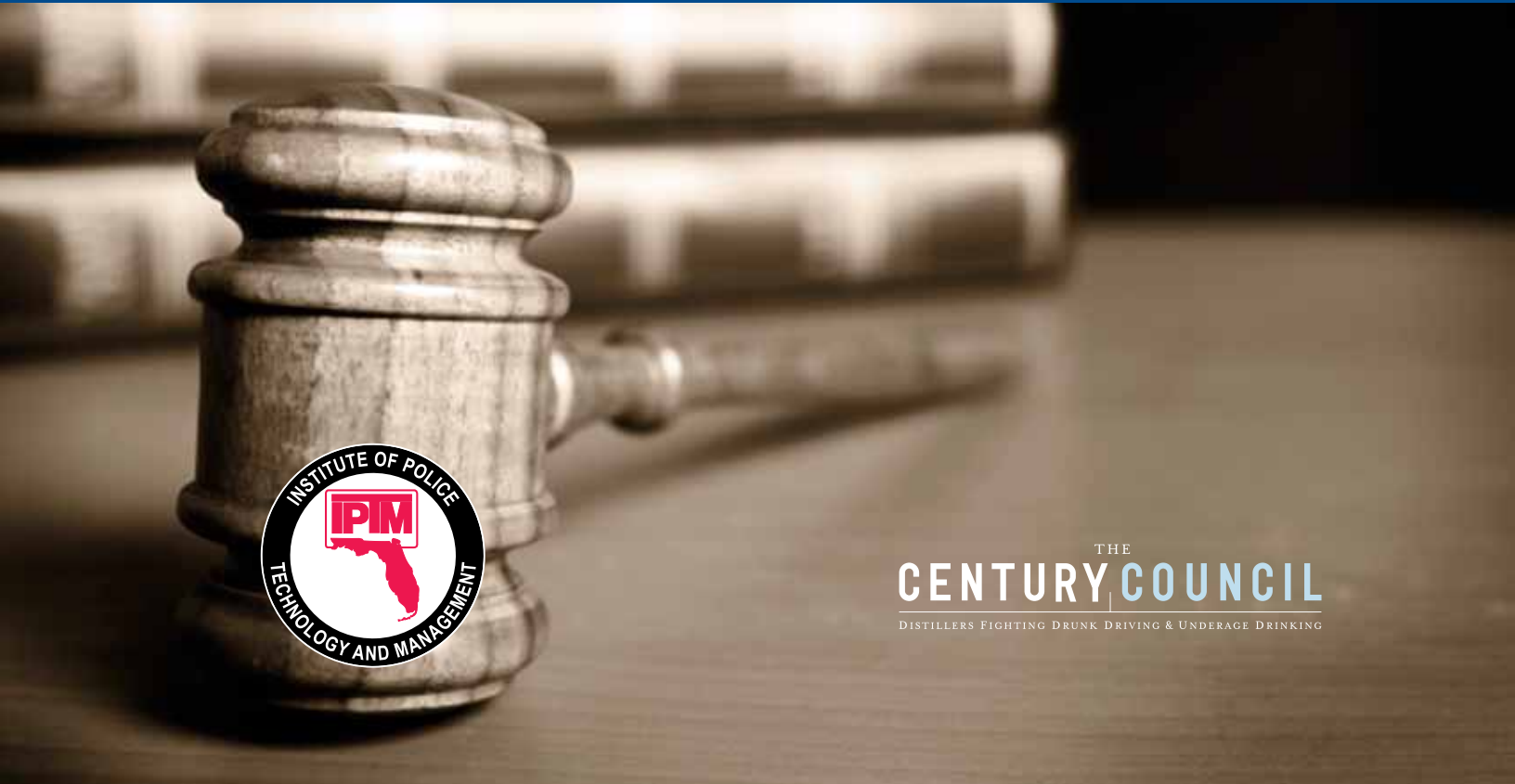




HARDCORE DRUNK DRIVING LAW ENFORCEMENT GUIDE

A Resource Outlining Law Enforcement Challenges, Effective Strategies and Model Programs



THE
CENTURY COUNCIL
DISTILLERS FIGHTING DRUNK DRIVING & UNDERAGE DRINKING

The Institute of Police Technology and Management (IPTM) was founded in 1980 to provide management, traffic and specialized training to municipal, county, state and federal law enforcement officers. The Institute has since become the largest police training center of its kind in the United States, annually training more than 14,000 officers from throughout the world.

The Century Council has transformed countless lives through programs that contributed to significant reductions in drunk driving and underage drinking. Funded for more than twenty years by the nation's leading distillers, we bring individuals, families and communities together to guide a lifetime of conversation around alcohol responsibility. To find out more, visit: www.centurycouncil.org

THE CENTURY COUNCIL IS FUNDED BY THE FOLLOWING COMPANIES:
Bacardi U.S.A., Inc.; Beam; Brown-Forman; Constellation Brands, Inc.; DIAGEO;
Hood River Distillers and Pernod Ricard USA

ACKNOWLEDGMENTS

SECTION I

THE HARDCORE DRUNK DRIVING ISSUE

- History of the Hardcore Drunk Driving Project
- Defining the Problem
- Challenges to Investigating the Hardcore Drunk Driving Offender

SECTION II

HOW TO IDENTIFY A HARDCORE DRUNK DRIVER

- Identifying the Characteristics of the Hardcore Drunk Driver
- DWI Detection
- DWI Detection Phase One: Vehicle in Motion
- DWI Detection Phase Two: Personal Contact
- DWI Detection Phase Three: Pre-arrest Screening
- Checklist for Identifying the Hardcore Drunk Driver

SECTION III

TECHNOLOGICAL TOOLS TO IDENTIFY A HARDCORE DWI OFFENDER

- Passive Alcohol Sensors
- Preliminary Breath Test Devices (PBT)
- Drug Recognition Program (DRE)
- ARIDE Program
- In-Car Video
- On-site Oral Fluid Screening

SECTION IV

AFTER THE TRAFFIC STOP

- Post-Arrest Investigation
- Law Enforcement Interview and Booking Interview
- Administration of Evidential Tests
- Report Writing

SECTION V

BLOOD ALCOHOL TESTING IN DWI CASES

- The Refusal Problem
- The Search Warrant; Refuting the Refusal
- No Refusal Programs
- Missouri v. McNeely and Warrantless Blood Draws
- Health Care Providers' Cooperation
- HIPPA and Its Potential Challenges to Law Enforcement

SECTION VI

HIGH-VISIBILITY ENFORCEMENT

- Introduction
- Sobriety Checkpoints
- Saturation Patrols
- Public Information Campaigns
- Multi-Disciplinary Approached to Enforcement
- DWI Task Forces
 - Multi-Jurisdictional DWI Enforcement Task Forces
 - Multi-Disciplinary DWI Task Forces

SECTION VII

STRATEGIES AND ADDITIONAL RESOURCES/LINKS

- Partnering with Prosecutors and Probation Officers
- Traffic Safety Resource Prosecutors (TSRPs)
- State Judicial Outreach Liaison (SJOL)
- National Law Enforcement Liaison (NLELP)
- DWI Courts

SECTION VIII

CONCLUSION

GLOSSARY OF TERMS

ACKNOWLEDGEMENTS

The Century Council and the Institute of Police Technology and Management gratefully acknowledge the assistance and efforts of the following people, all of whom played a critical role in the development of this Law Enforcement Guide. The advisory team was composed of law enforcement officers and prosecutors who have experience in the investigation and prosecution of Hardcore drunk driving offenders including what works and does not work as well as the knowledge of evidence-based/promising practices which are demonstrating success.

JOHN CULLEN

Detective
Jacksonville Sheriff's Office
Jacksonville, Florida

MARK NEIL

Senior Attorney
National Traffic Law Center
Alexandria, Virginia

ELIZABETH EARLEYWINE

Traffic Safety Resource Prosecutor
State of Illinois
Chicago, Illinois

DOUG PAQUETTE

Coordinator - Impaired Driving
Enforcement Programs
New York State Police
Albany, New York

RONALD ENGLE

Director, Traffic Safety
The Century Council
Arlington, Virginia

STEPHEN TALPINS

Chairman and CEO
National Partnership on
Alcohol Misuse and Crime
Washington, DC

DARRELL FISHER

Lt. Colonel (Ret.)
Nebraska State Police
Lincoln, Nebraska

AMY WALLING

Major
Jupiter Police Department
Jupiter, Florida

Editor

KYLE CLARK

Program Coordinator
Institute of Police Technology and Management
Jacksonville, Florida



Department of Police
46 Raupp Blvd.
Buffalo Grove, IL 60089-2199
Phone 847-459-2560
Fax 847-459-0201

Steven R. Casstevens, CPC
Chief of Police

Dear Law Enforcement Colleagues,

One of the mission priorities for law enforcement is to ensure highway safety by making our roads safe for all users. Through enforcement of the motor vehicle code, working in concert with traffic engineers and community education, law enforcement officers strive to reduce injuries, property damage, and the loss of life associated with traffic crashes.

Drunk driving is a serious social and public safety problem. Drunk drivers kill thousands of innocent victims, injure countless more, and cause millions of dollars in property damage each year. It is imperative that the criminal justice system respond to drunk drivers with aggressive preventive, rehabilitative, and punitive strategies.

Over the last three decades, the enforcement of impaired driving laws has become a significant issue to the public. One class of DWI offenders in particular continues to drive while intoxicated with disregard to the legal, social, and personal ramifications. In order to successfully identify, prosecute, sentence, supervise, and ultimately, rehabilitate persistent drunk driving offenders, a comprehensive, systemic approach is necessary.

These offenders are hardcore drunk drivers (chronic repeat DWI offenders and persistent DWI offenders). For purposes of clarity, we will refer to these offenders as hardcore drunk drivers throughout this Guide.

[The Definition](#)

[The Century Council defines hardcore drunk drivers as those who drive with a BAC of 0.15 or above; or who drive repeatedly with a 0.08 or greater BAC, as demonstrated by having more than one impaired driving arrest; and who are highly resistant to changing their behavior despite previous sanctions, treatment, or education.](#)

A law enforcement officer is the first contact that a DWI offender has with the criminal justice system. Identifying and dealing with hardcore drunk drivers often presents challenges for law enforcement. By definition, those who fall into this category have been through the judicial system and know how to deter and/or thwart law enforcement DWI investigations. It is critical to have strategies for dealing with hardcore drunk drivers in every agency's impaired driving enforcement program. Without these strategies, many are left to continue their drunk driving behavior, placing countless drivers in danger.

*An Accredited
Law Enforcement
Agency
Since 1987*



This Law Enforcement Guide to Detect Hardcore DWI Offenders is the result of a partnership between the Institute of Police Technology and Management (IPTM) and The Century Council. This Guide was created to provide law enforcement with guidance and tools to develop and/or enhance enforcement strategies to identify hardcore DWI offenders.

The Century Council and IPTM strongly believe this Guide presents strategies and interventions that have been shown to be effective in identifying DWI offenders at all levels of impairment. However, these strategies, unlike strategies directed mainly at first-time offenders, provide law enforcement officers the ability to identify that small percentage of serious offenders whose behavior is not changed by traditional interventions designed for first-time offenders. These offenders need more aggressive interventions.

I hope this Guide provides useful strategies for identifying DWI offenders and hardcore drunk drivers in particular.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven R. Casstevens". The signature is fluid and cursive, with a large initial "S" and "C".

Steven R. Casstevens
Chief of Police

SECTION I:

**THE HARDCORE
DRUNK DRIVING ISSUE**

SECTION I:

History of the Hardcore Drunk Driving Project

In 2002, the National Association of State Judicial Educators and The Century Council's National Hardcore Drunk Driving Project convened a national panel of judges and judicial educators recognized as experts on the issue of drunk driving. Their task was to examine the judiciary's critical role in reducing hardcore drunk driving. This meeting was the beginning of an effort to provide judges with the tools necessary to effectively adjudicate impaired driving cases. The resulting "*Hardcore Drunk Driving Judicial Guide: A Resource for Outlining Judicial Challenges, Effective Strategies, and Model Programs*" was introduced to more than 4,000 state and local judges in thirty-four state judicial education programs.

Judges are but one element in this system and cannot effectively combat hardcore drunk driving alone. For this reason, The Century Council has worked to include more criminal justice disciplines in this judicial education program. The National District Attorneys' Association partnered with The Century Council to provide prosecutors with needed tools and suggested courtroom practices – the "*Hardcore Drunk Driving Prosecutorial Guide: A Resource for Outlining Prosecutorial Challenges, Effective Strategies, and Model Programs*" coordinates judicial and prosecutorial efforts by educating prosecutors on promising evaluation, monitoring, sentencing, and treatment options.

Judges and prosecutors typically handle offenders on the front end of the sanctioning process and community corrections practitioners supervise these offenders once they have been sentenced and returned to the community.

What is meant by saying that someone is supervised in the community? It means that probation and/or parole officers using a combined approach involving surveillance, treatment, and accountability enforce the court-ordered rules and sentencing meted out to the offenders. The third publication, one focused towards enhancing the skills and practices of community supervision, was developed and published in 2010. The American Probation and Parole Association and The Century Council convened a group of practitioners and administrators knowledgeable about supervising hardcore drunk driving offenders to develop the "*Hardcore Drunk Driving Community Corrections Guide: A Resource for Outlining Supervision Challenges, Effective Strategies, and Model Programs*." The guide combined the latest in evidence-based supervision practices with treatment strategies known to work with alcohol-involved and DUI/DWI offenders.

Law enforcement is the most recent discipline to be addressed in this series of guides. The Century Council and the Institute of Police Technology and Management convened a group of practitioners and administrators with unique skills and knowledge about enforcement and prosecution of DWI offenders. Their charge was to develop the "*Hardcore Drunk Driving Law Enforcement Guide: A Resource for Enforcement Challenges, Effective Strategies, and Model Programs*." This guide combines effective enforcement strategies with knowledge concerning the unique challenges posed by the repeat DWI offender where it is needed most: on the street. To that end, the panel identified particular issues faced by law enforcement officers in investigating incidents

involving hardcore drunk drivers, practical uses of technology to enhance these investigations, model programs and operational strategies, and suggestions for government grant opportunities.

Defining the Problem

The first step in this process is a discussion of what a typical hardcore drunk driver looks like. Hardcore drunk driving offenders have specific identifiable characteristics or traits that can be utilized by criminal justice officials to more effectively combat hardcore drunk driving.

Convicted DWI offenders have continued to contribute significantly to the criminal justice problem every year. According to FBI Uniform Crime Statistics, “In 2011, approximately 1.4 million arrests occurred for impaired driving.”¹ This number has remained constant for many years. Even more shocking is that for many of these individuals, it is neither their first time driving while intoxicated, nor their first time getting caught. In fact, 34% of offenders in jail and 8% of offenders on probation reported having three or more prior arrests or convictions for DWI², and a full one-third of DWI arrests each year are repeat offenders.³ In 2011, 70% of all alcohol-impaired fatal crashes involved a driver with a high blood alcohol concentration (BAC) level of 0.15% or higher.⁴

Research literature indicates hardcore drunk driving offenders have common characteristics. Behaviorally, they demonstrate aggressive, hostile, and thrill-seeking tendencies.⁵ Four noteworthy studies, Jones & Lacey (2000), Siegel et al (2000) White & Gasparin (2006) and White (2007), identified common characteristics among individuals with repeat drunk driving offenses. Some of the commonalities included a median age of 35 years old, high school or less level of education, were mostly blue-collar workers, had prior traffic and criminal offenses, were predominately white males, and possessed a high percentage of alcohol dependency diagnosis.⁶ Additionally, the Siegel study (2000) identified that of the people in the sample:

- 98% were diagnosed with alcohol abuse
- 75% were diagnosed with alcohol dependence
- 60% had a history of drug abuse
- 69% experienced a psychiatric disorder sometime in their lifetime
- 62% never attended a driver intervention program
- 33% never participated in an alcohol/drug program

Research literature also shows that offenders who drive intoxicated commit other crimes as evidenced by criminal histories (Siegel, 2000; Wells-Parker, Cosby, & Landrum, 1986). In fact, a study by the Center for Drug & Alcohol Research at the University of Kentucky found that a higher prevalence of criminal activity was associated with multiple DWI arrests (Webster et al, 2009). Specifically, “probationers with multiple DWI arrests were more likely than non-DWI offenders to have committed auto theft, drug trafficking, assault and illegal weapons possession.”⁷

¹ FBI's Uniform Crime Report, 2011

² Dunlap, Mullins, and Stein (2007) citing Maruschak (1999).

³ Fell (1995).

⁴ NHTSA, Prevalence of High BAC in Alcohol-Impaired-Driving Fatal Crashes, August 2012 DOT HS 811 654

⁵ The Century Council, n.d.

⁶ Jones & Lacey, 2000; Siegel et al, 2000; as cited by the National Hardcore Drunk Driver Project, n.d.

⁷ Webster et al., 2009, p. 10

It is clear from these research findings that law enforcement officers frequently encounter hardcore drunk drivers. As a corollary, successfully changing the long-term behavior of hardcore drunk drivers can have a widespread impact across the entire criminal justice system. The Siegel study revealed that its control group was heavily involved in the criminal justice system. They had a mean average of 7.1 convictions for DWI and 29 arrests for any criminal offense. Specifically, domestic violence constituted a significant percentage of these criminal offenses.

Even though hardcore drunk drivers comprise a relatively small proportion of all drivers, the impact of hardcore drunk driving in human and monetary costs far exceeds their actual numbers.⁸



- 70% of alcohol-impaired fatal crashes involved a driver with a BAC of 0.15% or higher. Of particular note, drivers with a BAC level of 0.15% or higher in fatal crashes are 9 times more likely to have a prior conviction for DWI than drivers with no alcohol. (NHTSA 2012)

- Among drinking drivers involved in fatal crashes, the median BAC level remains at 0.16, twice the legal limit. (NHTSA 2012)

2X
LEGAL
LIMIT



- The most frequently recorded BAC level among drinking drivers in fatal crashes was 0.18%. (NHTSA 2012)

- Among drivers with a prior DWI conviction involved in a fatal crash, three out of four were hardcore drunk drivers.
- It is estimated that while a small cadre of drivers with BACs in excess of 0.15% comprise only 1% of all drivers on weekend nights, they are involved in nearly 50% of all fatal crashes during that time period (Simpson et al. 1996).
- About one-third of all drivers arrested for DWI are repeat offenders and over half have a BAC over 0.15% (Hedlund and McCartt, June 2002).
- Drivers with a BAC of 0.15% or above are 385 times more likely to be involved in a single vehicle fatal crash than a non-drinking driver (Zador 1991).

