

HIGHWAY TO JUSTICE

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EDUCATING JUDGES ON DRE EVIDENCE

Brian Burgess, Judicial Outreach Liaison NHTSA, Region 1

Introduction

Early in 2016, the newly appointed National Highway Traffic Safety Administration Region One Judicial Outreach Liaison wondered what to do next. Retired from the State of Vermont judiciary after eight years on the Supreme Court, one year as Chief Trial Judge, twelve years on the criminal and civil trial bench and earlier stints with the Attorney General's Office, the judge took the post of RJOL for the New England Region through a contract with the American Bar Association under a cooperative agreement with NHTSA. There was no predecessor RJOL to copy or replace, and no template for the job.

NHTSA, the Region One Administrator and the Directors of the New England state highway safety offices (SHSOs) shared common priorities. The spike in highway fatalities needed to be tamped down. For the first time in the RJOL's experience, traffic deaths were personified by these experts in a telling manner, like the pointed equivalence to an airliner crash every week. Stagnant seatbelt use needed to be ramped-up. Also for the first time, the RJOL came to realize the challenge of 15-20% hardcore non-compliance in safety belt usage.

On the other hand, the everyday hazard of distracted driving was no surprise to the RJOL, who, like everyone on the road, could see and dodge oblivious drivers reading and texting as they drifted. DUI remained a scourge, and establishing impairment in the field for suspected drugged drivers was an ongoing challenge.

But aside from equal concern (and fear), what does a judge bring to the table on these problems? The RJOL might offer experience and advice on traffic stops, testifying, evidence and trial tactics but, by and large, these were not what the state Directors or their Traffic Safety Resource Prosecutors (TSRPs) were looking for.

Identifying the Problem

Of much more immediate concern and frustration to the Directors and TSRPs was a common difficulty in getting their New England

state judicial branches to open up to education on the ability of police officers specially trained in drug recognition evaluation or expertise, or "DRE," to identify drug—as opposed to alcohol—impaired drivers in the field. Proponents of DRE argue that it is founded on a systematic protocol examining up to twelve factors including BAC analysis, objective reports on physical symptoms and observations, pupil dilation and eye tracking examinations, standard field sobriety exercises (walk, turn, balance and coordination), physiological measurements (blood pressure, pulse and temperature) muscle tone, interrogation and toxicological testing compared against nationally established scientific standards. See, e.g.: *Nebraska v. Daley*, 278 Neb. 903, 909-911 (2009) (also describing the "underlying principles" of the DRE protocol as "basic and familiar: Gather information from the suspect and measure fundamental physical symptoms and then derive a conclusion about drug or alcohol impairment from that data").

Some New England state trial courts admitted DRE testimony from police witnesses. Others tended to exclude such evidence unless presented by scientists, rather than police officers. Part-time magistrates were reported as particularly reluctant to grapple with admissibility of drug and impairment evidence from police, instead of from scientists. Invitations to attend American Automobile Association or SHSO-sponsored trainings were said to be generally ignored by the judiciary. One SHSO wondered if its judicial branch lack of response was due to lingering hard feelings over some publicity friction years ago.

Whatever the cause, there was a shared perception that the judiciary was not amenable to DRE education, at least when proposed by highway safety officials. Could the RJOL change that? The Regional Administrator echoed the Directors' inquiry, and also expressed enthusiasm for developing and expanding specialized DUI Courts to combat recidivism, and to ready New England for increased drugged-driving stops expected from marijuana legalization. These objectives could complement one another.

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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 Summer issue is July 7.

Admissibility of DRE Evidence

To be sure, admissibility of DRE evidence is not always clear cut. Courts around the country rule differently on whether the standard for DRE testimony is the "very low" threshold of simple "relevance" (does it make a contested fact more or less "probable?"), see: *City of Mequon v. Haynor*, 791 N.W. 2d 406 (Wis. 2010); or whether it is science at all. For example, in *State v. Klawitter*, 518 N.W.2d 577, 584 (Minn. 1994) the Minnesota Supreme Court opined that DRE generally is not "novel scientific discovery or technique," but is nevertheless worthy of some weight for a jury's consideration based on training and experience that supports police drug recognition "without suggesting unwarranted scientific expertise." However, in *Oregon v. Sampson*, 167 Or. App. 489, 497-500 (2000) the Oregon Court of Appeals held that the persuasiveness of DRE relies on a "cluster of published field and laboratory studies whose scientific patina naturally would have a tendency to influence lay persons" and so requires judicial "gatekeeping" to screen out junk science.

