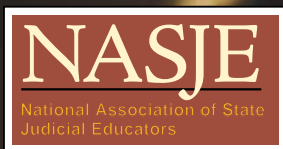




# HARDCORE DRUNK DRIVING JUDICIAL GUIDE

A Resource Outlining Judicial Challenges, Effective Strategies and Model Programs



The National Association of State Judicial Educators (NASJE) is a non-profit organization, founded in 1975, that strives to improve the justice system through judicial branch education. NASJE is a leader in defining the practice of judicial branch education and in gathering and sharing resources among educators.

The Century Council (TCC), founded in 1991, is a national not-for-profit organization funded by America's leading distillers to fight drunk driving and underage drinking. The Council develops and implements innovative programs and public awareness campaigns and promotes action through strategic partnerships.

The Century Council is funded by the following companies: Allied Domecq Spirits & Wine North America, Bacardi U.S.A., Inc., Brown-Forman, DIAGEO, Future Brands LLC, Pernod Ricard USA, Constellation Brands, Inc., Sidney Frank Importing Co. Inc.

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## OVERVIEW

In 2002, the National Association of State Judicial Educators and The Century Council's National Hardcore Drunk Driver Project convened a national panel to examine the judiciary's critical role in reducing hardcore drunk driving. At a judicial summit meeting in Washington, D.C., members of the panel — judges and judicial educators recognized as experts on the drunk driving issue — examined

- The problem of hardcore drunk driving;
- The role of the judiciary in sentencing hardcore drunk drivers;
- Challenges and obstacles to effective sentencing of hardcore drunk drivers;
- Effective sanctions, strategies and programs to reduce hardcore drunk driving;
- Model programs and promising practices.

This publication, which combines the panel's ideas and experiences with research in the field of hardcore drunk driving, highlights effective strategies, tactics and programs that can be implemented across the nation to reduce this dangerous problem. It is designed to serve as a resource for judges and judicial educators as they address the complexities of reducing drunk driving in their courts.

Hardcore drunk drivers are those who drive with a high blood alcohol concentration of .15 or above, who do so repeatedly, as demonstrated by having more than one drunk driving arrest, and who are highly resistant to changing their behavior despite previous sanctions, treatment or education.

Successful approaches to stop hardcore drunk driving require a comprehensive system providing for swift identification, certain punishment and effective treatment. The judicial community is uniquely positioned to lead the effort to reduce hardcore drunk driving through strong, consistent sentencing and creative, comprehensive sanctions. These measures not only punish the offender and protect the public but also promote behavior changes leading to reduced recidivism. *See Appendix A for The National Hardcore Drunk Driver Project's National Agenda: A System to Fight Hardcore DWI.*

## THE PROBLEM OF hardcore DRUNK DRIVING

Hardcore drunk drivers continue to be over-represented in alcohol-related traffic crashes. In 2002, traffic fatalities in alcohol-related crashes rose slightly from 17,400 to 17,419, representing 41 percent of total traffic fatalities for the year. In 2002, data shows that 55 percent of all drinking drivers involved in fatal crashes had a blood alcohol concentration (*BAC*) of .15 or higher, which is nearly double the legal limit for most states (*NHTSA 2003*). The most frequently reported *BAC* for drivers involved in fatal crashes with positive *BAC* levels was .16. About 1,343 alcohol-related fatalities occurred in crashes involving drinking drivers who had at least one previous driving while intoxicated (*DWI*)\*\* conviction within the past three years, accounting for 7.7 percent of all alcohol-related traffic fatalities. (*NHTSA 2003*)

**ALCOHOL DEPENDENCY.** Not surprisingly, compared with first-time driving-under-the-influence arrests, repeat offenders tend to have higher rates of alcoholism and alcohol-related problems, more frequent non-traffic criminal offenses and more severe mental health problems.

A study of 126 hardcore *DWI* offenders incarcerated in an Ohio prison (Siegal et al, 2000) found 98 percent had histories of alcohol abuse and 75 percent were alcohol dependent. They all had been previously arrested for *DWI*.

Too often one hears of a tragedy involving a hardcore drunk driver, and the issue can seem too complicated to address. Hardcore drunk drivers may be difficult to detect, difficult to prosecute and difficult to properly sanction and treat. Because they go undetected, many aren't reflected in any statistics. Often those who are apprehended know how to manipulate the judicial system's weak spots and avoid appropriate sanctions and treatment.

Comprehensive countermeasures to target the hardcore drunk driving population are critical and have been cited by the National Highway Traffic Safety Administration (*NHTSA*) as an immediate need on which the nation should focus. Strides are indeed being made as more successful tactics and programs are implemented in the fight against hardcore drunk driving. Here the focus is on how judges can best contribute to those efforts.