In a study by The Century Council (2007), hardcore drunk driving offenders participating in DWI Courts from across the country were asked a series of questions to probe the reality of the problem, their perceptions of getting caught driving intoxicated, and determine what, if anything, would deter them from drinking and driving. These questions revealed sobering information about these offenders:

- Self-reported averages of three prior DWI arrests and 2.6 DWI convictions.
- Average blood-alcohol levels were 0.20 (more than twice the legal limit).
- 80% reported drinking and driving at least a few times a month.
- 11% reported drinking and driving every day.
- 86% reported not waiting more than an hour after their DWI arrest to drink and drive again.
- 32% reported not waiting at all after their DWI arrest to drink and drive again.

⁸ The Century Council, p.15

Most of the respondents in this study who were convicted of DWI offenses reported believing that if they drove while intoxicated beyond the legal limit, they would be stopped (73%), arrested (95%), and convicted (97%). Many respondents indicated that more severe sanctions at their first DWI conviction would have prevented subsequent drunk driving arrests and convictions (80%). However, 19% of hardcore drunk driving offenders admitted “They would be unlikely to change their behavior even if more severe sanctions had been applied after their first conviction.”

The law enforcement officer is the critical first step in this process by identifying the hardcore drunk driving offender and entering the offender into the judicial system.

Despite a variety of attempts at modifying behavior, including treatment, incarceration, and license sanctions, hardcore drunk drivers continue to drive impaired. It is highly likely that law enforcement officers will encounter these drivers during the course of their duties. They should be fully prepared to investigate and take appropriate action when this happens.

Challenges to Investigating the Hardcore Drunk Driving Offender

It is difficult to determine the actual number of hardcore drunk driving offenders being arrested and entering the system each year. One reason for this is prior records may indicate only a traffic court violation rather than an alcohol-related driving incident. Another reason is that non-compatible information reporting systems and lack of information sharing between jurisdictions thwarts the ability to obtain an accurate account of all prior impaired driving offenses. Finally, driving records often do not indicate participation in diversion programs; therefore, those prior incidents may not be included in prior history reports.

The reality of working with hardcore drunk driving offenders is that unless a fatality has occurred, the hardcore drunk driving offender is most likely to be released back into the community, often with little or no bond and no pre-trial supervision (NHTSA, 2008). However, as illustrated above, the hardcore drunk driving offender poses a significant public safety risk to the community with the potential for serious, long-reaching consequences and thus should be subject to incarceration or more formal community supervision.

Law enforcement personnel encounter a variety of people during traffic stop investigations, including impaired drivers. In cases involving the hardcore drunk driving offender, the previous DWI arrest experience of the offender can be used to pose additional challenges to the investigating officer.

The following is a list of challenges the hardcore drunk driver poses to law enforcement officers, each of which will be addressed in the Guide:

- Identification of hardcore drunk driving offenders.
- The unique difficulties faced by law enforcement officers in hardcore drunk driving investigations.
- Lack of resources to successfully deal with hardcore drunk driving offenders.
- Hardcore drunk driving offenders’ refusal to take BAC tests when arrested. Research shows that more than 50% of repeat offenders refuse BAC tests.

- Low level of cooperation among hardcore drunk driving offenders during the investigation, including field sobriety test refusals.
- Unfamiliarity with equipment that can be utilized effectively in evidence-gathering in hardcore drunk driving investigations.
- Real or perceived difficulties in obtaining information from healthcare providers.
- The proper preparation of complete, accurate arrest reports.
- Proper administration and interpretation of Standardized Field Sobriety Tests.
- Dealing with the media.
- Lack of funding for investigative equipment.
- Lack of resources to utilize technologies.
- Lack of knowledge of promising practices and evidence-based programming.
- Ineffective partnerships and communication among other law enforcement agencies.

SECTION II:

**HOW TO IDENTIFY A
HARDCORE DRUNK DRIVER**

SECTION II:

Identifying Characteristics of the Hardcore Drunk Driver

The successful identification of a hardcore drunk driver begins with effective law enforcement and a thorough investigation. This task is not complicated when the offender submits to some form of chemical testing that reveals a BAC of 0.15% or above, or when the driver's record reflects multiple DWI arrests. But there is a third key element in recognizing the hardcore drunk driver, one that law enforcement may not realize they are in an ideal situation to assess: Is this particular offender resistant to changing his/her behavior?

Disproportionately to "first-time" offenders, a hardcore offender can create a challenge for the traffic enforcement officer throughout the course of the DWI investigation. This may be the person who was pulled over for an infraction that does not necessarily suggest impairment, such as speeding, tail light out, or driving on a revoked license. This is often the driver who refuses the field sobriety tests or is able to complete the psychophysical portion of the tests without revealing significant impairment. This is also the person who frequently refuses chemical testing. In summary, these are the drivers who continue to drive impaired because they can. These individuals are risk takers who believe they can and do in fact "beat the system."

"Seen as a whole, most DWI offenders have, are developing, or will go on to develop, a serious substance-related problem" (White & Gasparin 2007). Some statistics:

1. 40-70% of so-called first time DWI offenders have a prior history of alcohol or drug related criminal offenses. (Taxman & Piquero, 1998; Chang and Lapham, 1996; Kochis, 1997)
2. An "average" DWI offender has driven impaired many times before their first arrest. Some studies suggest it may take anywhere from 200-2000 incidents of DWI to statistically generate one arrest. (Borkenstein, 1975; Jones & Joscelyn, 1978; Voas & Hause, 1987; Beitel Sharp, & Glauz, 2000).
3. The vast majority of DWI offenders are found to have a significant problem in their relationship with alcohol and/or drugs. (Lapham et al, 2004).

Despite, or perhaps because of, their attitude toward drinking and driving along with their perceived ability to flaunt the system, hardcore drunk driving offenders often provide numerous identifying characteristics. Information obtained both during the three phases of the DWI investigation and subsequent to the arrest decision may provide the most accurate assessment possible during the entire criminal justice process.

In terms of the arrest event itself (initial contact with the vehicle until the decision to arrest is made), the hardcore drunk driver is likely to fall into certain statistically relevant groupings. The most conspicuous of these is that the hardcore drunk driver is more often a male, age 25 – 45. He is more likely to be driving alone and ultimately have other charges associated with the DWI arrest such as fleeing or resisting. Additionally, because the hardcore drunk driver is prone to have a history of prior DWI arrests, yet continues to drive, there may be a higher incidence of

⁹ Siegal

driving while license suspended or revoked (DWLS/R) being the probable cause for the traffic stop.

DWI Detection

DWI detection is defined as “The entire process of identifying and gathering evidence to determine whether or not a suspect should be arrested for the DWI violation.”¹⁰ Detection begins when the officer develops the first suspicion a DWI violation is occurring. Detection ends when the officer decides whether there is or is not sufficient probable cause to arrest the suspect for DWI.

A DWI traffic stop investigation involves three phases:

Phase One: Vehicle in Motion – the officer observes the suspect operating or being in actual physical control of the motor vehicle.

Phase Two: Personal Contact – after the officer has stopped the vehicle, there is usually an opportunity to observe and speak with the suspect face-to-face.

Phase Three: Pre-Arrest Screening – the officer usually has an opportunity to administer Standardized Field Sobriety Tests to the suspect to evaluate the suspect’s degree of impairment.

At the conclusion of each of these phases, the officer reaches a decision point on whether or not to proceed to the next phase, or in the case of phase three, whether or not to arrest the suspect for DWI. In other words, the officer must determine if there is sufficient reasonable suspicion necessary to proceed to the next phase in the detection process. The ultimate decision to arrest for DWI is based on the totality of all relevant evidence from all three phases and whether or not it provides probable cause to make the arrest.

DWI Detection: Phase One, Vehicle in Motion. Consists of the initial observation of vehicle operation, the stop decision and the observation of the stop. The initial observation of vehicle operation begins when the officer first notices the vehicle and/or the driver. What was it that attracted the officer’s attention to the vehicle? If the initial observation discloses vehicle maneuvers or human behaviors that may be associated with alcohol or drug influence, the officer may develop an initial suspicion of DWI.

Drivers who are impaired by alcohol and/or drugs usually exhibit common effects or signs of impairment such as slowed reactions, increased risk-taking, impaired judgment, impaired vision, and/or poor coordination. These common effects of alcohol on the driver’s mental and physical faculties may lead to predictable driving violations and vehicle operating characteristics.

The National Highway Traffic Safety Administration (NHTSA) sponsored research to identify the most common and reliable initial indicators of DWI. This research led to the development of a DWI detection guide and training materials, including a training video. The detection guide describes a set of 24 driving cues that were found to predict blood alcohol concentrations

¹⁰ National Highway Traffic Safety Administration, *Standardized Field Sobriety Testing Participant’s Manual* (2006), Oklahoma City, p. IV-1.

(BAC) of 0.08% or greater. This set of behaviors can be used by officers to detect motorists who are likely to be driving while impaired. Officers should be trained and aware of these high probability indicators so they are able to recognize the significance of their visual observations while on patrol. A brochure containing this information can be downloaded from: www.nhtsa.gov/staticfiles/nti/pdf/808677.pdf.

The task of making initial observations of vehicle operation is the first step in the job of DWI detection. Proper performance of that task demands two distinct but related abilities:

1. **The ability to recognize evidence of alcohol and/or drug influence;**
2. **The ability to describe that evidence clearly and convincingly.**

It is not enough for a police officer to observe and recognize symptoms of impaired driving. The officer must be able to clearly articulate what was observed so that a judge and/or jury will have a clear mental image of exactly what took place. The officer must provide convincing testimony that these observations indeed established probable cause for the arrest.

Hardcore drunk driver arrests have the potential to result in litigation. Multiple offenders, because they face enhanced penalties which often include large fines, imprisonment and license suspension, are more likely to engage legal counsel and demand a trial. A jury trial will surely challenge an officer's ability to provide courtroom testimony. Achieving the ability to recognize and clearly describe observational evidence requires proper training and practice.

The NHTSA/International Association of Chiefs of Police (IACP) training program **DWI Detection and Standardized Field Sobriety Testing** provides officers with the ability to recognize the most reliable, high probability indicators exhibited by impaired drivers as well as the necessary practice for describing those indicators clearly and convincingly. This program is managed by the Technical Advisory Panel (TAP) of the IACP which can be accessed at: <http://theiacp.org/About/Governance/Committees/HighwaySafetyCommittee/HighwaySafetyInitiatives>.

Based upon initial observations of the vehicle operation, the officer must decide whether there is reasonable suspicion to stop the vehicle. Alternatives to stopping the vehicle include delaying the stop/no stop decision in order to continue observing the vehicle or disregarding the vehicle and continuing on patrol. Whenever there is a valid reason to stop a vehicle, the officer should always be alert to the possibility that the driver may be impaired by alcohol and/or drugs.

Officers must select a safe location for the traffic stop and consider an area with sufficient space that may permit a DWI investigation to be conducted. Once the stop command has been communicated to the suspect driver, the officer must closely observe the driver's actions and vehicle maneuvers during the stopping sequence. Sometimes significant evidence of alcohol influence comes to light during the stopping sequence. In some cases, the stopping sequence may produce the first suspicion of DWI.

Remember, drivers impaired by alcohol and/or drugs may respond in unexpected and dangerous ways to the stop command. Repeat offenders may be quite capable of driving a vehicle in a straight line. They are difficult to detect unless an unexpected event requires them to react in a manner that they have not anticipated. Their impairment diminishes their ability to take corrective action. This may manifest in apparent delayed reactions or over-reactions in response

to the unexpected event (i.e., sudden swerving; overcompensating on turns; etc.). It is common for repeat offenders to be identified by something other than their driving actions, such as an equipment or safety belt violation.

There are key indicators that may signal to an investigating officer that the driver under observation may be a hardcore drunk driver. These indicators appear throughout the investigation. The common ones are indicated below:

Key indicators that you may have stopped a hardcore drunk driving offender:

- Driving while license is suspended or revoked.
- Moving violations not necessarily associated with the “NHTSA Impaired Driving Clues.”¹¹
- After being signaled to pull over, suspect flees (as opposed to merely failing to stop).

DWI Detection: Phase Two - Personal Contact. This phase consists of the face-to-face observation and interview of the driver (usually while still in the vehicle), the decision to instruct the driver to exit the vehicle, and the observation of the driver’s exit from the vehicle.

The interview/observation of the driver begins as soon as the suspect vehicle and the patrol vehicle have come to complete stops, continues through the officer’s approach to the suspect vehicle, and involves all conversation between the officer and the suspect prior to the suspect’s exit from the vehicle. Prior to any face-to-face observation and the interview of the driver, the officer may already have developed a suspicion that the driver is impaired based on the observations of the vehicle operation and of the stop, i.e., moving traffic violations.

Alternatively, the vehicle operation and the stop may have been fairly normal, and the officer may have no particular suspicion of DWI prior to the face-to-face contact, i.e., vehicle defect with no moving traffic violation. Regardless of what evidence may have come to light during detection phase one, the initial face-to-face contact between the officer and the suspect usually provides the first definitive indications that alcohol and/or drugs may be present.

Despite, or perhaps because of, their attitude toward drinking and driving along with their perceived ability to flaunt the system, hardcore drunk drivers often exhibit numerous identifying characteristics. Information obtained both during the three phases of the DWI investigation and subsequent to the arrest decision may provide the most accurate assessment possible during the entire criminal justice process.

In terms of the arrest event itself (initial contact with the vehicle until the decision to arrest is made), the hardcore drunk driver is likely to fall into certain statistically relevant groupings mentioned in Section I:

- Often a male, age 25 – 45,
- Likely to be driving alone,
- Has other charges associated with the DWI arrest such as fleeing or resisting,
- History of prior DWI arrests,
- Higher incidence of driving while license suspended or revoked (DWLS/R) is the probable cause for the traffic stop.

¹¹ Moving violations not normally associated with impaired driving as listed in the Standardized Field Sobriety Testing curriculum

Typical Hardcore Drunk Driving Behavior:

Once the officer reaches the suspect vehicle for an interview, the hardcore drunk driver may complicate this task by only cracking the window open to smile and nod rather than speak. He or she may attempt to conceal their alcohol consumption via breath mints or air freshener. Some drivers may refuse to get out of the car when requested by law enforcement, or try to limit law enforcement access to the passenger compartment of the car.

Many states and agencies have established procedures for these passive refusal situations. Law enforcement officers who conduct DWI investigations should consider the use of technology during this phase to address problem situations such as described.

Passive alcohol sensors (PAS) may provide a technological advantage for law enforcement by checking the ambient air in the vehicle. PAS devices are small electronic devices which are built into flashlights or clipboards and can detect ethanol in ambient air. They are not usually noticed by the driver¹². The sensors are quick, objective, and provide additional support for law enforcement to establish reasonable suspicion and/or probable cause to identify the impaired driver. In cases involving the hardcore drunk driver, a PAS device may help thwart attempts to conceal the odor of the alcoholic beverage and may provide initial evidence of a potential impaired driving violation. For information on PAS devices, see the Technology Section.

Officers should also look for evidence of an ignition interlock device, either based upon a restriction on the driver's license, or by looking for a device which has been installed near the vehicle ignition area. If an ignition interlock device is present, it can be a helpful tool in your investigation. Here are some suggested procedures for conducting a traffic stop with a driver required to have an ignition interlock device:

1. Verify the ignition interlock device is legitimately installed in the vehicle. This can be inspected from outside the vehicle by examining the mouthpiece device, and checking the security of the connection cable by slightly tugging on it to verify it is physically installed on the vehicle.
2. Safety dictates that suspected traffic offenders turn off their vehicle ignition during the course of the traffic stop. Have the driver turn off the ignition and wait 2-3 minutes and attempt to re-start the vehicle. A period less than two minutes usually will not require the driver to provide a breath sample to re-start the vehicle. When the driver re-starts the vehicle, the breath sample will provide valuable evidence if the driver has been consuming alcoholic beverages.
3. If the vehicle starts, the law enforcement officer should continue with the original purpose of the traffic stop. Remember: if a driver passes the ignition interlock breath test, there remains the possibility the driver could have ingested a drug which could have impaired driving performance. Continue to look for evidence of divided attention impairment during the face-to-face interview of the driver.
4. If the first breath test fails to re-start the vehicle, the failure may have occurred as a result of a nervous driver. Law enforcement officers may consider offering the driver a second chance to start the vehicle to verify the failure. Ignition interlock devices are programmed to prevent the starting of the vehicle if the driver's breath alcohol

¹² Law enforcement should speak with their prosecutors regarding the admissibility of such technology even for the limited determination of reasonable suspicion. The law on this will vary from state to state and such technology even may be deemed to require a *Frye* or *Daubert* hearing prior to testimony in court.

content is over a certain level, often 0.02 g/210 L of breath. If the driver fails the second attempt, continue the impaired driving investigation to determine if the driver is impaired.

5. If a driver has a license restriction requiring an interlock device, and the device is not properly installed, this may constitute a violation of state law. Also, if the device prevents the vehicle from starting, the driver should be investigated for a possible impaired driving offense. Further, if the driver appears to be impaired, despite the successful start of the vehicle, the investigation should continue for possibly operating while impaired by drugs or medications.

Based upon the interview and face-to-face observation of the driver, and upon the previous observations of the vehicle in motion, the officer must decide whether these observations provide sufficient cause to instruct the suspect to exit the vehicle. Once the decision to instruct the suspect to exit has been made, the officer must closely observe the suspect's actions during the exit and walk from the vehicle, and note any additional evidence of impairment. Officers must always practice appropriate officer safety tactics while the suspect exits the vehicle.

The decision to instruct the suspect to exit the vehicle may be based on suspicion that the suspect may be impaired. Even though that suspicion may be strong, the suspect usually is not yet under arrest at this point. How the suspect exits the vehicle, and the actions and behavior of the suspect during the exit sequence, may provide additional important evidence of alcohol and/or drug impairment. However, as mentioned previously, hardcore drunk drivers may refuse to exit the vehicle to perform the sobriety test batteries. Be prepared to continue your investigation, taking this refusal in to consideration as a possible indicator of DWI.

Key indicators for hardcore drunk drivers Personal Contact Phase:

- Odor of alcoholic beverage.
- Attempts to mask the odor of the alcoholic beverage.
- Open alcoholic beverage container or other drug paraphernalia in plain view.
- Minimal levels of cooperation (lowers window a few inches, etc.)
- Minimal speech impediment.
- Minimal physical signs of impairment (fumbling, etc.).
- A driver license status or vehicle check reveals that the driver:
 - o Is required to have ignition interlock, but is driving a car not so equipped or device is circumvented.
 - o Is suspended or revoked from driving due to prior DWIs.
 - o Has a history of high-risk driving offenses, such as prior crashes, dangerous moving violations, high-risk insurance or no insurance.
 - o Has a current or prior failed probation history (subsequent information may reveal this is due to failure to complete mandated treatment).
- Becomes angry, verbally abusive or aggressive without provocation.
- Exits vehicle showing minimal physical signs of impairment.
- Refuses to exit vehicle for field sobriety tests.

