

HIGHWAY TO JUSTICE

FALL 2013

From The ABA and The National Highway Traffic Safety Administration

THE IMPAIRED DRIVING ASSESSMENT (IDA): A NEW TOOL TO ESTIMATE RISK AND NEEDS AMONG DWI OFFENDERS

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The American Probation and Parole Association (APPA) has developed a differential screening tool aimed at identifying the recidivism risk level and service needs of the convicted impaired drivers: the Impaired Driving Assessment (IDA). The concept of risk assessment screening tools for criminal justice application has been around for decades¹ and through the years, many have been developed.² Armed with these tools, the criminal justice system can target offenders most likely to recidivate if they do not receive an intensive application of supervision and resources, which results in better outcomes in the reduction of future criminal activity³.

Despite decreases in impaired driving fatalities over the last four decades, driving under the influence of drugs and alcohol continues to be a major threat to public safety. Alcohol impaired driving fatalities accounted for 31 percent of all traffic fatalities in 2011⁴. Drivers with prior convictions for impaired driving are overrepresented in fatal crashes⁵ making the ability to predict future DWI behavior extremely important when dealing with impaired driving offenders. Courts that take the danger of drunk driving seriously have been screening these drivers to determine level of addiction and directing offenders who need it into treatment. However, research supported by the National Highway Traffic Safety Administration (NHTSA) and conducted by researchers at APPA, Dr. Matthew De Michele and Nathan Lowe, is premised on the theory that simply screening for level of addiction will not accurately predict repeat impaired drivers. Citing research on repeat DUI offenders⁶, they maintain that the level of addiction in repeat offenders

does not differ from that found in first time offenders. If there is no difference in the level of addiction, then why are they continuing to offend?

Shortly after beginning the project, Drs. De Michele and Lowe brought Drs. Kenneth Wanberg and David Timken on board. Wanberg and Timken have for many years maintained that therapies based on Freudian psychology, which is self-oriented and aimed at relieving the psychological pain of guilt, depression and anxiety, do not always result in changing criminal behaviors. The reason for this, they explain, is that these therapies do not address the lack of moral responsibility to others and the community, which is exhibited by people who violate the law. Freedom of choice can be a problem if it is not exercised with the good of society as a control and therapies that do not address sociopathy will not address the problem of criminal behavior⁷. Included in criminal behavior are traffic crashes caused by the irresponsibility of getting behind the wheel after becoming impaired.

The APPA team believes that DWI recidivism is caused by a blend of substance abuse or addiction and the decisions of high-risk drivers who do not have sufficient self-restraint to resist impulsive acts such as drunk driving. Citing various studies⁸, they posit that environmental and psychological factors that foster antisocial attitudes, desires, motives and rationalizations may take precedence over any substance abuse disorder. They believe that repeat impaired driving is a crime “rooted in anti-social attitudes, values and beliefs and learned throughout the life course”⁹ and that agencies are ignoring the evidence that rates of addiction don’t vary between single and multiple offenders. Using screening tools that only predict level of addiction is ignoring factors

(continued on page 2)

Editor's Note

Highway to Justice is a publication of the American Bar Association ("ABA") and the National Highway Traffic Safety Administration ("NHTSA"). The views expressed in *Highway to Justice* are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

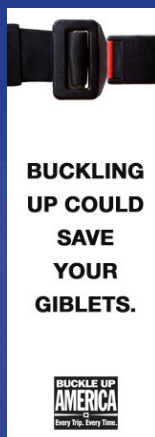
We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to the editor, Hon. Earl Penrod penrod26d01@msn.com with a copy to the staff liaison, Gena. Taylor@americanbar.org. Please contact Ms. Taylor for editorial guidelines.

The deadline for submission of articles for the Winter 2014 issue is November 18, 2013.

DATES TO REMEMBER

**November 25-
December 13, 2013**
Holiday Travel



**December 13, 2013-
January 1, 2014**
Holiday Travel - Impaired Driving



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(continued from page 1)

that they believe are more predictive of repeat drunk driving. Using this theory the team developed a tool that they believe will take all significant factors into consideration during the assessment process.

Although there has been previous research which focused on the high risk impaired driver and developing a screen tool that would assist the courts and probation officers in identifying those offenders,¹⁰ the APPA team's goal was to develop a tool that not only incorporated the research on anti-social attitude and behavior, but was also short enough to be easily administered as an initial screening tool at various stages of the justice system, and would be in the public domain.