*\*\* The *DWI* acronym is used throughout this guide for convenience and consistency, although some states use other terminology, such as *DUI* (driving under the influence) that can, in some cases, refer to different levels of offense severity.*



## THE ROLE OF THE JUDICIARY

“Hardcore drunk driving is not just a criminal issue. It is a public health issue second to none. We must change the role of the judge in order to be effective. We need to educate judges about the fact that it is ethical to treat a crime as an illness too. Judges should be willing to make an investment in offender’s lives if offenders will make the same investment in themselves.”

*Judge Robert Pirraglia at the National Hardcore Drunk Driver Project’s judicial summit*

The judiciary plays a pivotal role in the effort to reduce hardcore drunk driving and the deaths and injuries caused by it. A growing number of judges across the country are developing and adopting innovative programs that show great promise in addressing this complex issue. Of all types of criminal cases, drunk driving cases are among the most complicated in terms of the legal and evidentiary issues, with hardcore drunk driving presenting the thorniest challenges.

More than 2,000 laws have been enacted to punish convicted drunk driving offenders. But simply having a law on the books isn’t enough. For a variety of reasons unique to each locality, often laws are not enforced to the fullest extent or drunk driving cases are given only cursory consideration.

What is the best sentencing strategy to prevent or discourage the hardcore from driving drunk? Drunk drivers vary greatly in terms of their response to specific deterrent efforts. Judicial policies increasing the swiftness of adjudication and the certainty of punishment of convicted offenders are greater deterrents than policies increasing the severity of punishment (*NHTSA 1996*). But those two words — *sure* and *swift* — rarely apply to judicial proceedings for drunk drivers. Often there are significant delays between the offense and the trial or disposition of DWI cases. And plea-bargaining and pretrial diversion programs can result in a conviction on a reduced charge, which in turn, avoids a drunk driving conviction on the driver’s record. Sentencing guidelines often are ignored and licensing sanctions reduced (*Voas 1995*).

When hardcore drunk drivers receive a lenient sentence, the deterrent effect of the laws is considerably weakened. In order for society to successfully combat hardcore drunk driving, judges must come to the forefront on the issue.

As Judge Robert Pirraglia said at a judicial panel meeting, “It is the role of the judge in the 21st century to assume a leadership position with regard to the DWI issue. We should set standards for new judges and chief justices alike, identifying what is expected of judges handling DWI cases.”

Judges should comprehensively sentence the hardcore drunk driver in order to protect the public while restricting and rehabilitating the offender. The tolerance of some judges toward hardcore drunk drivers has led legislatures across the country to strengthen drunk driving penalties and give judges less flexibility in sentencing. That inflexibility can frustrate judges by restricting them to penalties that, in practice, turn out to be ineffective. For example, prison sentences not accompanied by treatment usually mean the hardcore drunk driver returns to old habits, including driving drunk upon release. Sometimes sentences include treatment when, in that particular community, appropriate treatment is not available.

**JUDICIAL LEADERSHIP.** Although many times judges feel their role is to follow the law and avoid taking a pacesetter position, judicial leadership is crucial to efforts to deter drunk driving. Not only is it well within the ethical bounds of a judge to do more than adjudicate the facts and apply the law; but our system relies on courts to help identify an offender's problems and promote the offender's healing and rehabilitation.

It is no easy task to identify, appropriately sanction and simultaneously help defendants who so often thwart any attempts to do so. Hardcore drunk drivers are savvy and know how to beat the judicial system, as is exemplified by their frequent refusal to take a BAC test when arrested. More than 50 percent of repeat offenders refuse to take the tests, thereby depriving police officers and prosecutors of critical evidence in any subsequent court case. Hardcore drunk drivers need to experience first hand that the loopholes in drunk driving laws are being closed. They need to perceive not only that they will be caught, but their repeated, high-risk behavior will result in meaningful sanctions and treatment.

Unfortunately, in too many courts that perception of risk does not exist; judicial leadership is needed to make that risk a reality by paving the way for effective prosecution and comprehensive sentencing. Research has shown alternative sentencing methods, DWI courts and sentences tailored to each offender can have a profound effect on an offender's ability to avoid re-offending. Likewise, drunk driving sentences handed down without regard for a hardcore drunk driver's history and habits may result in another DWI offense or death or injury. By thoughtfully combining mutually reinforcing sanctions that force a hardcore drunk driver to change his or her patterns of behavior or face further consequences, the judicial system can bring sufficient pressure on the problem to produce a significant social impact.

