

HIGHWAY TO JUSTICE

FALL 2015

From The ABA and The National Highway Traffic Safety Administration

JOINT JURISDICTION COURT

Hon. J. Matthew Martin, ABA/NHTSA Tribal Courts Fellow

In 2006, two judges, one a county Judge from northern Minnesota and one a Tribal Court Judge from Indian Country, created a remarkably and unheard of and unprecedented court system. Nine years later, and now on its second generation of jurists, the Leech Lake-Cass County Wellness Court is an award winning example of judicial innovation and ingenuity.

The Leech Lake-Cass County Wellness Court is a joint jurisdiction problem solving Court, the first of its kind in the nation.¹ In this Court setting, the Cass County, Minnesota Court and the Leech Lake Band of Ojibwe Tribal Court have come together in mutual agreement and determined to improve their shared communities. Utilizing the drug court model, this post-sentencing, impaired driving therapeutic court serves both tribal members as well as members of the local communities with two sovereign entities exercising the judicial power concurrently.²



The geography alone is challenging:

100 miles south of the Canadian border, the Reservation covers over 1050 square miles within its boundaries, and primarily consists of forests, lakes, and wetlands with small Indian and rural residential communities. The Reservation has few towns and eleven Indian communities, or “villages,” that are separated by distances of twenty to eighty miles. The rural location and size of the Reservation presents serious challenges for delivery of services to residents.³

Cass County is similarly rural. Impaired driving and other substance abuse crimes are endemic, on the Reservation as well as in the County.⁴ Both the state of Minnesota and the Leech Lake Band of Ojibwe have jurisdiction over impaired driving on the Reservation. By

enacting Public Law 83-280,⁵ Congress imposed state police powers on Indian lands in six states, including Minnesota. Increasingly, observers see this unfunded mandate as problematic at best and a failure at worst.⁶ In Indian Country the law is felt to be colonialist and heavy handed, and the States, in an era of shrinking budgets, struggle to provide justice services to their native communities.

Overcoming mutual distrust on top of a bureaucratic reluctance to change the way things had always been done, Cass County District Court Judge John P. Smith and Leech Lake Tribal Court Judge Korey Wahwassuck along with Reno Wells, Probation Director for Cass County, facilitated a remarkable cooperation between the Leech Lake Tribal Council and Cass County.⁷ The result: the birth of the first joint jurisdiction Wellness Court in the United States. “When we started this program, we tried to find a model, but we found out that we were the model,” said Smith.

“This is the first time any tribal court and state court have joined together for this type of program.”⁸

The project is a success. In its first six years, of the 61 participants, roughly one half completed. Of those, only two had re-offended as of 2012.

The Court convenes simultaneously in the Tribal courtroom in Cass Lake, where Judge Megan Treuer presides, and in the District Court in Walker, where Judge Jana Austad presides.⁹ Participants, both Indian and non-Indian can go to whichever courtroom is the most convenient.¹⁰ The locations are connected by video technology.

Judge Treuer feels that the joint jurisdiction Court has contributed to “immeasurable ways in which collaboration has been useful.” Judge Austad finds that the partnering inherent in the joint

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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, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Winter issue is December 2.

jurisdiction process has opened doors in ways that were not open before, including: rural transportation, the disproportionate rate of minority incarceration,¹¹ and the contributions of both culture as well as faith to the maintenance of sobriety. For example, in this restorative justice model, even non-natives get a cultural component as a part of the therapeutic process, so both communities can engage with and learn from each other. As Judge Treuer explains it, one of the goals is "We want our communities to be healthy and safe—we are not there to re-traumatize people."

Even the Judges find they have a lot to discover. "I learn more about the people who appear before me because of my conversations with Judge Treuer," says Judge Austad. "I can sometimes hear something differently this way." For example, Judge Austad observed, knowledge brings greater awareness: [With the increased information at the Court's disposal,] "I have a completely different understanding as to why someone might not have their chemical use assessment."