DWI Detection: Phase Three- Pre-arrest Screening. Consists of structured, formal psychophysical testing and preliminary breath testing (if available) of persons suspected of DWI, and culminates in the arrest/no arrest decision.

Psychophysical tests are methods of assessing a suspect's mental and/or physical impairment by focusing precisely on the human capabilities needed for safe driving. The most significant psychophysical tests are the Standardized Field Sobriety Tests (SFSTs) that are administered at roadside. The preliminary breath test can also be very important in helping to corroborate all other evidence, and in helping to confirm the officer's judgment as to whether the suspect's ability to drive is impaired. The final stage of detection phase three is the arrest decision.

There are three SFSTs which research has confirmed as having considerable accuracy to assist officers in making DWI arrest decisions (Burns and Anderson 1995; Fazzalano 2000). Field studies with officers trained and experienced with the battery of tests found arrest decisions were more than 90 percent correct (Burns 1999) in detecting impaired drivers at or above a 0.08% BAC.

Many prosecutors prefer officers to administer only the SFSTs to help make arrest decisions for DWI because the test battery is the only one to have been scientifically validated and is defensible in court (NHTSA 2001). However, the administration of field sobriety tests is the aspect of the test battery most often attacked in court, with the defense arguing that the arresting officer's interpretation of the performance of the SFST is subjective or that the officer did not precisely follow the protocol outlined in training documents.

The standardized field sobriety test battery consists of the Horizontal Gaze Nystagmus (HGN), the Walk and Turn (WAT), and the One Leg Stand (OLS) tests. The SFSTs are designed to detect impaired drivers. The results of these tests should be considered with other evidence and the totality of the investigation. Driving patterns, as well as driver appearance and behavior should also be taken into account with the SFST results in making a decision to arrest or release the driver.

Officers should take into consideration that some multiple offenders are fully aware of the field sobriety tests and may in fact practice them. If they are indeed impaired, they may perform the Walk and Turn and One Leg Stand tests adequately, but more slowly and deliberately because of their impairment. In this situation the Horizontal Gaze Nystagmus test becomes absolutely critical.

Key indicators of hardcore drunk drivers (Standardized Field Sobriety Testing):

- Exhibits significant clues on horizontal gaze nystagmus test, indicating impairment.
- May or may not exhibit vertical gaze nystagmus.
- Exhibits minimal impairment on psychophysical field sobriety tests (Walk and Turn, One Leg Stand).
- If driver consents to a preliminary breath test, the test results in a high BAC without the other gross signs of intoxication.
- Becomes angry, verbally abusive or aggressive without provocation.
- Most likely to refuse to participate in SFSTs.

Additional Resources for Standardized Field Sobriety Tests

- Burns, M.M., and Anderson, E.W. 1995. A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery, Final Report Submitted to the Colorado Department of Transportation. Denver, CO: Colorado Department of Transportation.
- Burns, M.M. 1999. Identification of alcohol impairment outside the vehicle: Field sobriety tests. In: Issues and Methods in the Detection of Alcohol and Other Drugs. Washington, DC: Transportation Research Board, National Research Council.
- Burns, Marcelline. 2007. The Robustness of the Horizontal Gaze Nystagmus Test. Los Angeles, California: Southern California Research Institute.

Additional indicators of a potential hardcore drunk driver:

- Statements or behavior indicating a lack of empathy or remorse (injury or fatality cases).
- Statements indicating an underestimation of impairment level.
- Statements indicating projection of blame upon others.

CHECKLIST FOR IDENTIFYING THE Hardcore DRUNK DRIVER

Key indicators that you may have stopped a hardcore drunk driving offender:

- Driving while license suspended or revoked.
- Moving violations not necessarily associated with the “NHTSA Impaired Driving Clues.”¹³
- After being signaled to pull over, suspect flees (as opposed to merely failing to stop).

Key indicators for hardcore drunk drivers Personal Contact Phase:

- Odor of alcoholic beverage.
- Attempts to mask the odor of the alcoholic beverage
- Open alcoholic beverage container in plain view.
- Minimal levels of cooperation (lowers window a few inches, etc.)
- Minimal speech impediment.
- Minimal physical signs of impairment (fumbling, etc.)
- A driver license status or vehicle check reveals that the driver:
 - Is required to have ignition interlock, but is driving a car not so equipped or circumvented.
 - Is suspended or revoked due to prior DWIs.
 - Has a history of high-risk driving offenses, such as prior crashes, dangerous moving violations, high-risk insurance or no insurance.
 - Has a current or prior failed probation history (subsequent information may reveal this is due to failure to complete mandated treatment).
- Becomes angry, verbally abusive or aggressive without provocation.
- Refuses to exit vehicle for field sobriety tests.

Key indicators of hardcore drunk drivers (Standardized Field Sobriety Testing):

- Exhibits significant clues on horizontal gaze nystagmus test, indicating impairment.
- Exhibits minimal impairment on psychophysical field sobriety tests (Walk and Turn, One Leg Stand).
- If driver consents to a preliminary breath test, the test results in a high BAC without the other gross signs of intoxication.
- Becomes angry, verbally abusive or aggressive without provocation.
- Most likely to refuse to participate in SFSTs.

Additional indicators of a potential hardcore drunk driver:

- Statements or behavior indicating a lack of empathy or remorse (injury or fatality cases).
- Statements indicating an underestimation of impairment level.
- Statements indicating projection of blame upon others.
- Other indications or observations of impairment

¹³ Moving violations not normally associated with impaired driving as listed in the Standardized Field Sobriety Testing curriculum

SECTION III:

**TECHNOLOGICAL TOOLS
TO IDENTIFY A HARDCORE
DWI OFFENDER**

SECTION III:

Passive Alcohol Sensors

While law enforcement professionals rely primarily on their senses to identify impaired drivers, technology exists that can assist in identifying those who attempt to conceal their alcohol consumption via breath mints, air freshener, or by limiting law enforcement access to the passenger compartment of the car. Such practices are common among hardcore drunk drivers. Passive alcohol sensors (PAS) may provide a technological advantage for law enforcement. Passive alcohol sensors are small electronic devices which are built into flashlights or clipboards that can detect ethanol in ambient air. The sensors are quick, objective, and provide additional evidence for law enforcement to establish reasonable suspicion and identify the impaired driver. In cases involving the hardcore drunk driver, a passive alcohol sensor may help thwart attempts in concealing the odor of the alcoholic beverage and may provide initial evidence of a potential impaired driving violation.

Passive alcohol sensors are significantly different than traditional breath testing instruments. A PAS encases a fuel cell in a passive “non-intrusive” instrument designed to act as an “extension of the operator’s nose,” sensing the presence of ethanol within seconds. A major difference is the suspect does not have to cooperate or actively participate with the PAS to result in a positive test for the presence of alcohol. The device simply needs to be positioned to sample the interior air of the vehicle to obtain a reading. The results from the PAS lack the precision or accuracy of a traditional breath test. However, the results can aid the officer in detecting the presence of alcohol coming from a person’s breath or a beverage in the car in sufficient concentration that further investigation is warranted.

After a positive reading from the PAS, an officer can then investigate further by looking for additional physiological indicators of impairment, such as bloodshot or watery eyes, slurred or mumbled speech. In some cases the indicators of impairment are obvious prior to the administration of the PAS. If the investigation warrants, the officer can proceed to conduct Standardized Field Sobriety Tests. While the PAS is an effective screening tool, officers should not rely solely on a positive reading to develop probable cause. It is just one tool in an officer’s comprehensive tool box. A PAS should be used in conjunction with the officer’s training and experience. Admissibility of these devices may differ from state to state; therefore law enforcement should consult with their prosecutor regarding routine use in DWI practice.

While PAS results are usually not permitted in the court as prima facie evidence of DWI, they can assist in establishing probable cause for further investigation by an officer. It is important to note that these devices can be relatively expensive if being provided to large numbers of patrol officers. Because of the cost, a majority of officers lack regular access to them.

How Effective Are Passive Sensors?

Studies have found these devices to be very effective. Their use has led to fewer high BAC drivers avoiding arrest and fewer low or zero BAC drivers being detained. A series of studies has shown passive sensors increase the detection rate of drivers with BACs at .10 or greater by about

50% in checkpoint operations (Voas et al. 1997). One study found passive sensors can identify about 75 percent of drivers with BACs at or above .10 and 70 percent of BACs at or above .08 — a vast improvement over the 40 – 50% detection rate by police officers at checkpoints not using sensors (Farmer et al. 1999).

Additional Resources for Passive Sensors

Burns, M.M. 1999. Identification of alcohol impairment outside the vehicle: Field sobriety tests. *Issues and Methods in the Detection of Alcohol and Other Drugs*. Washington, DC: Transportation Research Board, National Research Council.

Farmer, C.M., Wells, J.K., Voas, R.B., and Ferguson, S.A. 1999. Field evaluation of the PAS III Passive Alcohol Sensor. *Journal of Crash Prevention and Injury Control* 1(1): 55–61.

Fell, J.C. 2000. Comments on “Increasing the Opportunities to Examine Impaired Drivers.” *Issues and Methods in the Detection of Alcohol and Other Drugs*. Washington, DC: Transportation Research Board, National Research Council.

Grey, S.L. Spring 2001. Passive alcohol sensors and the fourth amendment. *Impaired Driving Update*. Kingston, NJ: Civic Research Institute, Inc.

Hedlund, J.H. 2000. What’s needed to improve police detection of alcohol and other drugs in drivers. *Issues and Methods in the Detection of Alcohol and Other Drugs*. Washington, DC: Transportation Research Board, National Research Council.

Voas, R.B., Romano, E., & Peck, R. (2006). Validity of the passive alcohol sensor for estimating BACs in DWI-enforcement operations.

Preliminary Breath Test Devices (PBT)

Today, law enforcement officers and prosecutors rely on breath alcohol, urine or blood testing to investigate and/or prove their DWI cases. In a number of states, officers are authorized to use preliminary breath testing devices (PBT) to identify impaired drivers at roadside to help determine probable cause. They then rely on evidential breath testing devices (EBTs) for breath or forensic laboratories to examine blood or urine to prove their guilt. Some hardcore drunk drivers display only minimal indicators of impairment during psychophysical testing, providing a false impression of sobriety. Some have been known to use breath contaminants that may diminish or conceal the detectable ethanol within the breath. Preliminary breath tests are an effective screening tool when used in conjunction with the standardized field sobriety tests in identifying the hardcore drunk driver.

Some states allow law enforcement officers to utilize preliminary breath testing at roadside to screen suspected impaired drivers. While the results of the PBT typically are not admissible as proof of guilt in the DWI trial, they may be used to support probable cause in pre-trial motions, such as motions to quash arrest or suppress evidence. Preliminary Breath Test technology has made the devices more accurate and cost effective, thus increasing the number of products available to law enforcement. There are three basic types of preliminary breath testing instruments: infrared, wet chemical, and electrical. Each is designed to take a breath sample and

calculate the amount of alcohol it contains, but the methods used may differ.

The use of PBTs, where applicable, can strengthen an officer's case where alcohol consumption caused the observable impairment. However, an officer must make certain the PBT is approved for use in the appropriate state, as well as calibrated to the state and manufacturer's specifications to avoid defense challenges. In addition, the investigating officer should ensure the test is conducted within manufacturer's guidelines to reduce the possibility of an erroneous reading.

A number of states have legislated that these devices may be used to make a determination of whether or not a suspected offender is alcohol-impaired at roadside and help establish probable cause for a DWI arrest. However, unless the devices are truly certified as evidential breath test devices, they cannot be used to establish the driver's BAC in court.

Like the PAS, these devices can be relatively expensive if being provided to large numbers of patrol officers. This means that a majority of officers lack regular access to them. "Officers in our survey estimate that over three-fourths of all DWI arrests result from routine patrol, so it is imperative that patrol officers have regular and consistent access to PBTs to assist with the detection of repeat DWI offenders during routine traffic stops." (Simpson and Robertson 2001)

PBT is only one component of detecting hardcore drunk drivers. More experienced officers offer a note of caution with regard to the use of PBTs. In their experience, newer officers come to rely extensively on these test results. That means that they may not develop proficiency at identifying DWI offenders without electronic devices. These devices should be used only after an officer has determined that probable cause exists that the offender is a DWI. If the arresting officer cannot establish reasonable grounds for applying the test, the results may be of no use in the prosecution of the case. The PBT device does not relieve the officers from standard arrest procedures to build a case to justify arrest and being familiar with standard signs of intoxication and adept at conducting the SFST.

Additional Resources

NHTSA. (2004). *Conforming Products List*. Washington, DC: National Highway Traffic Safety Administration.<http://www.nhtsa.dot.gov/people/injury/alcohol/ebtcpl040714FR.pdf>

Shults, R.A., et al. 2001. Reviews of evidence regarding interventions to reduce alcohol-impaired driving. *American Journal of Preventive Medicine* 21(4S): 66–88.

Simpson, H.M., and Robertson, R.D. 2001. *DWI System Improvements for Dealing with Hard Core Drinking Drivers: Enforcement*. Ottawa, Ontario: Traffic Injury Research Foundation.

Voas, R.B., Holder, H.D., and Gruenewald, P.J. 1997. The effect of drinking and driving interventions on alcohol-involved traffic crashes within a comprehensive community trial. *Addiction Supplement 2*: S221–S236.

DRUG RECOGNITION EXPERT PROGRAM

In the early 1980s, the NHTSA partnered with the Los Angeles Police Department (LAPD) and the IACP to develop the Drug Evaluation Classification (DEC) program which was based on the LAPD's Drug Recognition Expert (DRE) program. The DEC program, which became

operational in 1987, is currently managed by the Technical Advisory Panel of the Highway Safety Committee within IACP.

The purpose of the program is to train officers to recognize behaviors and physiological states associated with psychoactive drugs. The evaluation is conducted by a DRE, often at the request of an arresting officer, when a suspect's BAC is inconsistent with his driving and behavior. There are 12 steps associated with a DRE evaluation. At the end of the evaluation, the DRE is in a position to determine if a suspect is impaired by drugs and which drug category or combination of categories is causing the impairment. It also enables the DRE to rule out other possible causes such as neurological deficits, diseases and illness.

The procedure was designed to aid the officer in determining what specific type of drug or drugs was the likely cause of the observed impairment. The program was intended to help develop evidence of impairment and guide the analyses of biological specimens when looking for the presence of drugs other than alcohol in impaired drivers.

There are seven drug categories that the program is designed to detect:

1. Central Nervous System Depressants
2. Central Nervous System Stimulants
3. Hallucinogens
4. Dissociative Anesthetics
5. Narcotic Analgesics
6. Inhalants
7. Cannabis

The DEC training requires nine days in the classroom and additional days of field certification training. The program is designed to provide for only a limited number of DREs in a jurisdiction. It is not designed for the routine patrol officer.

To retain proficiency, DREs also need to use their skills regularly, participate in training programs to stay current with, and be vigilant to detect, emerging patterns of drug use within their respective communities. This includes testifying regularly to maintain their courtroom testimony skills.

Certification is issued by a state coordinator and credentialing is provided by the IACP. There are over 7,000 police officers certified as DREs in 50 states, Canada, the United Kingdom, Germany, and China.

ARIDE PROGRAM

The Advanced Roadside Impaired Driving Enforcement (ARIDE) program was developed by NHTSA in cooperation with IACP, the IACP Technical Advisory Panel and the Virginia Association of Chiefs of Police.

The purpose of ARIDE is to address the gap in training between the SFST and the DEC Program by providing officers with general knowledge related to drug impairment. The ultimate goal of the program is to encourage the use of DREs in states that have the DEC Program. The ARIDE program also stresses the importance of securing the most appropriate biological

sample in order to identify substances likely causing impairment.

The main prerequisite to qualify for receiving ARIDE training is the completion of the SFST/DWI Investigation course and a demonstrated proficiency in the SFST test battery. The course is 16 hours long and is traditionally taught by DRE instructors who hold state and IACP DRE credentials. The IACP highly recommends that every instructor be a graduate of the NHTSA/IACP DRE Instructor Training Course, however, states with a shortage of DRE Instructors and have a hardship have been permitted to teach ARIDE with a DRE who is also a DWI Instructor. The training also promotes interaction with representatives from the state's prosecution community. Part of the course may be taught by a local prosecutor or the state's traffic safety resource prosecutor (TSRP).

The ARIDE program is managed by the Technical Advisory Panel (TAP) of the IACP and is being used in most states.

IN-CAR VIDEO

Many law enforcement agencies throughout the United States utilize onboard video recording which can assist in gathering evidence in a DWI investigation with a hardcore drunk driver. There is widespread agreement that cameras can protect the rights of both police and citizens, exonerating officers of false complaints and monitoring professional administration of police duties. An in-car video camera enables the officer to record the actions of the vehicle prior to the stop as well as the performance of the DWI suspect on the SFSTs. Prosecutors report DWI offenders often will plead guilty after watching a video of their arrest. These admissions of guilt reduce plea-bargain attempts, requests for costly jury trials, and the amount of time officers spend in court. Although there are limitations with in-car video – such as a two-dimensional limited field of view – used properly, the video can document much of the results of the investigation.

Many police agencies welcome video cameras as a way to document that traffic stops are justified and conducted in compliance with sanctioned policies and procedures. Law enforcement officers frequently use video to document the arrest from the initial citing of a traffic violation through transporting the defendant to jail. This helps establish that the offender was afforded due process and protects the officer as well. Officers investigating a hardcore drunk driver offender can record the actions of the driver and any attempts at thwarting the investigator's efforts to acquire evidence. Here are some good practices for using in-car video in a hardcore drunk driver case:

1. **First, recap what just happened.** You have just observed some action by the suspect, possibly a traffic violation. This action caused you to start the recording. It is very important to verbalize what you just observed, as it might not have been captured on video. Such statements should be made contemporaneous with the event whenever possible.
2. **Provide a constant commentary.** As there is no way to be certain if the system is capturing video, it is essential to have audio. Additionally, there is no way for the system to know what you are thinking. So, give your “partner” (your in-car video system) a blow-by-blow commentary.

- 3. Safety first!** Officer safety should always be your first consideration when making a stop. Drive the car and do not become distracted by camera placement or angle during the stop.