When a hardcore drunk driving offender comes before the judicial system and is found guilty of DWI, it may be one of the only opportunities for the system to address the reasons for the offender's recidivism. But too often, breakdowns in the judicial system thwart that opportunity.

## CHALLENGES AND OBSTACLES FACED BY JUDGES

“Each court has restraints. The question is, what can we do despite these constraints to creatively sentence DWI offenders? What programs and ideas transcend limitations?”

*Tom Langborne, NASJE president, at the National Hardcore Drunk Driver Project’s judicial summit*

To successfully sanction the offender and protect the public, judges must work around a myriad of complex challenges and utilize any and all available tools and policies to creatively and comprehensively sentence hardcore drunk drivers. What do we mean by “comprehensive sentencing?” Simply put, it is building around the offender a box of combined sanctions, the only way out of which is changed conduct. As such, a judge must approach sentencing by sizing up the offender correctly and building the right size and type of box, using the tools allowed by law.

### AMONG THE FOREMOST CHALLENGES:

- **Underestimating the impact of hardcore drunk driving.** Hardcore drunk driving is frequently low on the judicial agenda, well below other social problems and safety challenges. Homicides, assaults and other types of violent crime, as well as other acute social issues, occupy a much larger place in the media, while political leaders rarely give drunk driving top priority. Compounding the problem, many judges seem unaware of the horrendous impact hardcore drunk drivers have on society and the importance of the judiciary’s role in reducing it.
- **Incomplete or unavailable records.** A lack of records make it difficult for judges to identify and assess a hardcore drunk driver. Hardcore drunk drivers frequently are misidentified as first-time offenders and are either convicted of, or plead guilty to, reduced charges. When treated as first-time offenders, they don’t face the tough sanctions and treatment designed not only to punish but to produce changes in conduct.

“You can’t effectively treat people without knowing what they’re bringing to the bench in terms of prior offenses and BAC levels.”

*Judge Christopher McNeil, at the National Hardcore Drunk Driver Project’s judicial summit*

A lack of complete records impairs a judge's ability to determine an offender's criminal history, access a plea agreement and determine the appropriateness of sanctions and/or treatment. Without complete and accurate records, the judge cannot reference previous sanctions imposed on the offender or determine whether they were correctly imposed or the sentence was completed.

This information also needs to be available at the time the court sets bail or bond for offenders. Too often hardcore offenders are not identified and failure to appear in court is a common problem associated with experienced offenders.

- **BAC test refusals.** Many DWI suspects refuse to cooperate with the police in any way by refusing to answer questions, take the field sobriety test, or take a breath test. But test refusals are most common with hardcore drunk drivers, primarily because they know they'll test high, they are familiar with the loopholes in DWI laws, and 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, the police officer is hindered in gathering the evidence needed to support a DWI charge. As a result, in many states, drivers who are drunk 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.

In a 2002 study on DWI prosecutions, three-fourths of the prosecutors interviewed said the blood alcohol test was the single most critical piece of evidence needed for a conviction, evidence they are frequently without (Simpson and Robertson). Refusal rates vary greatly from state to state. Some states report refusal rates of up to 50 percent for drivers with a prior DWI (*Jones and Lacey 2000*).

Even without the testing, DWI charges may still be brought against the offender, but conviction depends entirely on the law enforcement officer's observations and subsequent testimony.

The National Committee on Uniform Traffic Laws and Ordinances (*NCUTLO*) recommends in its DUI model law that the penalty for test refusal should be double the penalty for test failure. It also recommends that a driver's refusal to take a BAC test be admissible in court.

Forty-one states and the District of Columbia have administrative license revocation laws for DWI test refusal or failure (*The Century Council, 2003*). In most states, the penalties involve an administrative license suspension of 90 to 180 days. This is much less severe than the criminal penalties for failing a chemical test for DWI, and many continue to drive without a license (see section on ignition interlock devices).

- **Evidentiary deficiencies.** In addition to BAC test refusals, a number of evidentiary deficiencies can lead to cases being dismissed or result in reduced charges. Those shortcomings include lack of convincing or sufficient evidence, including incomplete or erroneous paperwork, ineffective officer testimony and inexperienced prosecutors.

Witness testimony is a vital part of the evidence in a jury trial. Police officers need to be able to properly articulate their cases. Omissions or insufficiently detailed testimony can lead to the dismissal of a case or acquittal of the defendant. This is especially important since repeat offenders are more likely to opt to go to trial. In a 2001 study by Simpson and Robertson, police officers said their credibility as witnesses was undermined by a lack of opportunity to prepare for cases, a lack of experience testifying in general and the difficulty of providing the court with the desired level of specificity upon cross-examination.