To conduct their research during the initial development of the IDA, the team used a sample of 3,884 convicted DWI offenders in a southwestern state. They parsed out items from the LSI-R^{TM11} and the ASUS^{TM12} that had been administered to the identified offenders, with the intent of determining the differences between single and multiple DWI offenders. The results of the analysis of the LSI-RTM responses showed that multiple DWI offenders had more extensive legal histories than single offenders, had been incarcerated more times and served more terms on probation than single DWI offenders. Both groups had similar participation in outpatient substance abuse and mental health treatment and nearly identical prior drug and alcohol arrest records.

Repeat offenders showed patterns of difficulty following rules, and a continuation of criminal behavior despite punishment. As a group, they were less educated than first time offenders. Summing up their findings from reviewing the LSI-RTM the team found that the repeat DWI offender in their sample was a white male, between the ages of 30 and 44, employed but with a low level of education, who had attended both substance abuse and mental health treatment, had an early onset of criminal behavior and general offending, and demonstrated an unwillingness to change and a poor attitude about punishment.¹³

The review of the ASUSTM responses showed that multiple offenders were more likely to use cigarettes, amphetamines and tranquilizers than were first time offenders. Multiple offenders had fewer violent encounters such as fist fights and brawls. Multiple offenders' responses showed an attitude that it was okay to violate the law as long as no one got hurt, and showed signs of emotional instability; specifically, they were more likely to see and hear things not present, be mentally confused, nervous or anxious and have drastic mood swings.¹⁴

When using the IDA, information about an individual is captured in two parts: a self-report (SR) segment and a report (OR) segment. The SR segment consists of thirty four questions designed to measure the person's retrospective and current perception of their mental health and mood adjustment, alcohol and other drug involvement, social and legal non-conformity, acknowledgment of problem behaviors and motivation to seek help for these problems. The OR segment has eleven questions designed to provide information about the individual's past DWI and non-DWI involvement in the judicial system, prior education and treatment

THE IMPAIRED DRIVING ASSESSMENT (IDA) A NEW TOOL TO ESTIMATE RISK AND NEEDS AMONG DWI OFFENDERS

(continued from page 2)

episodes, past response to DWI education and/or treatment and their current status with respect to community supervision and assignment to education and/or treatment services.

The protocol for administration of the tool calls for the screener to initially complete the IDA-OR using information from justice system records. Next the screener has the defendant complete the IDA-SR. The screener then conducts a brief interview with the defendant to ensure their responses are complete and accurate. The screener then finalizes the IDA-OR during the interview. Currently the screener hand scores both the IDA-SR and the IDA-OR. The goal, however, is to have an automated application that would provide immediate scoring and allow the screener to generate a summary report of the defendant.

The tool was piloted at four sites, the Brown County and Nicollet County Probation Departments in Minnesota, the Westchester County Probation Department in New York and the Tarrant County Community Supervision and Corrections Department in Texas. Validation studies have been completed and the tool has been finalized. A final report has been submitted to NHTSA for review and it is anticipated that the tool will be available for use by the end of the year.

For further information contact Nathan Lowe by email at nlowe@csg.org or by phone at 859-244-8057.

4. 2011 Motor Vehicle Crashes: Overview, December 2012, NHTSA DOT HS 811 701
5. Traffic Safety Facts: Repeat Intoxicated Driver Laws, January 2008, NHTSA, DOT HS 810 879
6. Brikkman, Beike, Kohler, Heinele & Bajanowski, 2002
7. Kenneth W. Wanberg, Harvey B. Milkman, David S. Timken, "Driving with Care: Alcohol, Other Drugs, and Driving Safety Education-Strategies for Responsible Living, Thousand Oaks, CA, Sage Publications, 2005
8. Akers, 1998; Andrews & Bonta, 2003; Brauer, 2009 and Burgess & Akers 1966
9. DeMichele & Lowe "DWI Recidivism: Risk Implication for Community Supervision" Federal Probation Vol 75, No. 3
10. William L White, MA and David Gasperin issued their "Management of the High-Risk Offender" and "Hard Core Drinking Driver Profile Checklist" in 2006 which is being used in the State of Illinois. Dr. Kenneth Wanberg developed the Adult Substance Use and Driving Survey-Revised (ASUDS-R)TM
11. Level of Service Inventory- RevisedTM Don Andrews, PhD & James Bonta, PhD. The LSI-RTM is a quantitative survey of offender attributes and their situations relevant to level of supervision and treatment decisions.
12. Adult Substance Use SurveyTM Kenneth Wanberg, PhD, The ASUSTM is designed to screen and assess an individual's alcohol and drug use involvement
13. DeMichele & Lowe, *supra*.
14. Id.