One court may insist on rigid compliance with all twelve recognition elements to qualify as "scientific." In *Oregon v. Aman*, 194 Or. App. 463, 473-74 (2004) DRE evidence was found inadmissible because "omission of the corroborating toxicology report deprives the test of a major element of its scientific basis." However, another court found that DRE testimony may be admitted without corroborating toxicology as "nonscientific expert opinion evidence." *Oregon v. Rambo*, 250 Or. App. 186, 192 (2012) (allowing DRE evidence without a confirming urinalysis where the urine sample supplied was suspiciously clear and cold). Other courts, albeit representing a minority view, may be hostile to DRE evidence altogether. In *Maryland v. Brightful*, K-10-40259 (Cir. Ct. Carroll Cnty, March 5, 2012) the court criticized the protocol as a product of law enforcement and highway safety "vested interest[s]" and so not an independently reliable standard.

There are other judicial approaches to DRE evidence, and its admissibility must be left to the informed discretion of judges on a case by case basis. That there are competing theories on admitting or excluding DRE testimony would seem to recommend more judicial education on the basic mechanics of DRE and the pros and cons of admissibility. Then why the perceived judicial reluctance?

Ethical Concerns and Considerations

One hurdle is that judges balk at attending some education programs because of ethical concerns. If a program looks too closely associated with an interest group, like law enforcement, NHTSA, SHSOs or the defense bar, judges risk charges of either bias or the appearance of impropriety. Bias in fact, and the appearance of bias, are both generally prohibited by Codes of Judicial Conduct; see, e.g.: ABA Model Code, Canon 1 ("A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"). While some ethical violations are clear cut, like breaking the law, ABA Model Code Comment on Rule 1.2 [5], others are never more than a clear shade of grey. See: 86 Cornell Law Review 167, 187 (2000) re: Canon 2(A) (reciting that the "test for appearance of impropriety ... is whether the conduct would create in reasonable minds ... a perception that the judge's ... impartiality is impaired").

Just as worrisome to judges is the Code's general prohibition against judges receiving "ex parte communications, or...other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter. . . ." ABA Model Code Rule 2.9 A.

Whether DRE instruction falls within these prohibitions is a matter of degree and debate. DRE can be the subject of "pending or impending" litigation for many judges, but what if the topic is of general interest and not specific to any one case? The Code

can also encourage judges to “participate in ...extra-judicial activities concerning the law, the legal system, [and] the administration of justice ...subject to the requirements of this Code.” VT Supreme Court A.O. 10, Canon 4 B. Similarly, the ABA Model Code Rule 1.2, Promoting Confidence in the Judiciary, Comment on Rule 1.2 [4] provides that “Judges should participate in activities that ...support professionalism within the judiciary.”

Refuting a complaint that a judicial education program funded by the state bar association violated the state’s Code of Judicial Conduct, Maine’s Judicial Ethics Committee opined that “[o]n the contrary, judges have an obligation to engage in activities designed to improve the law, the legal system and the administration of justice. Canon 4, CJC. Such activity necessarily includes an obligation to remain current as to changes in the law and to take advantage of programs designed for the training and continuing education of judges.” ME JEC, Advisory Op. 92-JE-3 (Jan. 5, 1993).

What if the instruction presents basic scientific fact, like Newton’s physical laws of gravity or motion? Promoters argue there’s nothing improper about judges learning the underlying fundamentals of DRE, just as they learn about elementary accounting principles, alcohol intake and elimination rates, basic statistical analysis, child psychological development, domestic violence cycles or DNA identification. Critics will counter that the “requirements of the Code” caution against bias and *ex parte* communication even in academic form, 86 Cornell Law Review 167, 188-190 (2000), or from background internet research. See: *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?* David H. Tennant and Laurie M. Seal; americanbar.org. If it sounds like this dog is chasing its own tail, it is.

Collaborative Judicial Education

But what if the same kind of educational content is sponsored by a nominally neutral organization identified not with a pro-prosecution or pro-defense agenda, but with generalized background or factual information? What if DRE is part of developing alternatives to traditional criminal justice system case dispositions? DRE is still relevant to substance abuse detection and compliance with DWI pre-trial release conditions, and to probation management in therapeutic and rehabilitative programs overseen by DWI or Drug Courts.