Often prosecutors also feel unprepared for DWI cases. Another study by Robertson and Simpson (2002) found that 48 percent of prosecutors surveyed reported they were not provided with adequate training or preparation before handling DWI cases in their jobs as prosecutors, and over one-third (34 percent) of judges believe prosecutors do not have the same knowledge or expertise about DWI as defense attorneys. Coupled with inexperience and high turnover, prosecutors also face the additional burden of inadequate staff and resources for the number of DWI cases they are charged with handling.

Technically, drunk driving cases are most challenging to try, from the Standardized Field Sobriety Test (*SFST*) to toxicology reports to crash reconstruction issues. DWI cases are the most legally challenging, too, with conflicting statutes and tough constitutional standards. They also are often vigorously argued by well-paid defense attorneys.

- **Lack of system coordination.** Different components within the judicial system sometimes operate irrespective of the actions and capabilities of the others. This piecemeal approach results in ineffective handling of hardcore drunk driving cases, with treatment too often getting short shrift. The hardcore drunk driver is in need of effective alcohol treatment and rehabilitation, but resources are often not available, the system does not mandate it, or the offender refuses to attend treatment programs. Their noncompliance often goes unnoticed by the courts.
- **Heavy caseloads.** The high volume and lack of resources in many courts risk the development of a “fast food” justice system where offenders are processed quickly and without regard for the individual rehabilitation and restriction needs that are essential for hardcore drunk drivers. Some 1.5 million DWI arrests are made each year, with most requiring some form of processing by a judge. Judges are hamstrung by heavy caseloads that severely limit the amount

of time available to discern case specifics and an offender's behavior patterns, which can allow repeat offenders to avoid identification and proper sanctioning. Ineffective plea-bargaining and charge reductions often result. Heavy caseloads also lead to prolonged adjudication, which in turn produce more dismissals and acquittals.

“Case volume is a big issue. Judges assume that prosecutors and defense attorneys have done their jobs and don't question before accepting their pleas.”

*Judge Birdie Jamison at the National Hardcore Drunk Driver Project's judicial summit*

- **Lack of financial resources.** Insufficient funding is a frequent problem, including lack of funding for special DWI courts, for DWI tracking systems, for supervised probation and for treatment programs. For example, while a judge can order intensive supervision probation for a hardcore offender, if caseloads for probation officers number hundreds at the time, it is unlikely the sentence will be meaningful.
- **Variations in alcohol evaluations.** Judges note a disparity of skill among evaluators and the absence of a model or uniform definition of what should be included in a court-ordered evaluation.
- **Failure to appear.** Failure of defendants to appear at hearings is another serious problem in prosecuting hardcore drunk driving cases, yet typically, only nominal penalties apply.

Failure to appear reduces the court's ability to determine guilt and to devise sanctions for an offender who is found guilty. Offenders who live near state lines and commit crimes in a neighboring state may be tracked only if the two states have a linked, computerized system of warrant.

- **Unrestricted plea-bargaining.** Plea-bargaining agreements between prosecutors and defense attorneys can reduce DWI offenders' sentences to those of non-alcohol-related offenses, such as reckless driving. Such unlimited plea-bargaining undermines the penalties of the initial charge and any specific deterrent value the arrest might have had. Allowing defendants to plead to non-alcohol-related offenses exempts the defendants from participating in alcohol education, screening for alcohol dependence, and, if appropriate, referral for treatment, and it deprives law enforcement officials of a standard method of identifying recidivists. Reducing a DWI charge to a non-alcohol-related offense hinders swift identification by allowing the next DWI to erroneously be viewed as a first offense.

- **Diversion programs.** These programs allow certain DWI offenders to be diverted from criminal sanctions by entering alcohol education or treatment programs. Diversion programs generally allow charge dismissal after successful completion of a treatment or education program and can prevent or delay information about an offense from appearing on the offender's driving record.

Diversion programs make it more difficult to identify hardcore drunk drivers. Most offenders seek diversion programs to avoid having a driving record or criminal history showing a DWI conviction. Because records are not consistently kept, an offender may become eligible for a diversion program several times as a first-offender. In some states, diversion allows the offender to retain a valid driver's license.