1. A.J Harno, E.W. Burgess & J. Landesco, "Factors Determining Success or Failure on Parole", Springfield, IL, State Board of Parole, 1928
2. LSI-RTM, COMPAS[©] and RANT[®] are a few currently in use.
3. Douglas Marlowe, JD, PhD, "Evidence-based Sentencing for Drug Offenders: An Analysis of Prognostic Risks and Criminogenic Needs", Chapman Journal of Scientific Justice, February 22, 2011



*Hon. J. Mark Hayes, II
Judicial Outreach Liaison, NHTSA Region 4
Spartanburg, SC*

When a person transitions from being a lawyer to a judge, he or she experiences immediate changes in their professional life. Judges are treated differently. Long-time friends no longer refer to us by the name given to us at birth. We are now called, “sir” or “your honor”. When we walk into our work space, someone is always there asking for others to “come to order”. Complete strangers rise to attention and remain that way until told to be seated. Even more emblematic of this dramatic change than the upfront parking space or the personally assigned security officer is the development within each judge of an ability for comic relief—every joke told is now greeted with robust laughter by every lawyer who hears them.

While some obvious and immediate changes do occur when someone ends their role as a lawyer and becomes a judge, several foundational truths remain. One of those truths is that a judge continues to be part of the judicial system of his or her community, state, and country—a system that has been called “the greatest judicial system ever created.” Judges also remain a part of the “profession of law”. A true professional is one that serves a public purpose. Traditionally, the term “professional” was reserved for one of only three vocations – law, medicine, and divinity. Members of the legal profession, including judges, have been educated and trained in the law. As such, lawyers and judges have distinct power to affect society and have a special responsibility to do so.¹

It is universally recognized and encouraged in professional codes of conduct that members of the legal profession are “public citizens”. As such, there exists an ongoing professional obligation to seek improvement to the law, the administration of justice, and the quality of service rendered by legal professionals. A member of the legal profession, including a judge, should strive to improve the law and exemplify the ideals of public service.²

While there are certainly necessary self-governing regulations of judicial conduct with regard to maintaining independence and the appearance of impartiality, a central characteristic of a judge’s role that is universally accepted is the judge’s duty in “promoting public understanding of and confidence in the administration of justice.”³ Likewise, canons of ethics and judicial conduct warn judges not to become isolated from the community in which they live, but rather to actively integrate themselves into their communities—being more than a person on a pedestal. These same codes also encourage judges to become leaders in furthering the public’s understanding and respect for the judicial system of which they are a part.⁴

Clearly a judge, through his elevation to the bench, is given a unique opportunity to contribute to the improvement of the law and administration of justice.

Service as a Judicial Outreach Liaison (JOL), working in cooperation with the National Highway Traffic Safety Administration (NHTSA), fulfills the judge’s obligation as a member of the legal profession and is consistent with judicial canons of ethics.

In 2011, 32,367 people died in motor vehicle traffic crashes in the United States and an estimated 2.2 million people were injured in motor vehicle traffic crashes. Of the 2011 fatalities, 31 percent occurred in an alcohol-impaired crash.⁵ Judges who serve as JOLs have a unique opportunity to reduce the number of fatalities and injuries caused by impaired driving. When working with judges who regularly deal with impaired driving cases, a JOL can assist in developing evidence-based sentencing strategies which appropriately address punishment, recidivism, and rehabilitation of the offender so that the offender will not drive impaired again.

Additionally, judges who serve as a JOL contribute their professional experience and training when working with criminal justice professionals and highway safety officials to help focus administrative and educational resources with the goal of reducing highway fatalities and injuries that result from impaired driving.

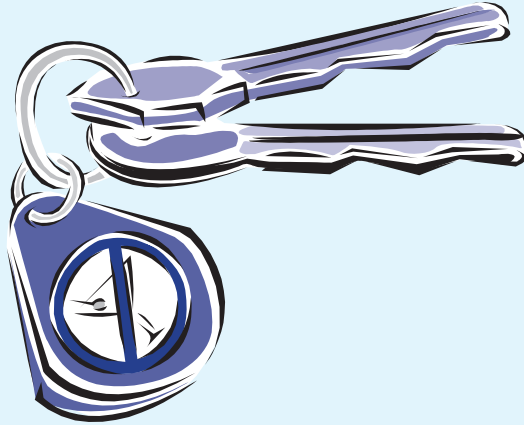
If a judge is undecided about serving as a state or regional JOL, I encourage him or her to meet with the state highway safety office director and staff. Without exception, every regional and state highway safety officer I have had the privilege of meeting has demonstrated the highest level of personal professionalism and dedication to the goal of saving lives and reducing human injury by improving highway safety. Their professionalism reflects the highest regard for public service.