Courts have ruled that there is no right to privacy in the back of a patrol car. In-car video cameras should be set up to record both video and audio of the impaired driver while being transported. Many times, offenders will make statements that reflect their consciousness of guilt while in the back of a patrol car. These statements are admissible and should be captured for trial. Again, this is especially important in the cases of hardcore drunk drivers who may not display the obvious signs of impairment as other DWI violators.

Finally, it is extremely important for an officer to review the video prior to writing the report and again before testifying in court. Any discrepancies between the video and the officer's report or testimony can cause enough reasonable doubt to jeopardize the case.

The value of in-car video as a means to gather evidence is crucial. Officers, however, need to be cognizant of its limitations and utilize best practices when conducting a traffic stop and DWI investigations on video. It is important to remember that when dealing with the hardcore drunk driver, it is more than just the SFSTs that make the case, it is the entire DWI detection process and that entire process should be captured as completely, professionally, and safely as possible.

Be aware that this is not a Hollywood production. You are gathering evidence at a one-time event! There are no rehearsals or retakes!

ON-SITE ORAL FLUID SCREENING FOR DRUGS

In some cases, hardcore drunk drivers may be impaired by drugs in addition to alcohol. DWI offenders in many states are required to participate in treatment as a condition of probation. Although offenders typically are evaluated as part of the treatment process, most will deny or minimize their problems to avoid having to do any more than absolutely necessary.¹⁴ Without a forensic test to document drug use, many of these offenders will avoid drug treatment. This creates a significant problem because many DWI offenders abuse alcohol and drugs and offenders with drug misuse issues appear to pose a higher risk of recidivating than those who do not.¹⁵ Researchers in Norway have conducted the most extensive study on this issue. They followed 850 drunk drivers with BACs between 0.16% and 0.19% and 1,102 drugged drivers for seven years after arrest. They found that drugged drivers were re-arrested twice as often as drunk drivers:

- 57% of the drugged drivers were re-arrested;
- 28% of the drunk drivers were re-arrested.¹⁶

Oral fluid kits may help determine the source of impairment. These kits are easy to use, fast and inexpensive (they cost between \$5.00 to \$25.00, depending on quality and volume of kits

¹⁴ See e.g. Lapham, S., C'de Baca, J., McMillan, G., and Hunt, W., Accuracy of alcohol diagnosis among DWI offenders referred for screening, 76 J. Drug Alc. Depend., 135-141 (2004).

¹⁵ See e.g. C'de Baca, J., McMillan, G., Lapham, Repeat DUI Offenders Who Have Had a Drug Diagnosis: Are They More Prone to Traffic Crashes and Violations?, 10 Traffic Inj. Prev. 134-140 (2009).

¹⁶ Christophersen, A., Skurtveit, S., Grung, M. and Morland, J., Rearrest rates among Norwegian drugged drivers compared with drunken drivers, 66(1) Drug Alc. Depend. 85-92 (2002).

purchased). However, caution must be exercised since there are no standards in existence for their use, nor are there performance standards for these tools.

Do On-Site Oral Fluid Screening Kits Work?

Today's oral fluid kits are not nearly as sensitive as urine kits. However, they may still have good value. In a recent study¹⁷, researchers published three articles that provide insights on the efficacy of oral fluid drug testing.¹⁸ Researchers tested eight commercially available on-site oral fluid kits on volunteer subjects who participated in a roadside survey, suspected drugged drivers, patients in treatment center and rehabilitation clinics and coffee shop customers.¹⁹

As expected, researchers determined that the kits varied dramatically in overall quality. In field evaluations, researchers determined that on-site oral fluid tests can help strengthen an officer's suspicion of an impaired driver's drug use.²⁰

In 2010-11, the Missouri Safety Center assessed the Drager DrugTest 5000, Oral Drug Screening Device. Police officers collected two oral fluid samples and a urine sample from arrestees suspected of driving under the influence. One oral fluid sample was screened with the DrugTest device. The other samples were submitted for laboratory testing. The second oral fluid sample was screened via enzyme immunoassay while the urine sample was tested using a gas chromatograph. Researchers determined that the DrugTest 5000 performed comparably to the laboratory oral fluid enzyme immunoassay testing. In fact, the DrugTest 5000 had a higher detection rate for cannabis and amphetamines (though a lower detection rate for benzodiazepines and opiates). Both methods were significantly less sensitive than urine testing; a drug or drugs were identified in 64.5% of the subjects using the DrugTest 5000, 63.5% of the subjects using enzyme immunoassay methods, and 90.8% of the subjects using gas chromatography.²¹

The use of oral fluid kits is still in its infancy and is not universally accepted, either in the law enforcement setting or in the courts. It must be remembered that this test method cannot replace evidentiary confirmatory testing conducted in a laboratory. At best, they are most useful to law enforcement in the probable cause determination, similar to a PBT. Few jurisdictions have rules or laws delineating collection and testing methods and approved kits. Should this be considered, it is imperative that law enforcement work closely with both prosecutors and chemists in developing sound protocol.

¹⁷ (DRUID)

¹⁸ All articles are accessible at: http://www.druid-project.eu/cln_031/nn_107542/Druid/EN/deliverables-list/deliverables-list-node.html?_nnn=true.

¹⁹ BIOSENS Dynamic (Biosensor Applications Sweden AB), Cozart DDS (Cozart Bioscience, Limited), DrugTest 5000 (Drager Safety), DrugWipe 5 (Securetec Detections – System AG), OraLab6 (Varian), OrAlert (Innovacon), Oratect III (Branan Medical Corporation), and Rapid STAT (Mavand Solutions GmbH)

²⁰ See D 3.2.2 Analytical evaluation of oral fluid screening devices and preceding selection procedures (DRUID March 30, 2010)

²¹ See Report for the Missouri Safety Center Concerning the Use of Saliva as a Tool for Law Enforcement in Missouri (Missouri Safety Center October 2011), available at: <http://www.ucmo.edu/safetycenter/>.

SECTION IV:

AFTER THE TRAFFIC STOP

SECTION IV:

Post-Arrest Investigation

In a hardcore drunk driving offender's DWI case, gathering evidence does not stop with the decision to arrest. Just as valuable evidence of the driver's impairment will be collected after the arrest is made, so too will valuable information regarding whether the driver is a threat to re-offend.

Of considerable significance is the driver's BAC. A BAC of 0.15% or higher is typical, but it is often substantially higher. On a rare occasion, a hardcore drunk driver may have a low BAC. This may be the result of the offender being stopped and detected early in a planned series of drinking episodes. Of course, these individuals are well-versed in the DWI-related criminal justice system, meaning that they are disproportionately more likely to refuse chemical testing.

It is also probable that, related to this familiarity with the system, the hardcore drunk driver's record will reflect prior refusals and perhaps prior DWI arrests without corresponding convictions. A more detailed investigation into these priors (typically conducted by the prosecutor or probation department at a later time) may reveal similar information related to the current arrest: an individual who cooperates minimally, refusing field sobriety and chemical testing, and whose exhibition of impairment does not reflect the true level of intoxication.

Law Enforcement Interview and Booking Interview²²

At some point after the arrest, but prior to booking, the offender is typically Mirandized and asked questions relating to the arrest. General observations about the offender's demeanor, dress, and actions are also documented. Many agencies use an "Alcohol Influence Report" on which to document this information. With some basic follow-up to the information typically obtained by completing these forms, the prosecutor, probation, and treatment provider can all have a wealth of data to identify the hardcore drunk driver.

Again, the information obtained in this phase of the investigation is likely to reveal that the offender falls into certain statistically relevant groupings. For example, in addition to driving alone, the hardcore drunk driver is more likely to drink alone.²³ Any social network the offender does have will consist of other heavy drinkers and drinking drivers.²⁴ As mentioned above, the hardcore drunk driver may come from a lower socio-economic status and have a blue-collar job.²⁵ Additionally, the offender may have less education and an unstable work history.²⁶ While law enforcement often equates the need to light up a cigarette by DWI offenders as an attempt

²² Information obtained at booking is not always admissible as evidence of guilt. It may, however, be valuable information in determining the defendant's honesty in substance abuse evaluations and determining proper sentencing requirements

²³ White, William: Management of the High Risk DUI Offender, University of Illinois at Springfield Institute for Legal, Administrative and Policy Studies via a grant from the Illinois Department of Transportation. August, 2003, p. 59.

²⁴ Ibid. p. 56

²⁵ Ibid. p. 55

²⁶ Ibid.

to mask the smell of alcohol, it is also statistically probable that the hardcore drunk driver is a heavy smoker and began this habit at an early age.²⁷

Finally, questioning at this phase of the investigation may reveal the driver’s true attitude toward drinking and driving. The offender may make comments suggesting an ability to drive safely even after consuming large quantities of alcohol and consequently underestimate their true level of impairment; brag about their ability to “beat the charge” or the system in general; or continue to blame bad luck, targeting by law enforcement, or dysfunctional family relationships for his/her current situation.

General observations made by officers during this phase of the investigation should be documented in a manner that ensures it will be recorded systematically and consistently in all investigations. An example method of recording this information is below:

Clothes	Condition:	<input type="checkbox"/> Dirty	<input type="checkbox"/> Soiled	<input type="checkbox"/> Stained	<input type="checkbox"/> Bloody	<input type="checkbox"/> Disorderly	<input type="checkbox"/>
	(describe)	<input type="checkbox"/> Torn	<input type="checkbox"/> Mussed	<input type="checkbox"/> Clean	<input type="checkbox"/> Orderly	<input type="checkbox"/> Other _____	
	Hat/cap: _____	Jacket/coat: _____	Shirt/dress: _____				
	Pants/skirt/shorts: _____	Shoes: _____					

- Do the clothes suggest manual labor or potentially periodic employment (i.e., mechanic, carpenter, builder)?
- The condition of the clothing – particularly “disorderly,” “soiled,” or “mussed” may be one of the few signs of mental and/or physical impairment that you may obtain.

Breath	Odor of alcoholic beverage: <input type="checkbox"/> Very strong <input type="checkbox"/> Strong <input type="checkbox"/> Noticeable <input type="checkbox"/> None				
Attitude	<input type="checkbox"/> Cooperative	<input type="checkbox"/> Emotional	<input type="checkbox"/> Confused	<input type="checkbox"/> Mood changes	<input type="checkbox"/> Belligerent
	<input type="checkbox"/> Polite	<input type="checkbox"/> Hilarious	<input type="checkbox"/> Paranoia	<input type="checkbox"/> Uncooperative	<input type="checkbox"/> Abusive language
	<input type="checkbox"/> Talkative	<input type="checkbox"/> Excited	<input type="checkbox"/> Nauseated	<input type="checkbox"/> Sarcastic	<input type="checkbox"/> Profanity
	<input type="checkbox"/> Relaxed	<input type="checkbox"/> Indifferent	<input type="checkbox"/> Euphoric	<input type="checkbox"/> Cocky	<input type="checkbox"/> Combative
	<input type="checkbox"/> Carefree	<input type="checkbox"/> Tense	<input type="checkbox"/> Dazed	<input type="checkbox"/> Insulting	<input type="checkbox"/> Fighting
	<input type="checkbox"/> Sleepy	<input type="checkbox"/> Restless	<input type="checkbox"/> Disoriented	<input type="checkbox"/> Other _____	
Unusual Actions	<input type="checkbox"/> Hiccoughing	<input type="checkbox"/> Belching	<input type="checkbox"/> Vomiting	<input type="checkbox"/> Fighting	<input type="checkbox"/> Crying <input type="checkbox"/> Laughing <input type="checkbox"/> None

- The offender’s attitude may be critically important in proving the case as well as identifying the hardcore drunk driver. Is the offender’s attitude consistent with the situation?
 - o Does it change throughout the period of contact?
 - o In addition to using forms like this one, consider detailing the offender’s attitude in more detail in the narrative report. Be comprehensive in your description.
- Any unusual or odd actions may also be one of the few actual signs of mental or physical impairment and critical to proving the case.
- This list is just a starting point. Again, consider detailing these actions in the narrative report.
 - o Did the belching conveniently start just moments before the breath test?
 - o Did the offender start laughing at an inappropriate time or for no apparent reason?
 - o Be specific!
- Statements/Behavior indicating a lack of empathy or remorse (injury or fatality cases).
- Statements indicating an underestimation of level of impairment.

²⁷ Ibid. p.59

- Statements indicating projection of blame upon others.
- Statement indicating that the observed impairment is from some other source – illness or injury. Repeat offenders will often bring up at trial that the “real” reason for their actions the night of the arrest was due to a medical or physical problem.
- Repeated requests or attempts to smoke – officer should attempt to elicit information regarding smoking habit such as “how long?” and “how much?”

Were you operating a vehicle?		Where were you going?
What street or highway were you on?		Where were you coming from?
What time did you leave there?		What time is it now? (without looking at a watch or clock) Exact time:
What is today's date?		What day of the week is it?
When did you last eat?	What did you eat?	Where did you eat?
What have you been drinking?	How much have you been drinking?	Where have you been drinking?
Who were you drinking with and were they drinking?		What time did you start drinking?
What time did you stop drinking?	Can you feel the effects of the alcoholic beverages or drugs?	
Are you under the influence?	When did you sleep last?	How much sleep did you get?
Have you used any type of drugs recently, to include tranquilizers, pills, or medicines of any kind?		
If so, what kind of drug did you take? What was your last dose and when?		
Comments:		

- Questions related to the drinking pattern should include an indication of where the offender was drinking, with whom the offender was drinking, and whether any plans had been made to designate a driver.
- If the offender is being cooperative, it can be beneficial to attempt to learn more about his/her drinking patterns, such as if the quantity consumed on this occasion is the typical amount; if the people the offender was socializing with are the typical comrades; why the offender did not call to have someone pick him/her up, etc. This can provide insight as to the offender's attitude toward drinking and driving at a time when they are likely to be more honest about it.
- This can also be an opportune time to gather information about the offender's life that may have relevance to the question of their being a hardcore drunk driver.
 - o For example, hardcore drunk drivers frequently have dysfunctional family relations.
 - o Learning their relationship status, particularly if there is indication of domestic violence in the offender's background, can be helpful in ascertaining the likelihood of recidivism.
 - o Erratic employment may be an indicator of the individual being a hardcore drunk driver. Some labor jobs change with each new contract, so offenders may attempt to appear unemployed during the transition between contracts.
 - o Attempts should be made to learn about key aspects of the offender's personal life.

Administration of Evidential Tests

Non-Consensual Chemical Tests

As noted above, hardcore drunk drivers are among the individuals most likely to refuse everything, increasing their ability to manipulate the system and get away with their behavior. Unless there is a strong prosecutor standing behind the case and a knowledgeable judge who understands that impairment is not proven just by bad driving and poor performance on SFSTs, the hardcore drunk driver will be free to roam the streets unchecked. Every state, however, has an effective tool to combat this – the per se BAC violation. As long as there is a legally admissible and reliably obtained chemical test showing a BAC of above 0.08, obstacles to successful prosecution of the hardcore drunk driver are greatly minimized.

Understanding state law in regards to obtaining non-consensual chemical tests and the use of search warrants is vital to this effort. Offenders often mistakenly believe they have the right to refuse. Implied consent should not be confused with an absolute right. The question really is to what extent law enforcement can go to obtain a non-consensual test and what steps are necessary prior to obtaining the sample. Officers must follow the protocol provided by their department.

Law enforcement must know if they are required to obtain a search warrant prior to requiring the offender to provide a sample of blood. They also must know to what extent reasonable force may be used to obtain the sample, regardless of the need for a warrant. Law enforcement agencies should work with their prosecutor partners to establish policies and procedures as to when non-consensual chemical tests are obtained. Do the resources exist to require testing in every arrest? Or by necessity does the procedure need to be limited to those cases involving repeat DWI offenders?

Conclusion

We are aware that when first approached with this issue, law enforcement officers may ask themselves “what can I do to help identify a potential hardcore drunk driver and why should I take the time to do it?”

Hopefully the information presented thus far has made it clear why you would want to address these dangerous offenders. Hardcore drinking drivers cause a disproportionate number of alcohol-related injury and fatal crashes that occur on the roadways every day. By being aware of the existing factors, you become a vital component in the proper identification and treatment of the hardcore drunk driver. It should be clear that many of the strategies to address these offenders is accomplished by things you are already doing. That which may have seemed anecdotal at best, when observed in a new light becomes not only relevant, but essential.

REPORT WRITING

The Basics of the Report

A law enforcement officer’s arrest report is a document that tells everyone what happened. It will be used repeatedly by law enforcement, the prosecutor, the defense attorney, the judge, and

the probation officer. An arresting officer is only as good as his/her report. In circumstances involving a hardcore drunk driver, the value of the report may increase dramatically.

The credibility of the arresting officer, along with his/her skill and judgment are an important issue in every DWI trial, but this is even more so than with the hardcore drunk driver. These cases often involve minimal evidence due to the refusal of the offender to cooperate with the officer during the investigative and evidence collection phases of the case. A well-written, complete and accurate report is an important mirror of an officer's believability and credibility while at the same time highlighting the culpability and unreasonable lack of cooperation shown by the offender. Everyone who views this report will form an opinion about the case itself and the integrity, professionalism, and credibility of the law enforcement officer who wrote it.

A Report Must Be Thorough and Accurate

The law enforcement officer's job is to ensure that the arrest report is accurate and thorough. One of the major concerns of law enforcement officers in any impaired-driving case is the quantity of the paperwork. Because of the number and complexity of the details, it takes more time to do this report than almost any other type of crime. However, it is here where the time must be spent, particularly in cases involving the hardcore drunk driver.

A complete well-written report is essential to the success of any DWI case. Often cases are heard many months after the arrest. Undocumented facts can be hard to remember. The ability of a law enforcement officer to thoroughly recollect and testify about the facts in a case may hinge on the quality of the report. As a direct result, a detailed report may be instrumental in obtaining a defendant's guilty plea or a guilty verdict. It will reduce the reasons to conduct a pre-trial hearing, or even a trial in many cases.

Officers must fully articulate the events and observations of the DWI investigation to provide the judge and jury sufficient information and evidence on which they can base their verdict. In other words, a thorough and accurate report can save time and effort in the end and it will play an important role in getting a favorable resolution.

The defense attorney will thoroughly review the report. If the defense finds any mistakes or inaccuracies, they will use it to create doubt over the rest of the report. The defense attorney will put a law enforcement officer in a box: either the officer was careless and unprofessional, or the officer is a liar. If the law enforcement officer was wrong about one fact, what else could be wrong in the report? Either way, the law enforcement officer loses.