- **Sentencing disparity.** Many drunk driving laws allow the judge considerable discretion in sentencing. Sometimes these laws are enforced to the fullest extent, but for a variety of reasons unique to each locality, many times they are not. When hardcore drunk drivers receive a lenient sentence, the deterrent effect of the laws is considerably weakened.
- **Lack of extended and highly supervised probation.** Extended and intensive probation can be one of a judge's greatest tools in combating recidivism because it allows the judge to hold the offender accountable for completing the sentence imposed and for demonstrating responsible, law-abiding behavior.
- **Sentence noncompliance.** Hardcore drunk drivers often don't comply with their sentences and don't suffer serious consequences for their noncompliance. When sentences are ignored and there are no repercussions, conviction becomes meaningless — an idle threat. Driving on a suspended license is a particular concern because the driving public remains at risk. One of the primary reasons given for sentence noncompliance is a sparsity of monitoring and follow-up after sentencing.

A study released in July 2003 found that nearly half of repeat drunk drivers are returned to court for failing to comply with the terms of their sentence. The study, for which researchers surveyed 890 probation and parole officers from 41 states, identified noncompliance with court orders as the number one obstacle to effectively monitoring hardcore drunk drivers (*Robertson and Simpson 2003*).

- **Need for judicial training to help deal with these obstacles.** Judges acknowledge they need more training to handle the technical and scientific evidence involved in hardcore drunk driving cases and to deal with all of the obstacles highlighted in this publication. Although a number of states hold DWI

workshops and seminars for judges, hardcore drunk drivers are rarely the main focus. However, the complexities of cases involving hardcore drunk driving pose distinct judicial challenges that sentencing seminars, workshops, and conferences focusing on the hardcore drunk driver would help address.

Judges should be trained to deal with the special issues presented by hardcore drunk drivers, beginning with recognizing the signs of a hardcore drunk driver. These signs include drivers who repeatedly refuse to take blood-alcohol tests or standardized field sobriety tests; drivers whose blood alcohol levels are substantially higher than the limits allowed by law; and underage and adult drivers with multiple DWI convictions.

Cases involving hardcore drunk drivers typically are litigated with intensity and require the judge be prepared to resolve vigorously contested factual and technical disputes. Judges note the value of learning how to handle such cases through peer-to-peer education taught by experienced judges.

By using a coordinated system of sanctions and programs, judges can better build the box that quarantines the hardcore drunk driver until he or she no longer presents a menace to the driving public.

## ADMINISTRATIVE LAW JUDGES: SPECIAL CHALLENGES AND SOLUTIONS

In addition to criminal charges, DWI offenders often face parallel prosecution in administrative proceedings. Administrative procedures usually involve the license and sometimes the vehicle, while criminal procedures generally involve the driver. Compared to judicial proceedings, administrative license suspensions are seen as a faster and more certain way to remove a dangerous driver from the roadways. Depending on state laws, there are a number of sanctions administrative law judges impose on DWI offenders, including:

- Revoke or suspend driver's licenses;
- Suspend or seize vehicle tags or registration;
- Order ignition interlocks;
- Order vehicle impoundment or forfeiture; or
- Fines.

These administrative procedures do not take the place of criminal proceedings against drunk drivers. Every state has laws authorizing — and in some cases mandating — incarceration, and all DWI cases covered by these laws are handled through the judicial system. Offenders who are subject to administrative sanctions usually remain subject to a separate criminal process, which could lead to additional penalties and sanctions.

The two tracks — administrative and criminal — must both be effective for an offender to be appropriately sanctioned and treated. Administrative license revocation or suspension (*ALR or ALS*) is recognized as having a strong, general deterrent effect on drunk drivers because the mandatory punishment is swift and sure, and it is by far the most frequently imposed administrative sanction on DWI offenders. No lengthy trial delays or plea bargains; drivers who fail or refuse to take a sobriety test lose their licenses on the spot. The National Highway Traffic Safety Administration recommends ALR laws impose at least a 90-day suspension or a 30-day suspension followed by 60 days of restricted driving.

According to the 2003 Combating Hardcore Drunk Driving sourcebook (*The Century Council 2003*), 41 states, the District of Columbia and one territory have laws that allow states to administratively revoke the offender's driving privileges without waiting for a conviction on a DWI charge. An unfortunate side effect of the widespread use of ALR is an increase in the number of offenders driving while suspended (DWS). Only a small proportion of DWI offenders reinstate their licenses when eligible because the process is time-consuming and costly in terms of fees and other requirements. Notification of the driver's insurance company of his or her suspension, attendance at education or treatment programs, or use of an alcohol interlock are often required by states before a license is reissued. Researchers also

attribute the low incidence of re-licensure to a perception on the offender's part that the risk of apprehension for driving while suspended is not great enough to justify the hassle of reinstatement (*Voas 2001*).

