075 (Dist. Ct., Suffolk, 1994); See also *People v. Prescott*, 95 N.Y.2d 655, 662 (2001).

<sup>4</sup> See Vehicle and Traffic Law § 114-a and Public Health Law § 3306(1).

<sup>5</sup> Cf. *People v. Cruz*, 48 N.Y.2d 419, 427 (1979) (defining impairment by alcohol).

the presence or absence of an odor of alcohol or a drug or drugs;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety or of the defendant's being under the influence of a drug or drugs];

[the circumstances of any accident];

[the results of any test for the presence of alcohol or a drug or drugs in the defendant's blood].

*[NOTE: If there is evidence of alcohol or a drug or drugs in the defendant's blood, add the following applicable paragraphs:]*

In considering the results of any test given to determine the 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>6</sup>]

[Evidence that the test was administered by a person

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<sup>6</sup> See *People v. Freeland*, 68 N.Y.2d 699, 701 (1986).

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>7]</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 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, a drug, or drugs in violation of law.<sup>8]</sup>

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

1. That on or about (date), in the county of (county), the defendant, (defendant's name), operated a motor vehicle;
2. That the defendant did so while his/her ability to operate a motor vehicle was impaired by the combined influence of drugs or of alcohol and any drug or drugs; and
3. That the defendant did so while a child who was fifteen years of age or less was a passenger in that motor vehicle.

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<sup>7</sup> See *People v. Mertz*, 68 N.Y.2d 136, 148 (1986); *People v. Freeland*, 68 N.Y.2d 699, 701 (1986).

<sup>8</sup> See *People v. Thomas*, 46 N.Y.2d 100 (1978), appeal dism. for want of a substantial federal question, 444 U.S. 891 (1979).

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Aggravated Driving While Intoxicated as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Aggravated Driving While Intoxicated as charged in the \_\_\_\_\_ count.