Enter the New England Association of Drug Court Professionals! NEADCP is a consortium of prosecutors, defense counsel, probation officers and substance abuse treatment providers, law enforcement and medical professionals from all the New England states interested in impaired driving interdiction and rehabilitative alternatives to incarceration. NEADCP, together with the Massachusetts Judicial [Education] Institute, was putting together its annual two day conference and training program for November, 2016. The RJOL approached its principal organizers, a Massachusetts trial judge, a Vermont DUI Court Coordinator and the Massachusetts Judicial Institute Curriculum Director to ask for inclusion of DRE instruction. If there had been estrangement between the SHSO and the judicial educators in the past, it was not evident now. Not only were the judge and educators enthusiastic about DRE, they offered a double session. And when the DRE suggested that Toxicology would complement and inform the topic, the organizers agreed to a double session on Toxicology too.

The New England RJOL, a novice to DRE, turned to the region’s TSRPs and Regional Law Enforcement Liaison (RLEL) for staffing recommendations and overall advice, and was not disappointed. The TSRPs, RLEL and a veteran DRE founder suggested several New England DRE police and toxicologists with teaching experience and, looking to insulate the presentation from claims of overt law enforcement “influence” (remember the appearance of bias and impropriety?) the RJOL elected to tap the more independently qualified DRE experts, a Massachusetts teaching optometrist with 20 years in DRE development and instruction, along with a veteran lawyer-DRE police sergeant, for this first foray into judicial education. Similarly, a New Hampshire forensic scientist recommended by the RLEL and DRE experts was selected to present the toxicology segment. As the RLEL assured, these presenters were well-versed and confident in their instruction and deftly fielded the Q&A afterwards.

Of judges who attended, some heard new information; some heard old information and some still questioned admissibility of DRE evidence without a scientist to lay the foundation. The positive points, though, were the transfer of knowledge and the notion that evidentiary admissibility, while questioned, is possible. Moreover, one state’s chief trial judge who could not be there due to a health emergency, expressed interest in having her entire bench attend a more comprehensive DRE educational program in the future.

Conclusion

DRE education need not persuade judges that a trained officers’ testimony should be admitted into evidence. It is enough that judges learn that under the correct circumstances of facts and established science, a trained officer’s testimony *can* be considered. It is enough that judges learn that an officer’s measurements and factual reports can be *objective*, rather than subjective, observations. It is enough that judges learn that the scientific standards underlying an officer’s DRE evidence *can* be sufficiently settled so that a trial court will adopt and follow rulings of appellate courts from other jurisdictions, without prior approval of its native Supreme Court, allowing DRE evidentiary foundations without fresh scientific testimony in each new case. See, e.g.: *State v. Grigas-Child*, Criminal Division, VT Superior Court, Chittenden Unit, Dkt # 731-3-14 Cncr (Findings and Order Nov. 26, 2014), citing *State v. Brochu*, 183 VT 269, 288 (2008) (confirming that a trial court “can fully evaluate the reliability and relevance of the evidence generally based on the decisions of other appellate courts . . . to the extent evaluation of the evidence by other courts is complete and persuasive”). Whether or not the underlying record is sufficient on a case by case basis remains to be decided by each independent judge, but DRE judicial education can open the door to the science without the need for scientists on the witness stand.

Hopefully, the ice is broken and DRE education can be expanded across the New England region’s judiciary.

DWI COURTS: AN EFFECTIVE AND NECESSARY RESPONSE TO IMPAIRED DRIVING

James Eberspacher, Division Director, National Center for DWI Courts

Recently, I was sitting in a packed courtroom. Normally, a courtroom like this is a somber place filled with the downcast faces of criminal defendants awaiting hearings and, all too often, bad news. But not on that day. This courtroom was filled with family members, friends, media, and the 10 people whose transformations we were there to celebrate. One by one, they stood in front of the crowd and told a unique story about their personal journey from addiction to recovery.

This was a driving while impaired (DWI) court graduation ceremony, an event unlike any other in our justice system.

As the graduates described what led them to participate in the DWI court program, their struggles and successes, and how their lives have been renewed through recovery, everyone in the courtroom that day heard a common theme: addiction often fuels dangerous behaviors, but it is a treatable disease.

Driving while impaired—whether by legal or illegal drugs, alcohol, or a combination thereof—is one of the single greatest threats to public safety facing American communities today. In fact, the National Highway Traffic Safety Administration reports that after five decades of declining traffic fatalities, those numbers rose in 2015, including a 3.2% increase in alcohol-impaired-driving deaths. Mixing drinking with driving resulted in 10,265 lives lost in 2015, accounting for 29% of the total fatalities that occurred on our nation's roads that year.¹

We are making progress in a few areas. Despite the spike in 2015, over the past 10 years, alcohol-impaired-driving fatalities have declined by 24% thanks to prevention messaging, enforcement, prosecution, community supervision, and treatment. Combined, these strategies have contributed greatly to this overall decline and have reduced recidivism, since about two-thirds of first-time offenders are never convicted for a second DWI offense.