Moreover, when deciding to serve as a JOL, do not forget the humanity behind the JOL program. During a recent visit with my state’s highway safety officials, I noticed three large white panels containing what appeared to be column after column of names in black lettering. After asking who the names represented, I was told each represented a fatality on South Carolina highways in the last year. My eyes gazed over the nearly one thousand names on the boards, suddenly focusing on the third to last name on the last panel. I had discovered the name of a friend I had forgotten died last year. He was a young man with a promising career, leaving behind a beautiful wife and young daughter. The humanity behind the JOL program became clear.

(continued on page 5)

(continued from page 4)

1. Barack H. Obama, II, Foreward, 2 Charleston L. Rev. 1 (2007).
2. See, Alaska Rules of Professional Conduct, Preamble.
3. ABA Model Code of Judicial Conduct, Comment 6 to Rule 1.2.
4. S.C. Code of Judicial Conduct, Commentary to Canon 4.A.; ABA Model Code of Judicial Conduct, Comment 2 to Rule 3.1.
5. Guidelines for Creating State Judicial Outreach Liaisons: Background (page 1).



A TIP of the HAT!

A special thanks to **Judge Karl Grube** for his service to NHTSA and the ABA. Judge Grube has served as a NHTSA Judicial Fellow, the first Judicial Outreach Liaison for NHTSA Region 4, and as the first State JOL for the state of Florida. He has been active in traffic safety education and outreach for a number of years, having taught for the National Judicial College and the ABA. As he leaves his time with the program, we wish him the best in all future endeavors.

To learn more about programs offered by NHTSA, please contact one of the following:

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THE FOLLOWING HAVE BEEN ADDED TO THE STATE JOL PROGRAM

WASHINGTON:

Hon. Scott Bergstedt has been practicing law since 1981. After starting a private practice he was a public defender and a Deputy Prosecutor, and then a private trial attorney and Judge. He has been an adjunct professor teaching at Washington State University for the last 10 years.

Judge Bergstedt has been a municipal court judge for over 25 years. He has recently retired from his position as a Municipal Court Judge and has accepted the position as the Judicial Outreach Liaison with the Washington Traffic Safety Commission where he will be applying his skills, passion and understanding to working with the District Court Judges in Washington State to better deal with impaired driver issues.

MONTANA

Hon. Audrey Barger lives in Havre, Montana, and presides over the Hill County Justice Court of Record. This Court was established as a Court of Record at Barger's request in November of 2012. Judge Barger has been on the bench since she was appointed to fill the vacant position in early November of 2010. In January of 2011, she was appointed by the Montana Supreme Court to sit on the Court's of Limited Jurisdiction Automation Committee.

In addition, Judge Barger has spearheaded team building, training attendance, and grant writing projects which has led to funding by both the Montana Department of Transportation and the Bureau of Justice Assistance for implementation of DUI and Drug Courts within her jurisdiction. Presiding over the treatment courts are some of the more fulfilling and challenging duties of her job, and the members of her team continually

inspire her as they work towards their common goal of creating a healthier, crime free, and safe community.

Judge Barger graduated from Northern Montana College in 1983 with a Bachelor of Technology in Business and a Minor in Communication. She has performed legal assistant work in both the private and public sector and acted as Deputy Clerk of District Court for ten years before taking office. Judge Barger is a non-attorney Judge and her goal is to competently, fairly, and impartially serve the public.

Barger regularly attends Federal and State judicial trainings and is a member of the National Association of Judges as well as the Montana Magistrates Association.

She has been married to Marty Barger since 1982 and they have two grown boys.

VERMONT

Hon. Ben Joseph is a graduate of the University of Pennsylvania where he completed his undergraduate and law degrees. He practiced law in Philadelphia, working as a Special Prosecutor and Public Defender. After moving to Vermont in 1991 he was appointed to the Vermont Superior Court bench by Governor Howard Dean in 1998.

He started a Rapid Referral program in Chittenden County (Burlington) in 2009 in which defendants were put into drug and/or alcohol treatment at arraignment as a condition of release. He retired from the bench in 2010 and has continued to sit as a Senior Judge on a per diem basis and works as a mediator. He and his wife, Judith, have two children and five grandchildren - all of which he says are brilliant. He plays the violin and raises a lot of garlic every year.

USEFUL RESOURCES AT YOUR FINGERTIPS



Traffic Resource Center for Judges:

www.trafficresourcecenter.org

National Highway Traffic Safety Administration:

www.nhtsa.gov

To hear recent webinars on traffic safety and impaired driving topics:

http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html.