If the joint jurisdiction Wellness Court is the centerpiece of as, Judge Austad puts it, "a bridging" between the dominant culture and Indian Country, it is only the start of greater things. For example, in 2007 neighboring Itasca County began its own joint jurisdiction wellness court. Success has opened up both the Tribal Council and the County Board to work together. Judge Treuer notes that a truth and reconciliation initiative is beginning, and Judge Austad suggests both communities are considering the possibility of holding traffic court on the Reservation.

"The stronger your relationships are," says Judge Austad, "the more you can understand your problems." With that mindset, this partnership is sure to grow.

1 Wahwassuck, Korey; Smith, John P.; and Hawkinson, John R. "Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction," *William Mitchell Law Review*: Vol. 36: Iss. 2, Article 3, p. 860 (2010). Available at: <http://open.wmitchell.edu/wmlr/vol36/iss2/3>

2 *Id.*

3 *Id.* at 863-64

4 Wahwassuck, Korey, "The New Face of Justice: Joint Tribal-State Jurisdiction," 47 *Washburn L. Journal* 733, 744-46(2008)

5 Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360, note).

6 See generally, Goldberg, Carole E., "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 *UCLA L. Rev.* 535 (1975).

7 Note 1, *supra* at 866.

8 Anderson, Jenny, "Leech Lake Wellness Court Earns Award for Innovation," *Cass Lake Times* Vol. 114, No. 34 Wednesday, August 22, 2012.

9 Both Judge Smith and Judge Wahwassuck have moved on. In 2012 Judge Smith joined the Minnesota Court of Appeals and Judge Wahwassuck became a District Judge for the State of Minnesota in 2013.

10 Note 1, *supra* at 862.

11 These statistics are shocking—Although native people make up only 11% of Cass County's population, they comprise 70% of the jail inmates. Of those arrested in Cass County, 50% are indigenous people, and natives account for 70% of the arrestees for assault and theft and 80% of the arrestees for vehicle theft. Statistics provided by the Regional Native Public Defense Corporation.

UNITED WE STAND: MONTANA'S THREE BRANCHES OF GOVERNMENT JOIN FORCES TO COMBAT IMPAIRED DRIVING IN BIG SKY COUNTRY

By Hon. Mary Jane Knisely, NHTSA Region 10 Judicial Outreach Liaison
Col. Thomas Butler, Montana Highway Patrol

Prior to October 2007, Montana had not lost a Highway Patrol trooper in the line of duty in nearly 30 years. In the next 17 months, three troopers lost their lives. Two of the three troopers were killed by impaired drivers and the third by a driver distracted by texting. These tragic deaths hit close to home. Montana consistently ranks at or near the top of the list of states with the highest alcohol-related traffic fatality rates. Impaired-driving crashes account for 13 percent of deaths among working-aged adults in the state¹ and in 2013 40% of Montana traffic fatalities involved a driver with a BAC of .08 or higher.²

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UNITED WE STAND: MONTANA'S THREE BRANCHES OF GOVERNMENT JOIN FORCES TO COMBAT IMPAIRED DRIVING IN BIG SKY COUNTRY continued from page 2

Trooper Michael Haynes' widow, Tawny, partnered with Highway Patrol leadership to bring South Dakota's successful, innovative 24/7 Sobriety Program to Montana. The 24/7 program requires offenders, as a condition of bail or sentence, to abstain from drinking and undergo twice-a-day, random, or continuous alcohol monitoring. As a pretrial release tool, the program strikes a necessary balance between a judge's statutory duty to protect the safety of the community and an offender's right to the least restrictive form of supervision. As a sentencing tool, it gives alcohol-dependent defendants a jumpstart on sobriety by offering frequent testing and face-to-face accountability for a set period of time, which helps ensure addicted defendants stay sober while completing intensive treatment.

Montana took an incremental approach to implementing the 24/7 program, which had administrative, legislative and judicial support from the onset. The Highway Patrol worked with the Montana Legislature to enact a DUI study bill, and then Attorney General Steve Bullock implemented a pilot program in one Montana county. Based on the pilot program's success, the 2011 Legislature approved statewide rollout, which began in 2012. The program continues with the support of Attorney General Tim Fox and Bullock, who is now Montana's governor.