So why is the DWI court approach necessary?

One area in which we have made too little progress is the rate of two types of impaired drivers involved in fatal crashes. The first is repeat offenders. Impaired drivers involved in fatal crashes are 4.5 times more likely to have a prior DWI conviction on their record. The second is impaired drivers with a blood alcohol content (BAC) of .15 or greater. In 2015, a full 67% of fatal crashes involved a driver with a BAC of .15 or higher. Despite our collective efforts, these rates have been relatively constant in recent years. Thus, high-BAC and repeat impaired drivers remain overrepresented in fatal crashes.

As the director of the National Center for DWI Courts, I feel privileged to speak with people all over the country who bring a variety of perspectives on this critical public safety issue, including judges, attorneys, law enforcement, treatment providers, social workers, and people in recovery from addiction. Those conversations often revolve around a common theme: justice reform is essential.

We now know that traditional approaches are not very effective for repeat and/or high-BAC offenders who suffer from moderate to severe substance use disorders. Incarceration simply does not work for people with a high risk of recidivism and in high need of services

for addiction and/or mental health conditions (commonly known as high-risk/high-need populations).

A DWI court graduate I met recently summed it up quite well. Allow me to paraphrase: “No amount of supervision, jail, prison, ignition interlock, arrests, or urine tests were going to keep me from drinking and driving. I did everything while drunk. Driving just happened to be one of the things I did.”

Thanks to a DWI court, that person is now in recovery, and such behavior is now part of his past. But his statement illuminates the very real challenge facing the justice system today. Until we get to the root of the problem and address it in a meaningful, lasting way, people like this graduate will continue their addiction-driven behavior and will repeatedly endanger themselves and others by driving while impaired.

The tools and interventions this graduate mentioned are each effective in their own way and with certain populations. Supervision and testing technology (such as breath, urine, transdermal, and interlocks) are highly effective at monitoring and aiding abstinence in a community setting. Incarceration can be an effective short-term measure, as it ensures public safety by physically preventing recidivism for a time. Substance use treatment alone, without monitoring, can be effective for some but is not effective for all.

Unfortunately, none of these interventions alone produce the kind of long-term results that will keep a high-risk/high-need person from once again using alcohol or drugs and then getting behind the wheel, increasing the risk of a fatal crash.

DWI court programs are intensely demanding, combining all of the tools and interventions noted above to specifically address high-risk/high-need individuals. Participants are under strict supervision, including home visits and frequent appearances in court. They undergo rigorous substance use treatment, participating in individual and group therapy. They must pass frequent and random drug and alcohol tests. Their behavior is constantly evaluated; positive behaviors are rewarded and encouraged, while negative behaviors are immediately addressed and corrected. Many participants have ignition interlocks installed on their cars to ensure public safety. In addition, participants are required to hold down a job, perform community service, or advance their education.

Research shows that DWI courts are the most successful way to reduce impaired driving for high-risk/high-need populations. They decrease recidivism by as much as 69%, all while saving valuable taxpayer dollars: an incredible \$3.19 for every \$1 invested.² Early research on DWI courts' ability to reduce the number of crashes is also promising: participants were half as likely to be involved in a crash within 18 months of program entry.³

DWI courts effectively change behavior in a way that no single intervention can. They not only aid and encourage sobriety, they impart the skills and habits necessary for long-term recovery and instill a sense of purpose and hope in participants.

There are just 713 DWI courts in the United States.⁴ With clear research, thousands of lives changed, and communities made demonstrably safer by these programs, it should be unacceptable that DWI courts

DWI COURTS: AN EFFECTIVE AND NECESSARY RESPONSE TO IMPAIRED DRIVING continued from page 4

are not being made available nationwide. Only a handful of states have fully embraced the model and are working toward implementing statewide court programs. Meanwhile, there are seven states that do not have a single DWI court, and five additional states have only one available for the many in need.

Rather than maintaining the status quo—traditional approaches that research proves are generally ineffective—while the number of impaired-driving fatalities continues to climb, the American people must demand a better solution through effective criminal justice reform. DWI courts are a proven justice system model that addresses and helps solve the complex problem of impaired driving for the most dangerous impaired drivers. We need to expand DWI courts nationwide to save more lives, better protect our communities, and lead more people into long-term recovery.

To learn more, please visit dwicourts.org.