Omissions are critical also. Some law enforcement officers believe that it is better to leave information out, to avoid being challenged on it or to make it more difficult for defense attorneys to attack the case. However, the exact opposite is true. When the facts are missing from the report, the defense attorney may believe there is an issue in the case. That increases the likelihood that the investigating officer will have to testify in pre-trial hearings and also in trial to establish probable cause for the arrest.

To prevent these events from occurring, the law enforcement officer should double-check the report right after it is written for thoroughness and accuracy. Once it is complete, it should be read over yet again, to ensure that all the facts of the case are included and correct. This is a time consuming process but the desired result, an accurate and complete report, will make trial

preparation and testimony that much easier. Remember, it is better to correct a mistake early in the station house than to try to do it in front of a jury later.

If any recordings are made during the investigation and arrest process, the investigating officer should compare them to ensure that the report is consistent with what is seen or heard in those recordings. Often, events occur that are not seen or heard on the recordings but were seen or heard by the law enforcement officer. Those details must also be included in the report.

The Basics of the Report

As we stated earlier, there are many key facts that are critical in creating a professional arrest report. To ensure that all of the critical information is recorded, officers may benefit from using a boiler plate format with which to refer to ensure that the basics facts are included in every report.

These key facts include:

- Date, time, & location of the incident
- What attracted the law enforcement officer's attention to the vehicle
- Vehicle in Motion
- Personal Contact
- Pre-arrest screening
- Other observations
- Witness activities and statements
- Time of arrest
- Chemical testing
- Defendant activities and statements
- A list all audio and video recordings
- A list of any physical evidence

It is not a law enforcement officer's job to anticipate every potential defense, nor what facts will be significant at a later time. The defense attorney will often have the report well before the trial. This provides the opportunity for them to craft a defense around the facts documented in the report. Experience shows that the more documented facts that are included in the report, the more difficult for the defense attorney to attack the arresting officer's case.

Do not editorialize when doing a report. Law enforcement officers should report their observations precisely as seen and/or heard without making conclusions. This protects the law enforcement officer's credibility, integrity, and professionalism.

Witness Statements

Once seated upon the witness stand, it is not uncommon for a witness to testify to something entirely different than what they told the investigating officer. There are numerous reasons why the testimony may vary from their original statement:

- Witness may be reluctant to testify;
- Witness may have a motive to change his/her statement; or
- Witness' memory of the facts has faded.

By taking a thorough and accurate statement from the witness at the crime scene, the investigating officer can help the witness recall what happened, or help the prosecutor refresh his/her recollection. The only question is how to ensure that the statement is accurate. Accuracy begins with a thorough interview of the witness.

The two most common ways to obtain witness statements are to 1) record it, or 2) write it down. Both have their benefits and drawbacks.

Recorded statements:

When taping the statement, be sure that the equipment works prior to the interview and confirm that it is clearly picking up all of what is being said. A recording that is not clear is close to worthless and raises more questions about the law enforcement officer's capabilities. If there is no handwritten backup, everything is lost. Conversely, a clear recording puts the witness in a box on what was said at the time of the investigation. If a recording is made pursuant to departmental protocol, be sure to turn it in as evidence in the case.

Handwritten statements:

If the witness writes a handwritten statement, it should be reviewed by the law enforcement officer and the witness, prior to the witness signing it. It is extremely common for a witness to write a different series of facts than the ones described to the investigating officer. This does not necessarily mean the witness was trying to be deceptive. The law enforcement officer needs to confirm with the witness those items that are missing and have the person add them - if those items were true. Make sure the witness acknowledges the truth of the entire content of the statement prior to the witness signing the statement.

The least preferable handwritten option is for the law enforcement officer to write the statement. When taking statements from the witnesses, the officer cannot paraphrase what the offender said. Only the actual statement can be used, regardless of the language. When completed, the officer should review the statement with the witness, and then request his/her to sign and/or initial it. There is the potential that this may create issues as the witness may later say the statement or its contents are not correct or were coerced. The statement with the witness's signature should reduce the likelihood of that claim being determined credible. In either case, the law enforcement officer should also summarize the witness statements in the narrative of the report.

Preparing an Impaired Driving Report

One of the concerns of law enforcement officers in an impaired driving case is the quantity of the paperwork. It takes more time to do this report than almost any other type of crime because of the number and complexity of the details. Notwithstanding, it is here where the time must be spent.

These cases are not just about the BAC results from a chemical test. The charge has two possible outcomes. The first results in a BAC of 0.08 or higher or the person was under the influence of alcohol and/or drug(s). The second occurs if the chemical test is successfully challenged. Then the law enforcement officer must be able to defend the administration of the Standardized Field Sobriety Tests and his/her opinion that that the suspect was under the driving under the influence.

The report should follow the same format for hardcore drunk drivers that is used in any impaired driving investigation - Vehicle in Motion, Personal Contact, and Pre-Arrest Screening, etc. For each component, be sure to provide the details of what was observed, smelled, heard, and touched. If the law enforcement officer is using a form with check boxes, a narrative should always be included to describe the observations.

Vehicle in Motion Observation

Clues from observations of the vehicle in motion provide reasonable suspicion to stop the vehicle. The report must include all of the observations in deciding to stop this vehicle. For the vehicle in motion component consider the following observations when preparing the report:

- What drew the officer's attention to the vehicle in the first place?
- Were there any vehicle code violations?
- How many times did the vehicle go over the white edge line?
- How many times did it go over the center or lane line?
- How far over was the vehicle in relation to these lines?
- Was there any on-coming traffic while the vehicle was over the center line?
- Was there any weaving within the lane?
- Did the vehicle strike a curb?
- Was there inappropriate speed?
- Were there any apparent delayed reactions or over-reactions that the driver made in response to some event (i.e., sudden swerving; overcompensating on turns; etc.)?
- How many traffic signals and signs were disobeyed?
- How long did it take for the driver to react to the officer being behind him?
- How far did the vehicle travel after the officer signaled the driver to stop? When determining this, use common measurements such as miles, blocks, yards, etc.
- Is vehicle within the law enforcement officer's jurisdiction?
- What were the road conditions?
- What was the traffic volume on the roadway?
- What were the weather conditions while driving?
- What was the time of day?
- Also, if a video recording is being used, it should be noted if the time on the videotape is incorrect.
- How many people were in the vehicle?
- What was the behavior of the driver (and other occupants) in the vehicle prior to the stop?

NOTE:

If the law enforcement officer does not observe the vehicle in motion, the investigating officer must fully explain in the report how initial contact with the driver happened. Also, it should be included in the report how the law enforcement officer determined that the subject was the driver.

Personal Contact

When coming into contact with the driver or any passengers, consider some of the following observations and document:

- How was the driver's identity obtained?
- Were there any unusual movements by the driver?
- Describe the driver's manner of speaking in detail.
- Did the driver make unusual statements to the law enforcement officer?
- What are the names of all the passengers in the vehicle?
- Did the passengers exhibit any unusual behavior, intoxication level, etc. during the stop?

What were their responses to such questions as:

- How much have you had to drink?
- What were you drinking?
- Where are you going?
- Where have you been?
- Do you have any medical conditions or other factors that would affect your driving or ability to perform field sobriety tests?

Document any physical evidence observed during this phase including such things as:

- Nightclub stamps on hands or wrist bracelets
- Credit card or other receipts
- Open containers of alcoholic beverages
- Drug paraphernalia
- Odors

Alcohol ignition interlock devices

- Does the driver have an ignition interlock restriction on their driver's license?
- Is the vehicle equipped with an approved ignition interlock device?
- Is the device properly installed and operating?
- Has the device been circumvented?
- Did the driver turn off engine, and attempt re-start after a three-minute pause.

Describe how the subject got out of the vehicle:

- Was the offender able to control their balance?
- Did the offender use the vehicle for support?
- Document the condition of the exterior of the vehicle.

Pre-Arrest Screening

During the pre-arrest screening phase, field sobriety tests should be documented fully, including the following:

- Describe the conditions for the testing:
 - o The weather conditions.
 - o The lighting conditions.
 - o The condition of surface on which the tests were conducted.
 - o The kind of shoes the driver was wearing.

- Describe administration of the test protocol
 - o Document that the law enforcement officer's instructions and demonstrations for each of the SFST tests to the subject.
 - o Document the subject's responses to the instructions.
 - o Describe the entire test as the subject performed it.
- Was a preliminary breath test offered to the offender?
 - o Was the device at proper operating temperature?
 - o Was the device in proper operating order.
 - o Was the mouthpiece clean?
 - o Did the result indicate a BAC higher than 0.08% BAC?
 - o Was the offender cooperative?
 - o What was the offender's reaction to the test result.

Arrest Decision

Once the decision to make an arrest is made, the arresting officer has a whole new battery of observations and actions to document.

- Document the time of the arrest.
- Document that the defendant was advised about chemical testing.
 - o Some states require that the defendant be advised about chemical testing prior to being under arrest. Some require that the defendant be advised post arrest.
 - o The law enforcement officer must know their state's law about chemical testing.

Post Arrest

Once the person is arrested, there are certain topics that should also be documented in the report:

- Results of any search of the vehicle as well as impoundment and towing.
- Chemical test protocols followed:
 - o The law enforcement officer should state in the body of the report that proper protocol was followed.
- Evidential breath test
 - o For evidential breath testing, specifically note in the report the required observation time period, checking of the mouth for cuts or lesions, food, gum, regurgitation, etc. as required.
- Blood test,
 - o Make sure to put the name and witness information of those individuals in the chain of custody in the report.
 - o Include the time of the blood draw in the report.
 - o If there was an extended delay, document the reasons for the delay - especially if the delay is due to the defendant's actions.
 - o Offender's refusal of chemical testing
 - o Offender's explanation for test refusal.
- Once in custody, document any notable behavior and spontaneous statements by the defendant and names of any witnesses to this behavior.
- Document whether there is any recording of the stop, arrest, booking process or administration of the breath test.
 - o Note whether or not the recording(s) was placed into evidence.

- Document any evidence discovered during the search of the person incident to an arrest such as credit card slips or other documents that will indicate where the person had been and how much they had to drink.

Conclusion

A well-written report is essential to the success of any DWI case. The ability of a law enforcement officer to thoroughly recollect and testify may hinge on the quality of the report. As a direct result, a detailed report may be instrumental in obtaining a defendant's guilty plea or a guilty verdict. Officers must fully articulate the events and observations of the DWI investigation to provide the judge and jury sufficient evidence and information on which they can base their verdict. The time invested in writing the report is time saved later.

SECTION V:

**BLOOD ALCOHOL
TESTING IN DWI CASES**

SECTION V:

The Refusal Problem

The amount of alcohol in a driver's blood is an important piece of evidence in demonstrating the influence of alcohol on a driver's ability to operate a vehicle safely. In all states, a blood alcohol concentration (BAC) of 0.08 grams per deciliter (g/dL) or greater is per se evidence of driving while impaired (DWI). More than half the states have enacted high BAC DWI laws with more severe sanctions for drivers with BACs exceeding 0.15 or 0.16 g/dL.²⁸ Implied consent laws in all states require drivers arrested for DWI to submit to chemical testing, which provides evidence of the driver's BAC, upon request of law enforcement. This evidence is typically obtained from a breath test, the most accessible and economical form of BAC testing, but urine and blood tests are still used.

Test refusal (breath, blood, urine) is often the first step a hardcore drunk driver takes in avoiding prosecution and sentencing. Many DWI suspects refuse to cooperate with the police by refusing to answer questions, participate in the field sobriety tests, or take a breath test.

Test refusals are most common with hardcore drunk drivers, primarily because they know they will test high and they are familiar with the loopholes in DWI laws. In most jurisdictions, sanctions for refusing to cooperate with police are much less severe than sanctions for a DWI conviction, especially repeat offender sanctions. When drivers refuse, police officers are hindered in gathering the evidence needed to support a DWI charge. In many states, the test refusal is not admissible as evidence in trial. As a result, in many states, drivers who are impaired and refuse testing avoid a criminal conviction and may not be identified as repeat offenders the next time they are stopped. Test refusal is one way hardcore drunk drivers continue to evade prosecution and sentencing.

Hardcore drunk driver offenders know that the criminal consequences of providing the sample ultimately will be more severe than any civil sanctions they may receive for refusing.

Jared Olson, Idaho TSRP

“Officers say they encounter some form of refusal in one-third of the DWI cases they process. And, 95 percent of the officers say that refusals are much more common among repeat offenders. Refusal rates vary widely across jurisdictions, from as low as 5 percent to as high as 50 percent, largely as a result of differences in the sanctions imposed on those who refuse” (Simpson and Robertson 2001).

Despite implied consent laws, obtaining BAC evidence from the hardcore drunk driver is far from guaranteed. These offenders are system savvy. They know that the criminal consequences of providing the sample ultimately will be more severe than any civil sanctions for refusing.²⁹ Very few states criminalize refusal, which allow the prosecutor to obtain equivalent sanctions for

²⁸ Hedlund, J. H., & Beirness, D. J. (October 2007). Use of Warrants for Breath Test Refusal: Case Studies. DOT HS 810 852, p.1. Washington, DC: National Highway Traffic Safety Administration.

²⁹ (Hedlund & Beirness, 2007).

a refusal as for the DWI charge. Many states experience high refusal rates, particularly among repeat offenders, one criterion for identifying the hardcore drunk driver.

Impact on Prosecution

In a 2002 study on DWI prosecutions, three-fourths of the prosecutors interviewed said the BAC test was the single most critical piece of evidence needed for a conviction, evidence they are frequently without (Simpson and Robertson 2002). Some states report refusal rates of up to 50 percent for drivers with a prior DWI (Jones and Lacey, 2000). Even without the test results, DWI charges may still be brought against the offender, but conviction depends entirely on the law enforcement officer's observations and subsequent testimony.

Without evidence of the driver's BAC, the evidence supporting a DWI charge is limited to an officer's observations of the driver during the course of the investigation. The fact is, without BAC evidence, DWI cases are more difficult to prove, resulting in fewer DWI convictions. One strategy to combat high refusal rates, particularly regarding the hardcore drunk driver, is the use of a search warrant to obtain blood and/or urine samples from a driver who refuses to provide a breath sample voluntarily.

The Search Warrant: Refuting the Refusal

Several states and local jurisdictions address this problem by following the request for a breath sample with the demand via a search warrant for a blood sample in refusal cases. In practice, once confronted with this eventuality and realization that his/her initial refusal does not terminate law enforcement's ability to obtain a chemical test, the drivers often become less likely to refuse the breath tests. Additionally, he/she may now be subject both to implied consent sanctions for refusing as well as a blood draw that may contain the BAC evidence that he/she sought to avoid. Either way, law enforcement obtains chemical evidence relevant to any subsequent impaired driving prosecution.

There are multiple benefits of proceeding with search warrants in the case of a refusal. With the blood evidence:

- Hardcore offenders with high BAC results are identified,
- fewer cases are pled down to lesser charges,
- defendants more often plead guilty,
- more DWI convictions are obtained,
- fewer cases go to trial,
- more cases are disposed more quickly, and,
- court time is reduced.

The basic procedures for obtaining a blood search warrant are the same as obtaining search warrants for any other evidence. Law enforcement should follow agency policy as well as consult with their local prosecutor to establish specific protocols for a particular jurisdiction. Once the driver arrested for DWI refuses to provide a breath test, the arresting officer will complete an affidavit establishing probable cause for the seizure of the evidence, and then contact a magistrate or judge. Law enforcement must remember the BAC evidence is dissipating during this time, therefore, timing is critical. Assuming the warrant is approved, the officer arranges for

the blood sample to be drawn in accordance with state rules pertaining to blood testing for BAC evidence.

The difficulties of obtaining blood search warrants in terms of resources, logistics, and staffing are outweighed by the benefits to their prosecution of impaired driving cases. Particularly in the case of hardcore drunk drivers, the acquisition of this evidence may make the critical difference in prosecution, adjudication, and treatment of the offender.

No Refusal Programs

In response to high BAC test refusal rates, a number of states have implemented No Refusal programs to reduce the number of test refusals. No Refusal programs ensure BAC test results by enabling police officers to obtain a search warrant from a judge or magistrate for blood samples of drunk driving suspects. Judicial cooperation with the program is essential to its success.

State and/or municipal police agencies are conducting No Refusal or warrant programs in Arizona, Florida, Idaho, Illinois, Kansas, Louisiana, Michigan, Missouri, Texas and Utah. Many other states have the necessary legal authority to conduct No Refusal programs, including Alaska, Alabama, California, Colorado, Georgia, Indiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and West Virginia (NHTSA, 2012). Each jurisdiction is implementing its No Refusal program differently, but the basic idea is outlined below:

After law enforcement officers arrest a DWI suspect who refuses the opportunity to give a breath sample, the prosecutor on site will review the case and may present a warrant to the judge on site. If the judge grants the warrant, it gives the qualified personnel (nurse, phlebotomist) authority to draw a blood sample.

In Montgomery County, Texas, the No Refusal Program has reduced the county's refusal rate from 45 percent to 25 percent. The BAC levels for those who provide samples via the warrant are higher than those who submit to the test without a warrant (.19 percent versus .13 percent). The county's rate of alcohol-impaired driving fatalities has been reduced by about 70 percent. Other counties implementing the program report similar results. Judges should refer to their own constitutions, case law, statutes and ethics rules to determine if No Refusal programs can be conducted locally.

NHTSA has created a No-Refusal Weekend Toolkit for use by jurisdictions wishing to conduct a No-Refusal program. The link to the toolkit is: <http://www.trafficsafetymarketing.gov/CAMPAIGNS/>. It contains resources which includes talking points, banner ads, sample earned media, logos, sample search warrants, sample blood forms, initiative facts and traffic safety facts.

Missouri v. McNeely and Warrantless Blood Draws

The United States Supreme Court in its *Missouri vs. McNeely* ruling may make the processing of DWI offenders more challenging for law enforcement. This case arose after a Missouri State Highway Patrol corporal observed Tyler McNeely driving erratically. He was stopped, and the officer determined that he was intoxicated. When asked to submit to a chemical test, he refused.

Based on this refusal and a change to Missouri law which the officer believed authorized warrantless blood draws under the exigent circumstances exception, he was transported to a local hospital and a blood sample was drawn.

Missouri, like every other state, has an implied consent statute. Under this statute, anyone who drives on public roads or highways has impliedly consented to submit to a chemical test upon being arrested for DWI. If a person refused this test, his license could be revoked. Prior to August 2010, the Missouri statute also included language providing that if a person refused a test then “none shall be given.” In 2010, this statute was amended to strike the phrase “none shall be given.” Based on existing case law, it was determined that officers could now rely on the exigent circumstances exception to secure a blood sample without first securing a search warrant.