In July 2015, the Montana Supreme Court unanimously upheld the constitutionality of the 24/7 Sobriety Program in *State of Montana v. Robert E. Spady*, 2015 MT 218, 380 Mont. 179, 2015 Mont. Lexis 396. Spady was arrested for a second-offense DUI and placed on 24/7 as a condition of his release pending trial. He argued the program violated his constitutional right to privacy and amounted to pretrial punishment. The Court ruled that any infringement on a defendant's privacy is minimal and outweighed by the government's compelling state interest in preventing traffic fatalities caused by impaired driving. The justices also held that the program does not constitute pretrial punishment. However, because of the associated fees, the Court ordered judges to conduct an individualized assessment as to whether it is appropriate for a particular defendant.

Most 24/7 participants submit to a preliminary breath test (PBT) twice daily, approximately twelve hours apart, and pay \$2 for each test. In some jurisdictions, after assessing the offender's criminal history, addiction level, employment needs, and driver's license status (judges may allow offenders in the program to have restricted licenses), judges may order an alternate testing method such as a continuous transdermal alcohol monitoring bracelet or remote breath analyzer. The key to the program's success is the imposition of swift and certain sanctions for violations. Defendants who fail to appear or fail a test face immediate arrest and incarceration. The potential imminent loss of freedom deters the vast majority of defendants from consuming alcohol while on the program.

Montana judges have ordered more than 7,500 people into the program since 2011. Participants submitting to twice daily PBT's have taken 640,000 tests with a 99.5 percent pass rate. Very few participants miss tests. More than 96 percent of the PBT's are administered on schedule.³ A study conducted by the RAND Corporation showed that 3.5 percent of program participants are re-arrested for impaired driving, compared with 9 percent of DUI offenders who do not participate in 24/7. Based on those figures, RAND estimated that 24/7 participants are 45 percent to 70 percent less likely ever to be re-arrested for DUI than are impaired-driving offenders who do not enroll in the program.⁴

Thirty-six of Montana's 56 counties (easily covering the majority of the state's population) use the 24/7 Sobriety Program, and several other areas are preparing to launch it. The program began in South Dakota in 2005, where it is credited for a 12 percent drop in repeat impaired-driving arrests and a 9 percent drop in domestic-violence arrests.⁵ It also is used in North Dakota and in some cities in the United States and the United Kingdom. In Montana, 75 percent of program

participants face impaired driving charges. By recent statutory expansion, other crimes with an alcohol nexus can qualify an offender for 24/7, including assault, burglary, child abuse, criminal endangerment, domestic violence, and drug possession.

In September 2015, Montana hosted the first National 24/7 Sobriety Program Summit, educating jurisdictions in other states and countries on implementation and operation of the program.

The event featured the foremost experts and researchers in the world on the 24/7 Sobriety Program. Presenters included the program creator, Judge Larry Long, South Dakota Attorney General Marty Jackley, Montana Governor Steve Bullock, Montana Attorney General Tim Fox, and researchers Dr. Beau Kilmer and Dr. Keith Humphreys. A portion of the summit focused on the availability of National Highway Traffic Safety Administration grants for states with 24/7 Sobriety Programs, as well as potential changes to the federal highway bill reauthorization that would provide for additional grant funding. Summit attendees represented 35 states, the Northern Mariana Islands, Canada, and Germany, and included eight attorneys general, law enforcement and judges from around the country. The summit provided information to successfully roll out the 24/7 Sobriety Program, expanding the benefit to new jurisdictions.

1. Mandy Stahre, Jim Roeber, Dafna Kanny, Robert Brewer, & Xingyou Zhang, *Contribution of Excessive Alcohol Consumption to Deaths and Years of Potential Life Lost in the United States*, *Prev. Chronic Dis.* vol. 11 (June 26, 2014).
2. National Center for Statistics and Analysis. (2014, December). Alcoholimpaired driving: 2013 data. (Traffic Safety Facts. DOT HS 812 102). Washington, DC: National Highway Traffic Safety Administration.
3. Gregory Midgette & Beau Kilmer, *The Effect of Montana's 24/7 Sobriety Program on DUI Re-arrest: Insights from a Natural Experiment with Limited Administrative Data* (RAND Justice, Infrastructure, and Environment, Working Paper No. 1083-MHP, 2014, available at http://www.rand.org/pubs/working_papers/WR1083.html).
4. *Id.*
5. Keith Humphreys, *A Simple Fix for Drunken Driving* (The Wall Street Journal, Aug. 14, 2015).