In addition to ALR, many jurisdictions also use other administrative actions aimed at drunk drivers. For example, the arresting police officer can suspend and seize vehicle tags or registration of repeat DWI offenders. In some states, such as Maryland, California and West Virginia, alcohol safety interlock programs are managed administratively by the motor vehicle departments. Several vehicle impoundment and forfeiture programs also are handled administratively.

In Minnesota, people arrested for drunk driving who have a previous offense within 10 years or who have a BAC of .20 or higher will have their license plates impounded and destroyed by a police officer acting as an agent of the Department of Public Safety. A study found Minnesota's license plate impoundment law to be quite effective. Violators who received a police-issued impoundment order had one-half the recidivism rate as compared to similar offenders who did not receive this order (*Rodgers 1994*).

**Challenges to administrative proceedings.** Administrative law judges say the challenges they face generally run parallel to those faced in criminal court, with two notable exceptions, both of which can have a direct, negative impact on the outcome of the criminal case:

1. Aggressive defense tactics that go beyond areas outlined by state law;
  2. Witnesses who do not appear, who frequently are law enforcement officers.
- The two are interrelated.

- **Aggressive defense tactics.** Ohio administrative hearing examiner and national panel member Christopher McNeil said defense lawyers are using the administrative hearing to cross-examine state witnesses (primarily the arresting or testing officers), getting them to commit to versions of the circumstances of arrest. The defense then uses this testimony against the officer during the DWI trial, which might take place several months after the administrative hearing. McNeil, who is also a faculty member at the National Judicial College and teaches administrative law at Capital University Law School, said the problem is systemic.

“Any variance, any kind of discrepancy, any inconsistency, is used by the defense lawyer to impeach the officer at the DWI trial,” McNeil said. “Given that the stakes are much, much higher at the DWI trial than they are at the administrative hearing, it certainly makes good sense for the defense to take this approach, but it can lead to unwarranted outcomes in otherwise strong DUI cases.”

The role of the administrative law judge is to control and direct the hearing, according to state law. When the judge doesn't control the proceedings, it can lead to the second problem of non-showing witnesses.

- **Witnesses who do not appear.** Most frequently it is the law enforcement officer who does not appear, according to McNeil, who has studied and written extensively on the role of administrative court judges and the problems they face.

“That is not true in DWI court proceedings, and it is alarming,” he said. “If the officer doesn't appear, the administrative law judge has to dismiss the charges. It's not uncommon, and there is no contempt action that an administrative law judge can impose. The only way you can enforce the subpoena is through a court of general jurisdiction.”

Law enforcement officers don't show, McNeil said, because there is no prosecutor at the administrative proceeding, which leaves the witness exposed to the defense lawyer. The witnesses look to the administrative law judge to reign in the defense lawyer, and if the judge doesn't, “the officer gets hacked.” So instead, some law enforcement officers decide not to show up and take that kind of abuse. “In part,” McNeil said, “the law enforcement officers are offended by the defense tactics and the lack of the administrative law judge's response, and in part, they feel they are protecting the DWI proceeding. They don't want to say or do anything that would jeopardize that outcome.”

A recent study of Utah's law allowing telephonic testimony of ALR hearings noted other reasons officers don't appear, including conflicting training and work schedules. The report also noted that some command officers don't encourage the arresting officers to attend ALR hearings because it removes the officers from service, and their departments must pay most of the costs for the officers' time (*Wiliszowski, Jones, and Lacey 2003*).

If a defendant fails to appear at an administrative hearing, McNeil said a judge can render a default order and impose the same sanction as could be imposed if the person appeared and wasn't the prevailing party. This is particularly important for identifying hardcore drunk drivers because the administrative law judge can impose a full sanction (typically a 90-day suspension for a first-offense DWI or refusal) even against the absent respondent; and that suspension can then be regarded as a prior administrative suspension when the recidivist returns to his or her bad behavior on the road. As a result, when presented before an administrative adjudicator, the hardcore drunk driver faces the enhancements that go with second or subsequent offenders.

**Solutions.** While the majority of challenges faced by administrative court judges mirror those of the judicial branch, solutions available to administrative judges are severely restricted by the limited number of sanctions they can impose. To address the challenges particular to administrative DWI judges, McNeil suggests

- Strengthened education for administrative law judges. The administrative law judge's role is to preserve due process rights, but sometimes administrative law judges are too lenient because they bend over backwards to make sure a defendant's rights are protected. Individual training in advanced evidence and trial procedure reduces this risk;
- Networking among administrative law judges, where peer-to-peer support exposes them to current trends in litigation tactics (both by the state and by the defense) that might have an impact on the process;
- Training opportunities with judicial branch judges — many administrative law judges are overly-permissive out of a fear of reversal in the judicial review process, a fear that diminishes with exposure to the “real world” of DWI prosecutions;
- Greater public awareness of the proper role of the judge in administrative DWI hearings;
- Clearly stated statutes that set forth exactly what is and isn't admissible in the administrative proceeding; and
- Law enforcement training.