The primary case relied on in making this determination was *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In *Schmerber*, the United States Supreme Court held that taking a blood sample from a person suspected of driving while intoxicated without consent and without a warrant was permissible under the Fourth Amendment. Because alcohol in the blood begins to dissipate shortly after the person stops drinking, resulting in the destruction of evidence, the court found that the exigent circumstances exception applied to this situation. Some states, including Missouri, had case law interpreting this decision to mean that the dissipation of alcohol was alone sufficient to justify a warrantless blood draw. Other states read *Schmerber* to require “special facts” in addition to the dissipation of alcohol to be present before exigent circumstances could be found.

In *McNeely*, the Supreme Court did recognize that alcohol in the body begins to dissipate once it has been fully absorbed, that it continues to decline until it is eliminated, and that a significant delay in testing will negatively affect the probative value of the test result. In spite of that, the Court ruled that the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that justifies an exception to the warrant requirement in all drunk driving cases. Rather, the Court held that **exigency must be determined case by case based on the totality of the circumstances**. Specifically, the Court said that in “those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so” (*Missouri v. McNeely*, 133 S.Ct. 1552, 1561 (2013)). This ruling has created a complex situation for law enforcement because it did not identify the precise circumstances under which an officer would be justified in concluding that exigent circumstances existed.

Though it does leave some questions unanswered, *McNeely* clearly allows for warrantless blood draws when exigent circumstances can be shown. Under *McNeely*, officers should be able to obtain warrantless draws where there has been a crash that will require time to investigate thereby delaying any test (133 S.Ct. at 1560), where they have made repeated unsuccessful attempts to contact a prosecutor or judge (133 S.Ct. at 1562), or where there is evidence that a substantial portion of alcohol consumed is being eliminated based on the time of the suspect’s last drink (133 S.Ct. at 1563). These, and other factual situations, will have to be litigated to determine the exact parameters of the exigent circumstances in DWI cases.

Officers in most states will have to analyze their own particular legal environments to determine how *McNeely* will impact whether and when they are permitted to do a warrantless blood draw. This case will have the most significant impact in those states that had adopted a *per se* exigency analysis allowing for warrantless blood draws in any case where a suspect refused testing. It

is clear that those states will have to re-work their policies and procedures. Those states that routinely secured a warrant before a blood sample was drawn will feel little, if any, impact from this ruling. This ruling will also have little impact in those states that have statutory restrictions on the practice of seeking blood draws, with or without a warrant.

To ensure that impaired drivers continue to be held accountable for their actions in your state, officers and prosecutors must work together. If an officer chooses to seek a warrantless blood draw, he should document each and every fact on which he will rely to show exigent circumstances. Officers should talk to their local prosecutors about how to apply *McNeely* in their own jurisdictions. And, prosecutors should develop procedures to expedite the warrant application process as much as possible. Officers can and should continue to do warrantless blood draws when and where appropriate under the circumstances.

This article was reprinted from Volume 22 Number 1 of *Between the Lines*, a publication of the National Traffic Law Center.

HEALTH CARE PROVIDERS' COOPERATION

The issue of needing warrants also arises when the hardcore drunk driver is involved in a crash involving personal injury or death. Seventy percent of all alcohol-impaired fatal crashes involved a driver with a BAC of .15 or above.³⁰ High BAC is one criteria of identifying the hardcore drunk driver.

Often offenders are hospitalized as a result of injuries incurred in traffic crashes. In addition, the hospital may be the location local law enforcement must take suspected DWI offenders to obtain blood samples for non-crash DWI arrests. This makes the hospital or medical facility a critical element in the adjudication of hardcore offenders. It also requires law enforcement officers to work collegially with hospital personnel to obtain the necessary chemical evidence.

It is not uncommon for law enforcement officers to encounter resistance from these facilities in the collection of blood samples for prosecution of offenders. Misconceptions about the criminal justice process may lead hospital medical personnel to hesitate or outright refuse to assist in the evidence collection process. This more than likely is due to the fact that health care professionals and hospital attorneys may have limited knowledge of any immunity statute that applies. In addition, they may be less than enthusiastic about offenders, who are having blood drawn against their will and being restrained in their facilities.

The potential that staff involved in drawing blood may be frequently subpoenaed to testify in court has been known to concern health care providers. These fears may contribute to hospital administrators' concerns about employee costs, time away from their duties, the need to provide coverage for the missing employee and even possible civil litigation. For these reasons, supervisors may put extraordinary pressure on employees not to cooperate. An occasional uniformed officer applying extreme pressure to hospital staff can only serve to exasperate the situation.

These situations create an opportunity for law enforcement officials and prosecutors to work together with the health care community to find effective solutions for these situations. The first

³⁰ FARS 2012.

step in this process is to assemble a team to meet with hospital administration and staff. This team should include the lead prosecutor and the heads of all of the law enforcement agencies affected by hospital policies regarding blood draws.

The team should work to understand the fears and misconceptions of hospital personnel to allow for a true meeting of the minds. The team should identify the health care officials' concerns about involvement in the blood draw and be prepared to propose strategies to address them to the satisfaction of both sides.

The group should also decide who will be the "voice" of the group in the meeting. Usually, this will be the prosecutor. It is critical to properly identify the members of the health care team that should be invited to participate. That list should include everyone who may be affected by the proposed strategy, such as the Director of the Emergency Department, the Laboratory Director, the Hospital Attorney, the Hospital Administrator or their designee, the Director of Nursing and the Chief of Hospital Security.

Prior to any meetings, you should make contact with your state Law Enforcement Liaison Officer, Traffic Safety Resource Prosecutor or Governor's Highway Safety Office. They should be aware of any jurisdictions within the state that have experienced the same issues. This could lead to the identification of potential solutions or strategies that have proven effective in those jurisdictions.

The goal of the team should be to create a strategy that addresses the needs of both law enforcement and the health care community in a positive manner. Particularly in the case of the hardcore drunk driver, the acquisition of this evidence could make a critical difference in prosecution, adjudication, and treatment of the offender.

Issues that should be addressed include:

- Create a policy that applies to ALL law enforcement agencies.
- Discuss what the health care provider's role really is in the blood draw procedure.
- Make it clear that they will not be involved in restraining the suspect.
- Explore the use of hospital security personnel as an aid in suspect restraint as well as a liaison with law enforcement agencies should any unforeseen issues develop.
- Discuss the availability of a restraint chair or bed along with a room away from other emergency patients for use with a combative suspect.
- Discuss the procedure to be used if the suspect is admitted as a patient and is already out of the emergency department and in residence in a patient room.
- Create a written Standard Operating Procedure for the draw to avoid confusion and disagreement between hospital staff and law enforcement.

Provisions should also be made to fulfill blood draw requests of other agencies from outside of your jurisdiction relative to suspects who are routinely taken to the subject hospital for treatment. This is critical when dealing with a hospital emergency department that is a Level One Trauma Center or one that is located so as to be commonly used by out of state emergency medical services. An agency should be identified as the liaison for those outside agencies to deal with in obtaining the blood draw using the protocol established for your jurisdiction.

Alternate Arrangements

If an agreement cannot be reached to use hospital personnel to obtain blood draws, the team will need to create an alternate plan to secure another provider. This option must also be discussed with all involved law-enforcement agencies in advance, since budgeting for these draws will be a concern.

These discussions should include the possibility of:

- Including the cost of the blood draw in the costs imposed by the Court upon conviction.
- Considering the creation of a blood draw facility.
 - In Tennessee, one of the Sheriff's departments has dedicated a room equipped with a restraint chair and video cameras for blood draws and allows the jail nurse to draw blood for impaired driving cases 24/7.

The Health Insurance Portability and Accountability Act (HIPAA) and Its Potential Challenges to Law Enforcement

One of the challenges a police officer may encounter is obtaining critical information about a suspect who has been transported to a hospital or medical facility for treatment. At the medical facility the officer may start asking a nurse or doctor about the suspect's injuries or blood alcohol concentration, clearly critical information related to the ongoing investigation. It is possible the officer will be told that the patient has not authorized the release of that information and that "HIPAA" does not allow the facility to release it.

The Health Insurance Portability and Accountability Act, known by the acronym HIPAA, was enacted in 1996³¹ to protect an individual's private health information. In general terms, HIPAA contains seven sections that cover everything from applicability and definitions³², uses and disclosures of protected health information³³ to transmission requirements and compliance dates.³⁴ Civil and criminal penalties were also established for the unauthorized disclosure of a person's private health information. However, at the same time several exceptions for non-disclosure were created.³⁵ The first exception listed is when the law requires it.³⁶ The exception makes no distinction on whether the law is state or federal. Therefore if a state law requires a medical facility to provide certain information, it appears they must still follow the state law.

When a state law requires disclosure, an oral request by a police officer for toxicology results does not, on its face, appear to be prohibited by this section of HIPAA. However, the better practice is to make the demand in writing with some form of state authorized process.³⁷ If making the request for health information in a state mandated written form, the hospital will appreciate a HIPAA letter and, if authorized by state law, a general court order. The letter should cover the requirements contained in the relevant section of HIPAA.³⁸ For example, a HIPAA

³¹ Health Insurance Portability and Accountability Act of 1996: 42 U.S. C. Section 1320D et seq.

³² 45 C. F. R. sections 164.500 and 501

³³ Ibid. 164.502

³⁴ Ibid. 164.532 and 534.

³⁵ Ibid. 164.512

³⁶ Ibid. 164.512 (a) (1)

³⁷ Id at section (t) (1) (ii) (A)- (C)

³⁸ Id at section (t) (l)- (6)

letter could state that the request is relevant and material to a legitimate law enforcement inquiry, is specific and limited in its scope to the extent reasonably practicable in light of the purpose for which the information is sought, and that “de-identified³⁹” information could not reasonably be used.⁴⁰ Providing a statutory citation in the HIPAA letter will also assist the hospital attorneys in reviewing and approving the request. A separate court order, although not necessary when a subpoena or warrant is issued, will also help to alleviate the hospital’s reluctance to comply. Any prosecutor or police officer that regularly responds to the scene of a crash should keep a sample letter, standard form court order and subpoena handy.

HIPAA also recognizes other circumstances where law enforcement officers have legitimate reasons for the requested information with a section specifically entitled: “*Standard: Disclosures for law enforcement purposes.*”⁴¹ It goes on to list six additional exceptions to non-disclosure. Of the six, the first exception will most likely cover the majority of impaired driving/motor vehicle crash cases. It repeats the original exception, if disclosure is required by law, and then additionally allows for disclosure when in compliance with a court order such as a search warrant issued by a judicial officer or a grand jury subpoena.⁴² Therefore, when armed with a search warrant, the medical facility must comply with it.

The second exception listed within the law enforcement section also allows for quick and easy access to information for law enforcement.⁴³ It authorizes disclosure of limited identifying information (name, address, social security number, type of injury, and a few other distinguishing characteristics) to law enforcement for the purpose of identifying or locating a suspect. While this specific exception does not allow for release of toxicology results and may not reveal all the needed evidence, it can be helpful in locating a suspect.

This is a complicated process when experiencing it for the first time. It is not the purpose of this guide to be a primer on HIPAA, but to make officers aware of the possibility of encountering the privacy protections provided by the act. When this occurs the investigating officer should first request assistance from the department’s command structure. More than likely the officer will be referred to the jurisdiction’s prosecutor. The prosecutor will be aware of the requirements and will be able to provide assistance in submitting the proper documentation for obtaining the critical information.

³⁹ De-identification is where identifiers are removed from the health information. Typically it is used to obtain information for research purposes or similar actions.

⁴⁰ These are the requirements for a law enforcement request made administratively under section (f) (1 \ (ii) (C). Therefore, they do not apply to other requests under this section, but it may facilitate obtaining the requested information by using this language.

⁴¹ 45 C. F. R. section 164.512(f)

⁴² Ibid. 164.512(f)(1)

⁴³ Ibid. 164.512 (f) (2)

⁴³ Ibid. 164.512(f)(1)

⁴³ Ibid. 164.512 (f) (2)

SECTION VI:

**HIGH VISIBILITY
ENFORCEMENT**

SECTION VI:

Introduction

One of the mission priorities for law enforcement is to ensure highway safety by making our roads safe for all users. Through enforcement of the motor vehicle code, and community education, we strive to reduce injuries, property damage, and the loss of life associated with traffic crashes. Identifying and dealing with the hardcore drunk driver can provide challenges for law enforcement. By definition, those who fall into the hardcore drunk driver category have been through the judicial system and have an idea of how to deter and/or thwart law enforcement DWI investigations. It is best to have strategies for dealing with the hardcore drunk driver in every agency's impaired driving enforcement program.

For many years, law enforcement agencies have employed strategies that are based upon the principles of general deterrence. The concept of general deterrence is to create a high enough perception of risk among potential DWI drivers so they believe that if they drive impaired, there is a strong chance that they will be arrested for DWI. Multiple studies have shown that in order to be effective and raise the perception of risk of arrest for impaired driving, enforcement activities must be well planned, properly executed, visible and sustained for substantial periods of time. DWI enforcement strategies must be complemented by aggressive, timely and complementary public information campaigns or "media blitzes."

A 1996 study of repeat offenders showed when police presence was certain, there was a decrease in DWI behavior among study participants. Additionally, the threat of arrest and/or the consequences of arrest caused 61 percent of the repeat offenders studied to stop their behavior for some period of time.⁴⁴

"Research has shown that likelihood of apprehension is more important in deterring offenders than is the severity of punishment. The key to creating this perception is enforcement. Merely putting strong laws on the books is not enough. Enforcement efforts must be sustained and well publicized and create a realistic threat of apprehension."⁴⁵

Enhanced DWI enforcement strategies are typically in the form of sobriety checkpoints and/or saturation patrols. This section examines sobriety checkpoints and saturation patrols individually and with the understanding that extensive research has shown that each of them, in order to have an impact, must be used in concert with a strong public information campaign which may include media blitzes.

High visibility enforcement efforts including sobriety checkpoints are a critical part of a state's program to reduce drunk driving. These checkpoints, accompanied by a complimentary media campaign, remind drivers that there will be serious consequences for driving drunk.

Kendell Poole, Chairman, GHSA

⁴⁴ Wiliscowski, C. et al. *Determine Reasons for Repeat Drinking and Driving* (1996), Washington, D.C., National Highway Traffic Safety Administration (DOT HS 808 401).

⁴⁵ Insurance Institute for Highway Safety, *Q&A: Alcohol: Deterrence and Enforcement*, 2000, http://www.iibs.org/safety_facts/qanda/alcohol_enforce.htm.

NHTSA funded seven state alcohol demonstration projects between 2000 and 2003 to examine this concept. The programs were conducted in Georgia, Louisiana, Pennsylvania, Tennessee, Texas, Indiana and Michigan. While each individual program was different, each of the programs was premised on well-publicized and highly visible enforcement. There were a number of findings in the evaluation of this comprehensive program, but most importantly: “Based upon previous research and some of the implications from this study, a State impaired driving enforcement program is more likely to be successful if it incorporates (a) numerous checkpoints or highly visible saturation patrols conducted routinely throughout the year along with mobilized crackdowns and; (b) intensive publicity coverage of the enforcement activities, including paid advertising.”⁴⁶

NHTSA recently completed another study on High Visibility Enforcement (HVE). This study conducted six case studies of HVE programs currently operating in the United States. Three county level programs were examined—Anoka County, Minnesota; Charles County, Maryland; and Pasco County, Florida; a city level program in Escondido, California; a regional State program (Southeast Wisconsin); a multi-state program covering six States (Delaware, Kentucky, North Carolina, Maryland, Virginia, and West Virginia); and one in the District of Columbia.

“The case studies showed HVE strategies can be creative and flexible. They need not depend on the use of sobriety checkpoints. In several States in which sobriety checkpoints are not allowed, agencies conducting HVE activities have nevertheless incorporated many of the high visibility elements normally associated with checkpoints (e.g., publicity in media, increased concentration of law enforcement officers, lighted signs, reflective vests) into their HVE strategy.”

One of the major findings was that public information coverage of the programs was very difficult to secure at the levels believed to be necessary to create a high perception of risk in the driving population. Both NHTSA reports can be obtained at their website:

<http://www.nhtsa.gov/Impaired>.

Sobriety Checkpoints

Sobriety checkpoints are a proven tool used by traffic law enforcement agencies nationwide in their efforts to deter impaired driving. Properly conducted, sobriety checkpoints involve the stopping of all vehicles, or a specific sequence of vehicles, at a predetermined, fixed location.

The primary purpose of a sobriety checkpoint is to focus increased attention on the problem of impaired driving by employing high profile enforcement and public information activity, thus creating a very high perception of risk of arrest. One of the consequences of the high visibility is that sobriety checkpoints do not usually result in large numbers of DWI arrests. This is due to the fact that research has shown the increased risk of arrest deters many potential DWI offenders from driving impaired while the checkpoints are being conducted. This results in fewer alcohol-related crashes.

PLANNING FOR SOBRIETY CHECKPOINTS

Before implementing a sobriety checkpoint program, it is paramount that agency legal counsel or the prosecutor’s office be contacted and ensure all activities fall within the limits established by

⁴⁶ Fell, J. C., McKnight, A. S., & Auld-Owens, A. (2013, February). *Increasing impaired-driving enforcement visibility: Six case studies*. (Report No. DOT HS 811 716). Washington, DC: National Highway Traffic Safety Administration.

both federal and state constitutions as well as pertinent case law. It is the responsibility of each agency to comply with these guidelines and not jeopardize this aspect of DWI enforcement for their state.

NHTSA has published guidelines to assist law enforcement in implementing checkpoint programs. You can link to them at: http://www.nhtsa.gov/people/injury/enforce/LowStaffing_Checkpoints/index.htm. These guidelines suggest and describe procedures police administrators may want to consider to ensure that sobriety checkpoints are used legally, effectively, and safely. These points are consistent with those specified in recent court decisions, including the United States Supreme Court ruling in *Michigan Department of State Police v. Sitz*, upholding the constitutionality of sobriety checkpoints.

To specifically target the hardcore drunk driver, sobriety checkpoints should be scheduled for times when the incidents of impaired driving are likely to be high. Normally, the highest number of incidents, as indicated by crash statistics, occur on weekend nights between the hours of 9 p.m. and 3 a.m. As stated earlier in this publication, crashes are closely associated with high BACs, a significant factor in identifying the hardcore drunk driver. Other strategic times may be consistent with other periods of high visibility enforcement, such as Thanksgiving weekend or Super Bowl weekend.