Marty Sullivan

Arkansas Judicial Branch Education Director

Those of us fortunate enough to serve in the field of judicial branch education quickly realize the necessity of stretching every dollar and doing "more with less." With relatively small budgets, judicial educators are tasked with working with committees of judges and court personnel to ensure that judges and court staff are receiving the most up-to-date training on a whole host of issues ranging from legislative updates to caseload management. Many of us are responsible for all types of judicial education programs, including new judge orientations for both general and limited jurisdiction judges, as well as programs for court staff, from court reporters to limited jurisdiction court clerks.

We are a busy group, to say the least. Our focus is always on long-range planning and reviewing court trends around the nation. Keeping that in mind, I would like to share with you what I feel is an underutilized resource nationally, one that certainly helps me stay ahead of the curve: funding administered by the National Highway Traffic Safety Administration (NHTSA) and made available through the State Highway Safety Offices in every jurisdiction.

NHTSA is an agency within the U.S. Department of Transportation tasked with reducing deaths, injuries, and economic losses caused by motor vehicle crashes. In addition to setting and enforcing safety standards for motor vehicles and equipment, NHTSA provides grants to state governments to help conduct effective highway safety programs. Every state and U.S. territory has an agency responsible for coordinating its highway safety programs.

Each of these State Highway Safety Offices (SHSOs) develops and coordinates a statewide highway safety program to make effective use of federal and state funds and other resources to save lives and reduce injuries on the state's roadways. SHSOs may administer a number of grant programs authorized and funded through federal legislation, including grant funding obtained through NHTSA.

Each year, the State Highway Safety Office develops a Highway Safety Plan (HSP) that identifies the traffic safety related problems and establishes the traffic safety goals and objectives for the state. By working with and reviewing program proposals from a variety of local and state traffic safety entities, organizations and stakeholders, the SHSO determines which programs will receive funding to meet the goals and objectives established in the HSP.

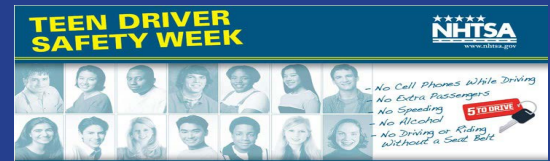
Let me share with you three examples of how the Arkansas Highway Safety Office, housed within the Arkansas State Police, has helped me serve the judiciary in my home state. Several years ago, I learned that the National Judicial College in Reno, Nevada offered a three-day course for limited jurisdiction judges called *Impaired Driving Case Fundamentals*. Sessions included "Legal Aspects of Field Sobriety Tests," "5th Amendment Issues,"

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October 19–25

National Teen Driver Safety Week
TEEN DRIVING ISSUES: 5 to Drive
www.trafficsafetymarketing.gov



October 31

Halloween
IMPAIRED DRIVING: Buzzed Driving is Drunk Driving
www.trafficsafetymarketing.gov



November 27

Thanksgiving Holiday Travel
OCCUPANT PROTECTION: Buckle Up,
Every Trip, Every Time
www.trafficsafetymarketing.gov



December 16-January 2, 2016

Holiday
IMPAIRED DRIVING: Drive Sober or Get Pulled Over
www.trafficsafetymarketing.gov



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

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“Pharmacological Effects of Addiction & Medical Treatment,” and “It All Begins With a Stop: Searches, Seizures, and Arrests.” After reviewing the schedule, I immediately thought how beneficial it would be to send all our state limited jurisdiction judges to this course.