The 2003 Utah study by Wiliszowski et al. found that allowing police officers to testify by telephone at DWI administrative hearings contributed to a 20 percent reduction in the return of driver licenses to defendants due to the absence of the arresting law enforcement officer. The authors recommended increased usage of telephonic testimony, but noted that training is important because almost half of the law enforcement officers who responded to their survey said they didn't feel adequately trained in the standard ALR hearing procedures, much less telephonic hearings.

## MEASURES MERITING JUDGES' SUPPORT

State laws making look-back periods a minimum of 10 years so judges can consider an individual's previous 10-year history when evaluating their driving record and applying penalties and sanctions. Also, judges can encourage the maintenance of records on test refusal and suspensions for the entire look-back period. The National Hardcore Drunk Driver Project, along with NHTSA, MADD and the NTSB, recommend states maintain at least a 10-year look-back period. Long record retention and look-back periods are important because of the low probability of arrest and the need for long-term measures to change the behavior of hardcore drunk drivers (*NTSB 2000*).

Statewide tracking and record keeping should be supported as a means to identify hardcore drunk drivers and to ensure that all jurisdictions within a state have accurate information concerning an offender's record. Current technology allows automated electronic database management systems to connect law enforcement, motor vehicle administrators, the courts, probation and treatment professionals so that a complete information loop can be achieved. Accurate, up-to-date information reduces the likelihood that repeat offenders will be dealt with as first time drunk drivers.

Effective case flow management techniques should be instituted and supported to reduce the likelihood of overloaded courts and the possibility that hardcore drunk drivers will fall through the cracks. According to the National Association for Court Management (*NACM*) in its Core Competency Curriculum Guidelines, "Properly understood, case flow management is the absolute heart of court management."

Effective case flow management must be built on a solid management foundation that includes (a) leadership; (b) commitment among judges and court staff to managing the pace of litigation; (c) communications within the court and with lawyers and other institutional participants connected with the case; and (d) a learning environment enabling a court to be flexible in the face of changing events. (*Best Practices Institute, 2002*)

Judge Fields said the misdemeanor case flow system in Harris County, Texas, ensures that the docket moves fast and is not overloaded, meaning defendants, including hardcore drunk drivers, get the time and attention their cases deserve.

"Why it works in Harris County is because of a rigid and intimate system," says Fields, a member of the national panel to examine the judiciary's role in reducing hardcore drunk driving. "Our court manager is a big part of the reason it works. Plus, our court is big enough to handle all of the cases."



## EFFECTIVE STRATEGIES: BUILDING THE BOX

So how can judges combat hardcore drunk driving from the bench? How can they contain the hardcore drunk driver in a way that protects the public and leads to long term behavior change? Research and the experience of judges reveal that certain, consistent and coordinated sanctions are key to reducing hardcore drunk driving, with certainty and consistency having greater impact than severity. Alternative sentencing methods, DWI courts and sentences tailored to each offender can have a profound effect on an offender's ability to avoid re-offending (*Jones and Lacey 1998*). Likewise, drunk driving sentences handed down without regard for the source of a hardcore drunk driver's problem be followed by another DWI offense or worse, death or injury.

No one sanction or strategy is successful unless used in conjunction with other measures. It is the coordination of a variety of measures that prove most effective. For example, the combination of home confinement with electronic monitoring, intensive supervision, treatment, and an alcohol interlock can be quite effective in controlling the hardcore drunk driver. But the overseeing agencies need to coordinate their initiatives so, for example, the person conducting the intensive monitoring has access to the record of the interlock. That way the monitor knows if the offender has attempted to drive after drinking and can take any necessary action.

# THE JUDICIAL HARDCORE DRUNK DRIVER BOX

## EFFECTIVE SANCTIONS



**HARDCORE DRUNK DRIVERS ENTER THE JUDICIAL SYSTEM**



Support DWI tracking systems to ensure sentencing compliance

Avoid using community service in place of harsher sanction

Supplement incarceration with treatment and aftercare

Use intensive monitoring, supervision and probation

**CREATIVE SENTENCING**



**FOR THE  
HARDCORE DRUNK DRIVER,  
COMPREHENSIVE SENTENCING  
MEANS THERE'S ONLY**

**ONE WAY OUT OF THE BOX:  
CHANGED BEHAVIOR**

**EFFECTIVE SANCTIONS**



**CHANGED  
BEHAVIOR**



## CREATIVE SENTENCING

The following steps, based on National Highway Traffic Safety Administration's (*NHTSA*) list of factors to help reduce DWI recidivism, give the general overview of what needs to happen when judges face potential hardcore drunk drivers.