Saturation Patrols

Saturation patrols, while not always as highly visible as checkpoints, work toward another strategy of dealing with the hardcore drunk driver: sustained enforcement. Interviews with hardcore drunk driving offenders indicate that they expect to be caught. The most effective way to increase the odds of this happening is with sustained enforcement. Saturation patrols should be consistently used in areas with high incidents of alcohol-impaired crashes. As with sobriety checkpoints, technology should be considered to increase the effectiveness of a saturation patrol. A marked patrol vehicle equipped with a license plate recognition system can be utilized to detect the possible presence of drivers suspended or revoked due to DWI.

Saturation Patrol Location Selection Criteria

Location selection is the first critical step in conducting effective saturation patrols. Selection criteria can include, but not be limited to, the following elements:

1. Areas with a history of high crash rates, especially those where alcohol or drug-impaired crashes have been noted
2. Areas where high-profile impaired crashes have recently occurred
3. Areas where a high number of DWI arrests have been made.

Even though saturation patrols will provide more initial information toward the driver impairment than a checkpoint, law enforcement still must develop reasonable suspicion within a relatively short period of time. The hardcore drunk driver may be sophisticated enough to initially be cooperative. Once the investigation indicates the need for SFSTs, the hardcore

drunk driver may change his/her attitude toward cooperation and may initiate “passive refusal.” Officers should be prepared for a refusal to submit to SFSTs and for claims of medical problems that would affect such tests.

Public Information Campaigns

When used in conjunction with enforcement campaigns, media blitzes and public information campaigns play an important role in the fight against hardcore drunk driving. Elevating the public’s awareness of efforts to stop impaired driving through print, electronic and/or social media, acts as its own deterrent to the illegal behavior.

The concept of deterrence is key to effective DWI enforcement. The combination of a visible reminder in conjunction with published arrest numbers provide the necessary incentive and warning to the public not to drive while impaired.

The message can be delivered in a variety of ways to more effectively reach varied target audiences.

Paid Media:

This delivery is effective in reaching a large population; however, it can be cost prohibitive if purchasing air time via television or radio in larger media markets. Purchasing airtime via social media (YouTube, Pandora, Facebook, Promoted Tweets, etc.) can be far less expensive and just as far reaching.

Earned Media:

Earned media involves public relations efforts from law enforcement agencies. Press conferences, pre-event releases, posters, brochures, letters to the editor, editorials, and blogs are all examples of earned media. While effective, the audience is typically smaller and competition for earned media is strong.

“Publicity without sufficient enforcement is soon perceived as not credible; enforcement without publicity has too little impact on the drinking driving population to create a general deterrent effect” (Rodriguez 2002).

Social Media:

Finally, there is social media. ‘Social media’ is a term that defines the various activities that integrate technology, social interaction, and communications through words and pictures, and expands the opportunity to reach the audience in real time. There are a number of advantages to using social media over traditional media options:

- It is immediate. Messages are provided in real time.
- It is short. Messages are limited to a small number of characters; therefore, it does not take long to develop versus a traditional press release.
- It can go viral. The message can be forwarded to others greatly expanding its reach.
- It is relatively inexpensive and reaches a highly attentive audience.

Media Blitzes:

Information and intervention go hand-in-hand. The success of a public information campaign relies on strong backup by the promised enforcement: one doesn't work without the other. When enforcement is inconsistent, public compliance diminishes.

NHTSA prepares Impaired Driving Prevention Toolkits and places them on its website for download as resources for communities launching public awareness campaigns, including sample press materials. These toolkits, which vary based upon the holiday or other cultural event, also stress the importance of campaign evaluation and provide assessment tools to help focus and evaluate progress towards the campaign's goals and objectives. These toolkits can be obtained at: www.nhtsa.gov/impaired.

Multi-Disciplinary Approaches to Enforcement

Combating the hardcore drunk driver is a team effort that occurs on many fronts. The team should consist of law enforcement, prosecution, probation and court services personnel, the judiciary, treatment providers, victims and victim service providers, as well as concerned citizens. Even defense attorneys have a role to play in minimizing the effect of the hardcore drunk driver. Law enforcement obviously plays the key role in enforcement, and in some cases prosecution, of the hardcore drunk driver. Prosecutors take the lead in bringing the offender to justice before the courts. The judiciary takes the lead in imposing effective sentences and is joined by probation and court services in ensuring the offender complies with those sanctions. None of these participants in the system should consider their job to be limited to their primary role, however. Successful deterrence and rehabilitation of the hardcore drunk driver will be achieved only if all of these interested parties come together to combat all aspects of the problem.

This team effort comes in many forms. In some instances this effort comes from the law enforcement agencies themselves, coming together to create multi-jurisdictional DWI task forces to conduct high visibility enforcement. There are also task forces that go well beyond DWI enforcement. Both statewide and more locally-oriented multi-disciplinary task forces work on issues related to enforcement, prosecution, effective sanctioning, public information and education, and promotion of stronger DWI laws. Finally, DWI treatment and other specialty courts also use a multi-disciplinary approach in the rehabilitation of the hardcore drunk driver.

Combating the hardcore drunk driver is a team effort that occurs on many fronts. The team consists of law enforcement, prosecution, probation and court services personnel, the judiciary, treatment providers, victims and victim service providers, as well as concerned citizens.

Multi-Jurisdictional DWI Enforcement Task Forces

Across the country, law enforcement agencies from neighboring jurisdictions band together to conduct high visibility enforcement, a key element of containing the hardcore drunk driver. These task forces can be active year-round, for special holiday enforcement periods, or to participate in national enforcement crackdowns supported by NHTSA. In any case, the benefit of multi-jurisdictional groups is two-fold. First, they are primarily staffed by the participating

agencies' top DWI enforcement officers. These men and women are highly motivated to get the drunk driver off the street and have the training and experience to conduct a thorough investigation that will bring the hardcore drunk driver to justice. Second, these task forces enable departments to create larger deployments of officers for smaller departments and are more effective in creating an aura of general deterrence. They are also useful for pooling resources by working as multi-jurisdictional units which allows for a more effective use of agency or grant funding.

There are some basic issues to consider when developing a multi-jurisdictional enforcement task force.

- Coordinating agencies should work with local prosecutors to resolve any jurisdiction issues prior to enforcement activity.
 - Is there a statute governing whether a law enforcement officer can make an arrest based on actions committed entirely outside his or her own jurisdiction?
- Are there limitations to that authority?
 - For example, in Illinois, the Code of Criminal Procedure authorizes a police officer to make an arrest outside his or her jurisdiction if the officer, while on duty, becomes aware of the commission of a felony or misdemeanor.⁴⁷

While DWI is minimally a misdemeanor, the underlying basis for the traffic stop most often is not. Because of this, local officers may not have authority to make the stop outside their jurisdiction.⁴⁸ While these officers do retain the right to effect an arrest as a private citizen, this argument is a difficult one to make when the officer is on duty, in uniform and in a marked squad car.

A better solution is for the agencies involved in the multi-jurisdictional effort to enter into an inter-agency agreement under which the officers involved are sworn as law enforcement officials for all the jurisdictions involved. Other issues to resolve may run to the more mundane administrative sort, such as where the offender will be booked and under whose jurisdiction paperwork should be completed and filed.

The 2013 *Delaware Checkpoint Strikeforce Campaign* is an excellent example of a regional multi-jurisdictional DWI task force.

In 2013, the State of Delaware's Office of Highway Safety instituted its 13th Checkpoint Strikeforce campaign. This campaign was a six month multi-jurisdictional program. The eight police agency task force was created with the New Castle County Police Department acting as the host agency. The DUI Task Force is comprised of officers from the Delaware State Police, the Middletown PD, New Castle City PD, New Castle County PD, Newark PD, Newport PD, University of Delaware PD, and Wilmington PD. To complement the task force, Georgetown PD, Rehoboth Beach PD, and Milford PD will conduct coordinate checkpoints within their town limits.

A number of police agencies were not authorized to make DWI arrests outside of their own jurisdictions. In order to make this multi-jurisdictional task force a reality, Attorney General Beau

⁴⁷ 725 ILCS 5/107-3

⁴⁸ *People v. Kirvelaitis*, 315 Ill.App.3d 667, 734 N.E.2d 524, 248 Ill.Dec. 596 (2d Dist. 2000).

Biden conducted a swearing in ceremony for all of the officers participating in the program. This provided legal authority for these officers to conduct traffic enforcement anywhere within New Castle County.

During the 2013 six-month program, a total of 56 sobriety checkpoints were scheduled and were supplemented with saturation patrols. On special high incident holiday periods such as Labor Day, Halloween, and the month of December, the enforcement was augmented with additional DUI saturation patrols statewide.

The campaign's enforcement activities will be supplemented by an all new intense public awareness and education campaign that highlights the fact that a DUI follows you everywhere with paid messages in the form of TV, radio spots, billboards, print, online, Pandora, movie theater ads, ice chest wraps, store floor clings, and website: www.DUIRealTime.com. Paid messages will also be included in Spanish print and radio ads.

Multi-Disciplinary DWI Task Forces

Another common type of DWI-related task force is the multi-disciplinary task force. These are found all over the country on both a statewide and local basis. Generally speaking, the goal of such task forces is to address the problem of impaired driving through a combination of enforcement, education and advocacy. Such groups have a positive effect on the apprehension, adjudication and rehabilitation of the hardcore drunk driver in that they support training of all stakeholders in the system, increase awareness of the consequences of drunk driving through public outreach and education, further increase the profile of high-visibility enforcement through earned media efforts, and bring together resources geared toward rehabilitating the offender.

Many of these task forces started as basic law enforcement partnerships, which expanded to include other system stakeholders with the realization that more ground could be covered by including others in the process. As recognized by the IACP, "by expanding productive partnerships and advancing collaboration, law enforcement agencies can gain vital support, amplify available resources, and share ownership for traffic safety enforcement programs and activities. The payback for expanding partnerships is well worth the investment."⁴⁹ A variety of publications are available on the topic of both statewide and local impaired driving task forces. An excellent resource is NHTSA's publications *A Guide for Local Impaired-Driving Task Forces, Volumes I and II* and *A Guide for Statewide Impaired-Driving Task Forces*. They are free via download at: <http://www.nhtsa.gov/Impaired>.

No single discipline of the criminal justice system can be successful in attacking the hardcore drunk driving problem. Instead, what is required is for all justice entities to unite and work together within ethical bounds to combat hardcore drunk driving.

**Karl Grube,
State of Florida Senior Judge**

⁴⁹ *Impaired Driving Guidebook: Three Keys to Renewed Focus and Success*, Report of the Impaired Driving Subcommittee of the International Association of Chiefs of Police, 2006.

Additional Resources

“Blitz to Enforce Laws Against Impaired Driving, *NHTSA Now*, Volume 8, No. 7. Washington, DC: National Highway Traffic Safety Administration.

“Effectiveness of mass media campaigns for reducing drinking and driving and alcohol-involved crashes” (2004). *American Journal of Preventive Medicine*, 27, 57–65.

Driving Update. Kingston, NJ: Civic Research Institute, Inc.

Elder, R.W., Shults, R.A., Sleet, D.A., Nichols, J.L., Thompson, R.S., Rajab, W., & the Task Force on Community Preventive Services.

Fell, J. et al. “Why sobriety checkpoints are not widely adopted as an enforcement strategy in the United States.” *Impaired Winter* 2002.

Highway Checkpoint Strikeforce Debuts for July Fourth Holiday: Multi-State (July 17, 2002). National Highway Traffic Safety Administration.

Lacey, J.H., Jones, R.K., and Smith, R.G. 1999. *Evaluation of Checkpoint Tennessee: Tennessee’s Stateline Sobriety Checkpoint Program*. Washington, DC: National Highway Traffic Safety Administration.

Levy, M., Compton, R., & Dienstfrey, S. Public Perceptions of the July 2003 “You Drink & Drive. You Lose” Crackdown: Telephone Surveys Show the Media Campaign Reaches Target Audience” (2004). *Traffic Safety Facts: Research Note*. Publication No. DOT HS 809 708. Washington, DC: National Highway Traffic Safety Administration.

Miller, T.R., Galbraith, M.S., and Lawrence, B.A., “Costs and benefits of a community sobriety checkpoint program” (1998). *Journal of Studies on Alcohol*: 462–468.

Saturation Patrols and Sobriety Checkpoints: A How-to-Guide for Planning and Publicizing Impaired Driving Enforcement Efforts (June 2001). National Highway Traffic Safety Administration.

Shults, R.A., et al. “Reviews of evidence regarding interventions to reduce alcohol-impaired driving” (2001). *American Journal of Preventive Medicine* 21(4S): 66–88.

SECTION VII:

**STRATEGIES AND ADDITIONAL
RESOURCES/LINKS**

SECTION VII:

Partnering with Prosecutors and Probation Officers

There are potential rewards for prosecutors and law enforcement officers working together to solve common criminal justice issues. This potential is often minimized due to a limited understanding of each other's role in the criminal justice system. For example, law enforcement officers may not understand the rationale for the prosecutor's plea agreement of what appeared to be an excellent case for prosecution because they are unaware of recent case law affecting the circumstances of their DWI investigation. Likewise, prosecutors may not be aware of the challenges faced by law enforcement officers who often confront suspects in adversarial conditions and make split-second arrest decisions.

A good opportunity to improve communications between the two disciplines is for law enforcement officials to include prosecutors in departmental traffic law enforcement training. This may go a long way toward overcoming these challenges, particularly when case law is concerned. Providing an opportunity for prosecutors to share recent courtroom issues allows the law enforcement officer to gain a better understanding of the relevant case law, how to better prepare their cases, and how to improve courtroom testimony. In addition, officers can use this opportunity to ask questions on courtroom procedures and protocols. These training events can establish a partnership network, create a teamwork environment, and provide law enforcement with an excellent resource in the prosecutor's office for future questions or concerns.

Sobriety checkpoints provide another excellent opportunity for prosecutors to experience firsthand how law enforcement interacts with a large number of motorists. Agencies hosting a sobriety checkpoint should consider inviting their prosecutor(s) to attend the checkpoint in order to provide them with real world experience surrounding the complexities of properly conducted sobriety checkpoints. Police officials should consider inviting prosecutors to participate in "ride-alongs" for special DWI saturation patrols. Prosecutors should provide the same opportunities for law enforcement officers to participate in courtroom "ride-alongs" to understand the courtroom environment. This will provide them with valuable insight related to DWI enforcement strategies and it will help better prepare them to ask appropriate questions during motion hearings and trial. The National District Attorneys' Association strongly encourages prosecutors to take advantage of these opportunities. In fact, many state Traffic Safety Resource Prosecutors (TSRPs) routinely conduct cross-training with law enforcement officers and prosecutors.

Law enforcement agencies should not overlook probation officers as valuable law enforcement partners. Probation officers provide assistance to law enforcement by ensuring that offenders either correct/change their behavior, or returning the offender to the judicial system for violation of court-imposed sanctions. Law enforcement officers, who are usually the first responders to crime in our communities, can be additional "on the street" eyes and ears of probation officers by keeping them informed about individuals who are under probation supervision. Serious-minded DWI enforcement officers may want to learn which probationers reside within their patrol area and know the terms of their probation. Such knowledge may lead to increased detection of violations and referral for appropriate sanctions.

Likewise, probation officers should be invited to observe sobriety checkpoints. These officers are familiar with their probationers, and if they see them in the checkpoint in violation of a curfew, or after having consumed alcohol or other drugs in violation of court sanctions, they can take appropriate action in regards to these probation violations. Since, by definition, hardcore drunk drivers are resistant to behavioral changes that reduce the likelihood of recidivism, aggressive enforcement, coupled with aggressive probation supervision, can produce more effective results than either of these two efforts independently.

Successfully dealing with the hardcore drunk driving offender requires a concerted effort among law enforcement, prosecution, judges, and community supervision. While each component of this process can achieve limited successes in their respective areas, a unified process exponentially increases the likelihood of successfully removing these drivers from the roadways.

Traffic Safety Resource Prosecutors (TSRPs)

Traffic-related prosecutions, especially DWIs and vehicular homicide cases often present enormous challenges to prosecutors as a result of the technical complexity of the DWI statutes, the sophistication of the scientific issues involved, and the constantly evolving nuances in expert witness testimony. Defendants in these cases are often represented by very experienced, highly paid defense attorneys who bring an arsenal of well paid expert witnesses.

Training together builds a team mentality. Teammates trust one another, communicate with one another and learn from one another. Saving lives is a huge job. We all need all the help we can get.

Tom E. Kimball, TSRP, Tennessee

Most prosecutors' offices are besieged by limited funding resources and staff. The result is that some attorneys who handle misdemeanor DWI cases have received minimal training. This leaves the ill-equipped prosecutors to overcome the challenge of their highly experienced opponents. Lack of adequate prosecutor training should not be a reason for DWI drivers to escape justice.

The TSRP Program is intended to provide traffic prosecutors with up-to-date resource material and training opportunities designed to prepare them and assist them with the ongoing battle against impaired driving and traffic fatalities. These positions are often funded totally or in part with grants from the respective State Highway Safety Office's grant programs. Almost every state has a least one TSRP, while other states have hired multiple TSRPs.

Cross training prosecutors and law enforcement officers has been a critical component to my success as a Traffic Safety Resource Prosecutor in securing justice in DWI prosecutions.

Jared Olson, Idaho TSRP

The TSRP responsibilities include:

- Serving as experts on DWI law and evidence;
- Providing professional education on pertinent issues including trial advocacy, visual trial techniques, and complex defense challenges;

- Providing prompt notification to prosecutors about new legislation and how to effectively prosecute violations of these statutes;
- Researching and providing assistance on traffic safety issues (many TSRPs publish trial manuals, memoranda of law, legal updates, predicate questions to keep their prosecutors current about the state of the law);
- Analysis of emerging legal issues pertinent to traffic safety that are being developed and used by defense attorneys across the State;
- Providing answers to questions posed by prosecutors throughout the state on traffic safety issues, whether via telephone, e-mail, or in person.
- Assisting or “second chairing” trial prosecutors on complex motions, hearings and trials.
- Providing support and leadership on a statewide basis;
- Training law enforcement officers on case preparation and courtroom testimony;
- Serving as a liaison between prosecutors and the traffic safety community.

Most TSRPs conduct “cross training.” This concept involves including law enforcement officers either in training primarily intended for prosecutors or including prosecutors in law enforcement training. This strategy serves to improve the quality of preparation of arrest reports, case preparation, and courtroom testimony, areas which are often the Achilles heel of law enforcement officers. The end result is appropriate case resolutions and improved public safety.

You can contact the National Traffic Law Center of the National District Attorneys’ Association to identify the TSRP in your state at the following: http://www.ndaa.org/ntlc_resources.html.