1. U.S. Department of Transportation (August 2016). *2015 Motor Vehicle Crashes: Overview*. Washington, DC: National Highway Traffic Safety Administration (NHTSA). <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812318>
2. Carey, S., Harrison, P., Johnson, A., & Zil, C. (2014). *Minnesota DWI Courts: A summary of evaluation findings in nine drug court programs*. Portland: NPC Research.
3. Carey, S. M., Herrera Allen, T., & Einspruch, E. L. (2012). *San Joaquin DUI Monitoring Court Process and Outcome Evaluation*. Portland: NPC Research.
4. National Association of Drug Court Professionals (2015).

SAVE THE DATE



Save the Date

We are busy making plans for the
2018 Traffic Court Seminar,
and hope you will make plans now to attend

March 5 – 7, 2018
San Diego, CA

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

DATES TO REMEMBER

May

Motorcycle Safety Awareness Month

Motorists: Share the Road With Motorcyclists and Scooter Riders



Bicycle Safety Month

Share the Road with Bicyclists

Cinco de Mayo – Friday, May 5

Impaired Driving

Buzzed Driving is Drunk Driving



May 15 – June 4

National Enforcement Mobilization

OCCUPANT PROTECTION

Click It or Ticket



May 22 – June 4

National Tire Safety Week

June 19

National Ride to Work Day

Share the Road With Motorcyclists and Scooter Riders
Heatstroke Awareness

July

Vehicle Theft Prevention Month

July 4, Fourth of July

Impaired Driving

Drive Sober or Get Pulled Over

Buzzed Driving is Drunk Driving



July 31

National Heatstroke Prevention Day

Heatstroke Awareness



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UPCOMING NATIONAL JUDICIAL COLLEGE COURSES



Impaired Driving Case Essentials

May 8 – 11, 2017

Location **Reno, NV**

Tuition **\$1,079**

Conference Fee **\$289**

This course provides you with an overview of sentencing practices and evidence-based options for impaired driving traffic offenses including those committed by younger drivers, older drivers, and hardcore DUI defendants. After this course, you will be able to analyze circumstances providing a legal basis for stops, searches, seizures, arrests, and the admissibility of testimonial or physical evidence.

Drugs in America Today: What Every Judge Needs to Know

May 17 – 19, 2017

Location **Atlanta, GA**

Tuition **\$999**

Conference Fee **\$339**

With opiate addiction at epidemic levels in both urban and rural America, the NJC has crafted a new course that focuses on the neurology of addiction with an emphasis on heroin and painkillers. After this course, you will discuss basic brain chemistry; analyze the physiological and psychological effects of specific categories of drugs, develop skills to determine whether a participant is under the influence of drugs, identify different types of treatment options, which will cover psychological, behavioral, and social aspects, identify special population, such as juveniles, those with co-occurring disorders, and veterans, and exercise examples of effective management and sentencing strategies for each group, and craft effective sentences to bring about positive change in the drug user, while also providing effective sentencing options.

NJC COURSES CONTINUED



The hotel for this course will be the Ritz-Carlton, Atlanta. Surrounded by the state's centers of finance and government, and just minutes from the Georgia Aquarium and sports events at the Georgia Dome, Phillips Arena and Turner Field, this downtown Atlanta hotel is ideally situated.

The group room rate is \$179 per night [plus applicable sales taxes, currently 16% + \$5.00 per night] for single or double occupancy. This special rate will be available until April 24, 2017, unless our room block is filled earlier. Please contact our Registrar's Office with any questions.

Make your reservations by calling [800] 570-1382 and referencing "The National Judicial College."

Whom should I contact for more information?

For more information, please contact the Registrar's Office at (800) 255-8343 or registrar@judges.org.

Scholarships available: To learn more about financial assistance to attend NJC programs, please email njc-scholarships@judges.org or call us at (800) 25-JUDGE.

This course qualifies for The National Judicial College Certificate in Judicial Development program Administrative Law Adjudication Skills, Dispute Resolution Skills, General Jurisdiction Trial Skills, Special Court Trial Skills and Tribal Judicial Skills disciplines.



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DON'T FORGET

Valuable resources can be found at:

- **National Highway Traffic Safety Administration**
<http://www.nhsta.gov/Impaired>
- **American Bar Association/Judicial Division/NCSCJ**
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html
- **Highway to Justice - Archives**
http://www.americanbar.org/publications/judicial_division_record_home/judicial_division_record_archive.html
- **National Judicial College**
www.judges.org
- **Governor's Highway Safety Association: Impaired Driving Issues**
<http://www.ghsa.org/html/issues/impaireddriving/index.html>
- **AAA Foundation for Traffic Safety**
<https://www.aaafoundation.org/>
- **National Center for State Courts**
<http://www.ncsc.org/>

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