I realized very quickly there was no way I could afford to send over 100 judges halfway across the country to attend this program. Searching for an alternative, I reached out to the staff at the National Judicial College and they seemed very open to the idea of coming to Arkansas to conduct this program specifically for our judges. Then, after a few meetings with the wonderful staff in our Highway Safety Office, it was agreed that I should include this proposal in the annual highway safety grant request. As a result, the National Judicial College has held a traffic course in Arkansas for our judges for the last five years. Thanks to these funds, conference expenses, mileage, and meal reimbursements are covered for all limited jurisdiction judges in our state. This conference has given our Arkansas judges access to remarkable national experts and provided them with tools to be better judges when hearing traffic cases in their courtroom, all at no cost to our office. I believe this program has made the roadways in Arkansas safer.

The Highway Safety Office was also instrumental in helping our office send traffic judges to the American Bar Association/Judicial Division Traffic Court Seminar that is held annually around the United States. For many years, the ABA/JD has presented the most comprehensive, cutting edge traffic court program in the country, and we wanted our local judges to experience this conference firsthand. Naturally, this would require registration fees, airfare, lodging, and meals. Once again, we contacted the staff at the Arkansas Highway Safety Office and they were very supportive of the idea and suggested we include this in our grant proposal. As a result, we sent seven traffic judges from Arkansas to the ABA Traffic Court Seminar in San Antonio in March of 2015.

The most creative way we have used these traffic safety funds resulted from a conversation with a local judge about his experience with DWI defendants showing up for court seemingly intoxicated. If the judge suspected someone of drinking before coming into court, the local Sheriff's Office would be called to transport the individual to the Sheriff's Office for a breathalyzer test. The judge said, “It would be nice if we had access to a portable breathalyzer machine in our court that our bailiff was trained to use.” Based on this conversation, our office once again contacted the Highway Safety Office and it was agreed this would be a good tool to target those “Hardcore Drunk Drivers” who really need help. We included the purchase of sixty portable breathalyzer units in our next grant proposal, which was approved. We held a training class for local bailiffs and distributed the units, and now sixty of our local traffic courts have portable breathalyzer units in the courtroom, all at no cost to us.

These are just some examples of how State Highway Safety funds may be available to help the Judiciary in addressing traffic related cases that are so common in our courtrooms. If you are a judge, I encourage you to pass this information along to the judicial branch educators in your jurisdiction. If you are a judicial branch educator, I encourage you to contact and establish effective lines of communication with the State Highway Safety Office in your state. If you do not know about your State Highway Safety Office, you may visit <http://ghsa.org/html/about/shsos.html> for a list of the highway safety office in each state. Finally, if I can be of assistance in any way, please do not hesitate to email me at marty.sullivan@arkansas.gov.

Together, we can make a difference.

Marty Sullivan serves as the Judicial Branch Education Director for the Arkansas Administrative Office of the Courts. He is also past president of the National Association of State Judicial Educators, and a Fellow of the Institute for Court Management. Sullivan was the 2012 recipient of the ABA Judicial Division's Judicial Education Award.

Impaired Driving Case Essentials. October 26-29, 2015. Reno, NV:

This course is designed to provide judges with an overview of the impaired driving issue, and will provide insight into several pertinent areas, such as impairment detection methods, the pharmacological effects of drugs and alcohol on the human body, and effective sentencing methods. After completing this course, you will be able to analyze circumstances providing legal bases for stops, searches and seizures, and arrests; and will be able to analyze the admissibility of testimonial and physical evidence. In addition, you will be able to describe the principles of pharmacology in order to effectively evaluate expert testimony. The course will also include a trip to a local AA (Alcoholics Anonymous) meeting, in order to familiarize the judge with the inner-workings of this often-ordered part of a sentence. Finally, the course will conclude with several discussions on evidence-based sentencing practices, and tips on how to most effectively manage impaired driving cases.

Scholarships available: Please contact Rebecca Bluemer at Bluemer@judges.org for more information

<http://www.judges.org/index.html>



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Save the Date

We are busy making plans for the
2016 Traffic Court Seminar,
and hope you will make plans now to attend

March 16 – 18, 2016
New Orleans, LA

All sessions will be held at the Hotel Monteleone.

The complete agenda and registration details will be finalized in late fall. Check our website, www.ambar.org/jdncscj where details will be posted when available.

If you want to make sure you are on our mailing list, contact Cheronne.Mayes@americanbar.org