State Judicial Outreach Liaison (SJOL)

In recent years, States have been creating liaison positions in several public safety disciplines to better meet the specific needs of their jurisdictions. This is especially true with the judicial discipline of the criminal justice system.

Initially, the Judicial Fellowship Program was created by NHTSA to provide a mutually beneficial working relationship between NHTSA and judges whose jurisdictions currently involve the adjudication of motor vehicle and pedestrian-related offenses. There are two Judicial Fellows, working under a cooperative agreement with American Bar Association (ABA). The two judges work directly with the NHTSA Impaired Driving Division on national impaired driving efforts and they function as active liaisons between NHTSA, the ABA Judicial Division and judges, and traffic safety partners, stakeholders, and organizations across the country.

In addition to the Judicial Fellows, NHTSA created Regional Judicial Outreach Liaison (RJOL) positions. The purpose of RJOLs is similar to that of Judicial Fellows; however, they operate within the states served by a particular NHTSA Regional Office. Currently, there are seven RJOLs covering 36 states, who are working with NHTSA’s Regional Offices to coordinate efforts across multi-state region lines.

The most recent addition to this trend is the State Judicial Outreach Liaison (SJOL). Several states have their own SJOLs and several more are in the planning process. The theory behind the creation of SJOL is that local judges, whether sitting or retired, are in good positions to understand and to respond to local highway safety concerns and are more likely to have close working relationships with local players. In addition, SJOLs serve as direct resources to state

and local judges, and have access to or knowledge of national resources that may be of benefit to them. The SJOL can assist jurisdictions within their respective states by giving individual technical assistance where needed, and representing their interests at state and regional traffic safety meetings.

Each state has its own highway safety laws, judicial and political culture, and leadership dynamics. The duties of Judicial Fellows include performing services such as teachers, writers, community outreach advocates, consultants, liaisons, reporters, and spokespersons. Whether the topic is DWI, driving while a license is suspended or revoked, aggressive driving, traffic stops, or other highway safety-related subjects, the Judicial Fellows are available to support both judges and court personnel.

National Law Enforcement Liaison Program (NLELP)

The National Law Enforcement Liaison Program (NLELP) has evolved over the past twenty years in support of traffic safety initiatives, mobilizations and enforcement crackdowns. The state Law Enforcement Liaisons (LELs) work with State Highway Safety Offices (SHSOs) to provide traffic law enforcement expertise, encourage involvement in state traffic law enforcement initiatives and act as a liaison between the state's law enforcement community and the SHSO. The desired outcome of these activities is to create a stronger and more cohesive law enforcement liaison network between the states, territories, and NHTSA Regions.

The LELs provide traffic law enforcement expertise to police departments within their respective states for evidence-based enforcement site identification, selection of appropriate grant strategies and countermeasures, and grant development for the state's law enforcement community to maximize effective leadership, funding and programming. They conduct networking activities and act as liaisons within the state's law enforcement, SHSO, and NHTSA Regional Offices.

The LEL duties include:

- Educate state and local law enforcement leaders on the need for priority attention to traffic safety issues and cooperative enforcement projects in conjunction with other traffic safety disciplines;
- Network with the state law enforcement community and promote the SHSO and national traffic safety priorities.
- Support and assist local agencies and grant project directors with media events, and coordination of local law enforcement mobilization activities;
- Serve as a state's law enforcement expert in the design of traffic safety programs and the development of strategic highway safety plans;
- Identify best practices; analyze and assess new law enforcement traffic safety programs and technology, and provide recommendations concerning new initiatives;
- Provide direct support for law enforcement activities associated with state and national law enforcement mobilizations;
- Provide a communication link with the state courts and media outlets to promote enforcement messages.

In 2012, the Governors' Highway Safety Association, in cooperation with NHTSA, created the position of National Law Enforcement Liaison Program Manager (NLELPM) to support the

activities of the state LEL. The purpose is to enhance communications between state LEL, ensure greater coordination of LEL activities nationwide, and provide support and assistance as needed. The NLELPM responsibilities consist of the following:

- Effectively communicate with LELs, state and federal traffic safety personnel, and law enforcement agencies;
- Facilitate communication among LELs and with LELs and state and federal highway safety partners;
- Assist in the delivery of training that enhances the skills and abilities of state LELs;
- Prepare and deliver presentations and webinars that directly support the LEL program;
- Gather information to determine law enforcement needs related to LEL program delivery;
- Provide technical assistance and support to LELs; Prepare plans, progress and other reports as needed;
- Maintain the LEL on-line List Serve communication tool.

If you do not know your state LEL, you may reach them through your respective SHSO or through GHSA at <http://www.gbsa.org/html/links/sbsos.html>. The MLELPM may be contacted through GHSA at 202-789-0942.

DWI Courts

Except where DWI Courts have already been instituted, it has been left to the traditional courts and criminal justice system to deal with DWI cases, and it has become clear that the traditional process is not working for hardcore drunk driving offenders. Punishment, unaccompanied by treatment and accountability, is an ineffective deterrent for the hardcore drunk driving offender. The outcome for the offender is continued dependence on alcohol; for the community, continued peril. However, a proven strategy exists to fight these hardcore drunk driving offenders. It is called DWI Court.

A DWI Court is an accountability court dedicated to changing the behavior of the hardcore drunk driving offender through intensive supervision and treatment. The goal of DWI Court is to protect public safety by using the Drug Court model to address the root cause of impaired driving: alcohol and other substance abuse. With the hardcore drunk driving offender as its primary target population, DWI Courts follow the Ten Guiding Principles of DWI Court, found here http://www.dwicourts.org/sites/default/files/ncdc/Guiding_Principles_of_DWI_Court_0.pdf and the Ten Key Components of Drug Courts, both as established by the National Association of Drug Court Professionals. Unlike Drug Courts, however, DWI Courts operate within a post-conviction model.

DWI Courts utilize all criminal justice stakeholders (judges, prosecutors, defense attorneys, probation, law enforcement, and others) coupled with alcohol or drug treatment professionals. This group of professionals comprises a “DWI Court Team,” which uses a cooperative approach to systematically change offender behavior. This approach includes identification and referral of participants early in the legal process to a full continuum of drug or alcohol treatment and other rehabilitative services. A DWI Court’s coercive power is the key to admitting DWI offenders into treatment and ensuring that they remain there for a period of time that is long enough to make a difference. Compliance with treatment and other court-mandated

requirements is verified by frequent alcohol/drug testing, close community supervision and ongoing judicial supervision in non-adversarial court review hearing.

Accordingly, if treatment is to be effective, DWI offenders not only must enter treatment but must remain in treatment and complete the program. To do so, most will need to be ordered or coerced into treatment. DWI Court is the best vehicle within the criminal justice system to expedite the time interval between arrest and entry into treatment, and provide the necessary structure to ensure that a DWI offender stays in treatment long enough for treatment benefits to be realized.

Most importantly perhaps, DWI Courts serve as a potential unifying hub for the myriad agencies and organizations that have been part of piecemeal attempts to plug the gaps in the drunk driver control system. By partnering with the respective state's department of motor vehicles, Governor's Highway Safety Commission, highway patrol, local law enforcement crash prevention squads, MADD and other crash prevention and victim support groups, DWI Courts can add teeth to the justice system's response to repeat drunk driving.

NHTSA research shows that DWI Courts are effective:

- Hardcore drunk driving offenders graduating from DWI Courts were up to 65 percent less likely to be re-arrested for a new DWI offense.
- All DWI Court participants had a recidivism rate of 15 percent, whether or not they graduated or were terminated, versus a recidivism rate of up to 35 percent for those not in DWI Court.
- The three DWI Courts prevented between 47 and 112 more repeat DWI arrests.

WHERE ARE THEY BEING USED?

As of 2012, there were 208 designated DWI Courts, and 401 "hybrid" Drug Courts for a total of 609 in 42 states and territories.

SECTION VIII:

CONCLUSION

SECTION VIII:

Conclusion:

In conclusion, this Guide is intended to provide law enforcement officers with effective strategies and skills to identify hardcore drunk drivers. The traffic law enforcement officer is the first contact that a DWI offender has with the criminal justice system. Hardcore drunk driving offenders have been through the judicial system and many know how to deter and/or thwart law enforcement DWI investigations. The Guide identifies a number of significant challenges that hardcore drunk drivers often pose to law enforcement.

The Hardcore Drunk Driving Law Enforcement Guide provides proven strategies in each phase of the DWI investigation process to assist law enforcement officers in making correct arrest decisions at roadside, particularly with instances involving the hardcore drunk driver. The guide also provides guidance on how to complete the investigation in such a manner as to increase the officers' ability to develop and present an effective DWI case. It is critical to have effective strategies for dealing with hardcore drunk drivers in every agency's impaired driving enforcement program.

The Century Council and IPTM strongly believe this Guide presents strategies and interventions known to be effective in identifying DWI offenders at all levels of impairment. More importantly, it provides law enforcement officers the ability to identify that small percentage of serious offenders whose behavior is not changed by traditional interventions designed for first time offenders. These hardcore drunk driving offenders need more aggressive interventions. They are responsible for a highly disproportionate percentage of the alcohol-impaired traffic fatalities.

Despite research that shows a high percentage of repeat DWI offenders believe they would be arrested and convicted if they drive under the influence, they continue to do so anyway. Without these strategies for dealing with hardcore drunk drivers, these serious multiple offenders may continue to drink and drive and they will endanger their own lives as well as innocent citizens. Law enforcement officers are encouraged to adapt the strategies contained within this manual to their agency's needs and help rid the highways of these particularly dangerous offenders.

GLOSSARY OF TERMS

ALCOHOL-IMPAIRED DRIVING FATALITY: Drivers in all 50 states and D.C. are considered to be alcohol-impaired if their blood alcohol concentration (BAC) is .08 grams per deciliter (g/dL) or higher. Any fatality occurring in a crash, that involves at least one driver or motorcycle operator with a BAC of .08 percent or higher, is considered to be an alcohol-impaired fatality.

ALCOHOL-RELATED TRAFFIC FATALITY: A traffic fatality is considered alcohol-related if either the driver or anyone else involved in the police reported crash other than a passenger (e.g., a pedestrian or bicyclist) has alcohol in their blood stream (a BAC level of .01 percent or more). For example, if a pedestrian with a BAC of .01 percent steps off the curb in front of a sober driver and is killed by that driver, the fatality is included in alcohol-related traffic statistics. If a driver who has been drinking hits a car with two sober people in it and kills both, those two fatalities are considered alcohol-involved. In producing national and state statistics, NHTSA estimates the extent of alcohol involvement when alcohol test results are unknown.

ASSESSMENT: Depending on the discipline, the term “assessment” can refer to a variety of methods used to determine the nature of a problem and course of action needed to correct the problem. In general, criminal justice assessment tools fall into three basic categories: screening instruments, comprehensive risk/needs assessments, and specialized tools.

BINGE DRINKING: According to the National Institute on Alcohol Abuse and Alcoholism (NIAAA), binge drinking is defined as occasions of heavy drinking measured by the consumption of five or more (for males) and four or more (for females) drinks in a row at least once in the past two weeks.

BLOOD ALCOHOL CONCENTRATION: BAC is measured in grams of alcohol per 100 milliliters of blood. A BAC of .01 percent indicates .01 grams of alcohol per 100 milliliters of blood. By July 2004, all 50 states and the District of Columbia have passed legislation establishing that a driver with a BAC of .08 percent is considered legally intoxicated. Additionally, 42 states and the District of Columbia have laws and penalties for those who drive with elevated or “high” BAC levels.

COMMUNITY CORRECTIONS: A component of the criminal justice system which offers programs and services in the community and/or viable alternatives to incarceration for individuals at various stages of the criminal justice process. Community corrections may include bail/bond programs; behavior change strategies; restitution, fines and fees collection; probation and parole supervision; electronic monitoring; community service; and day reporting centers.

COMMUNITY SUPERVISION: Refers to the conditional release and supervision of defendants/offenders in a community setting. A conditional release of a defendant/offender to community supervision can occur at varying times in the criminal justice process, including pretrial, pre-sentence, and post-sentence. Additionally, the availability of various community corrections supervision strategies vary by jurisdiction as resources vary.

COMPREHENSIVE RISK/NEEDS ASSESSMENT: Covers all major risk and needs factors (both static and dynamic) and help ascertain levels of risk and/or need that are correlated with outcome measures like recidivism. These assessments can also be useful in re-assessment to determine if needs changed after interventions have been introduced. The results from these assessments should be used to facilitate the development of case plans that can be aimed at addressing a full range of factors.

DIVERSION PROGRAMS: A criminal justice program run by either a police department, court, a district attorney's office, probation department or outside agency designed to afford offenders the opportunity to avoid criminal charges and a criminal record by completing various requirements dictated by the program (e.g. drug treatment, counseling, community service). Successful completion of all requirements could result in dismissal or reduction of charges; whereas, non-completion of requirements could result in more serious action being taken by the court.

DIVIDED ATTENTION TEST: Divided attention tests require a suspect to listen to and follow instructions while performing simple physical movements. Impaired persons have difficulty with tasks requiring their attention to be divided between simple mental and physical exercises. Divided attention tests are easily performed by most unimpaired people.

GENERAL DETERRENCE: General deterrence is a concept that states that when the perceived risk of getting caught for DWI by law enforcement goes up, the likelihood that people will drive impaired decreases. This is achieved by conducting law enforcement efforts in a highly visible way, educating the public about law enforcement's saturation or roving patrols and sobriety checkpoints through publicity.

HARDCORE DRUNK DRIVERS: Hardcore drunk drivers are those who drive with a high BAC of .15 percent or above, or who drive repeatedly with a .08 percent or greater BAC, as demonstrated by having more than one impaired driving arrest, and are highly resistant to changing their behavior despite previous sanctions, treatment, or education.

HEAVY ALCOHOL USE: Five or more drinks on the same occasion on five or more days in the past 30 days.

HORIZONTAL GAZE NYSTAGMUS (HGN): Part of the SFST battery. An involuntary jerking of the eyes as they gaze toward the side. Horizontal Gaze Nystagmus is an involuntary jerking of the eye that occurs naturally as the eyes gaze to the side. Under normal circumstances, nystagmus occurs when the eyes are rotated at high peripheral angles. However, when a person is impaired by alcohol, nystagmus is exaggerated and may occur at lesser angles. An alcohol-impaired person will also often have difficulty smoothly tracking a moving object.

INTENSIVE SUPERVISION PROGRAMS (ISP): These programs are often viewed as an alternative to incarceration. Persons sentenced to ISP are typically those who, in the absence of intensive supervision, would have been sentenced to imprisonment. No two jurisdictions operate intensive supervision in exactly the same way. However, one characteristic of all ISPs is that they provide for very strict terms of probation or parole. This increased level of control is usually achieved through reduced case loads, increased number of contacts, and a range of required activities that can include treatment services, victim restitution, community service, employment, random urine and alcohol testing, electronic monitoring, and payment of a supervision fee.

ONE LEG STAND: Part of the SFST battery. The One-Leg Stand test is a "divided attention" tests that is easily performed by most unimpaired people. In the One-Leg Stand test, the suspect is instructed to stand with one foot approximately six inches off the ground and count aloud by thousands (One thousand-one, one thousand-two, etc.) until told to put the foot down.

PAROLE: Any form of release of an offender from an institution (jail, prison) to the community by a releasing authority (parole board) prior to the expiration of an imposed sentence. Upon release, the offender may be subject to an array of supervision terms and conditions.

PROBATION: A sentencing option whereby an offender who has been found guilty of a crime is permitted to remain in the community under court supervision. Typically, the court will impose conditions of supervision, such as paying a fine, completing community service activities, participating in drug and/or mental health treatment, and education/employment requirements, which will be monitored by a probation officer. Failure to comply with the imposed terms could result in the offender being incarcerated to finish out the imposed sentence.

RATE PER 100,000 POPULATION: The rate of alcohol-impaired traffic fatalities per 100,000 population is the number of alcohol-impaired traffic fatalities for every 100,000 persons in the population being measured. For example, an alcohol-impaired traffic fatality rate of 4.3 per 100,000 population nationally means that for every 100,000 people in the nation, there were over four alcohol-impaired traffic fatalities.

REPEAT OFFENDERS: The NHTSA/FARS data records prior driving records (convictions only, not violations) for driving while intoxicated events occurring within three years of the date of the crash. The same driver can have one or more of these convictions during this three year period. Drivers who have a prior conviction in this three year period are reported as repeat offenders.

SCREENING INSTRUMENTS: Are generally quick and easy to use and focus more on static risk factors, such as a person's criminal history or potential substance use concerns. Screening tools can be useful in making quick determinations about in-or-out decisions (e.g., who should be detained, who should be released on their own recognizance), in helping to classify offenders into low, moderate or high-risk categories or whether a more thorough substance abuse or mental health assessment should be conducted. However, their usefulness is somewhat limited since they do not help the practitioner identify an offender's criminogenic factors or the unique issues they have related to substance abuse or mental health.

SOBRIETY CHECKPOINT: A visible law enforcement operation that seeks to evaluate drivers for signs of alcohol or drug impairment at certain points on the roadway. Vehicles are stopped in a predetermined sequence, such as every other vehicle or every fourth, fifth or sixth vehicle depending upon staffing and traffic conditions.

SPECIALIZED TOOLS: Specialized tools include things like alcohol and drug assessments. Typically, these types of assessments are ones that judges refer offenders to other professionals for. The key is that when referrals are made and these types of assessments are done that the results be provided to and considered by judges so they can be used in the formulation of a supervision plan.

STANDARD DRINK OF ALCOHOL: According to the Dietary Guidelines for Americans, the federal government's official nutrition policy defines a standard drink of alcohol as 1.5 ounces of 80-proof distilled spirits, 12 ounces of regular beer or 5 ounces of wine.

STANDARDIZED FIELD SOBRIETY TESTS (SFSTs): SFST is a battery of three tests administered and evaluated in a standardized manner to obtain validated indicators of impairment and establish probable cause for arrest. These tests were developed as a result of research sponsored by the National Highway Traffic Safety Administration (NHTSA) and conducted by the Southern California Research Institute.

WALK AND TURN: Part of SFST battery. The Walk-and-Turn test is a "divided attention" test that is easily performed by most unimpaired people. They require a suspect to listen to and follow instructions while performing simple physical movements. Impaired persons have difficulty with tasks requiring their attention to be divided between simple mental and physical exercises.



THE
CENTURY COUNCIL

DISTILLERS FIGHTING DRUNK DRIVING & UNDERAGE DRINKING

2345 Crystal Drive | Suite 910
Arlington, VA 22202 | 202-637-0077
www.centurycouncil.org