- First, properly identify the hardcore drunk driver. Require a thorough records check, including compliance with any previous sentences;
- Evaluate offenders for alcohol-related problems and recidivism risk;
- Act swiftly to prevent the offender from driving drunk again and punish him or her, using sanctions and remedies appropriate for each offender. No single sanctioning and treatment strategy is effective for all offenders;
- Mandate appropriate sanction combinations designed to produce behavioral changes. Include provisions for appropriate alcoholism treatment in the sentencing order for offenders who require treatment. Treatment alone never substitutes for sanctions or remedies, and sanctions and remedies do not substitute for treatment;
- Monitor the offender's compliance with sanctions and treatment; and
- Act swiftly to correct noncompliance (*NHTSA 1996*).

**Specific tactics and actions.** Based on research and recommendations from our panel of judges, following are some specific tactics and actions that have proven helpful to judges in combating hardcore drunk driving. To help ensure hardcore drunk drivers are correctly identified and sanctioned, judges should:

- **Recognize high BAC as an indicator of a hardcore drunk driver.** According to the 2003 Combating Hardcore Drunk Driving sourcebook, almost all states have graduated penalties based upon prior convictions, and 31 states, plus Washington, D.C., and American Samoa have graduated penalty systems based on blood alcohol concentration (*BAC*) at the time of arrest. The severity of the penalty increases with BAC, and sanctions are the most severe for multiple offenders. The system recognizes that drivers with high BACs — often defined as .15 and above — warrant stiffer sanctions because they are more dangerous on the highway and may also be more likely to repeat the behavior. Such a tiered system recognizes the increased problems caused by offenders driving with a high BAC and allows for more severe sanctions and more intensive treatment to be applied to high BAC drivers and repeat offenders.

The National Transportation Safety Board recommends that a model program to reduce hardcore drinking and driving should incorporate legislation that defines a high blood alcohol concentration (.15 percent or greater) as an “aggravated” DWI offense that requires strong intervention similar to that ordinarily prescribed for repeat DWI offenders (*NTSB 2000*). By calling attention to the seriousness of the crime, a higher-level charge acts as a deterrent for the general population. The primary objective of strong sanctions for high BAC offenders is to reduce recidivism by increasing the certainty and severity of punishment and by reducing loopholes in the system (*McCartt and Shabanova 2002*).

States’ high BAC systems vary greatly, with enhanced sanctions including:

- Longer or more intensive alcohol education or treatment;
  - Limitations on plea reductions, deferred judgments or diversion programs;
  - Driver-based punitive sanctions such as longer license suspensions;
  - Vehicle-based punitive sanctions such as mandatory ignition interlocks; and
  - Courts’ consideration of a high BAC in sentencing as an aggravating or special factor (*McCartt 2001; Combating Hardcore Drunk Driving 2003*).
- 
- **Restrict plea bargaining** in order to deter offenders, apply appropriate sanctions and accurately identify hardcore drunk drivers. Placing limits on plea-bargaining can lead to more accurate identification of repeat offenders and more appropriate sanctions being imposed. A meta-analysis of 52 studies on plea-bargaining restrictions combined with other policies found an 11 percent reduction in crashes and injuries, suggesting plea-bargaining restrictions are a vital part of an effective strategy for reducing drunk driving (*Wagenaar et al. 2000*).

According to a 2002 survey by the Traffic Injury Research Foundation, prosecutors support the idea of restricted plea-bargaining, such as removing the opportunity to plead down to a non-alcohol offense and discontinuing plea-bargaining in high BAC cases. Prosecutors also support stating the reasons for a plea agreement on the record (*Robertson and Simpson 2002*).

New York is an example of a state that has enacted legislation to prohibit drunk driving offenses from being plea bargained to a non-alcohol related offense. A drunk driver who plea bargains for a lesser charge still is identified as an alcohol-related offender.

- **Restrict diversion programs.** A 2002 AAA Foundation for Traffic Safety study recommends the elimination of diversion programs that allow offenders to escape license suspension and that remove the DWI offense from the offenders’ driving records. The National Transportation Safety Board and others have

recommended the elimination of diversion programs. One criticism is that without proper record keeping and centralized reporting, a repeat offender could be classified as a first offender multiple times.

- **Consider pretrial intensive supervision programs**, which are designed to get repeat drunk drivers into counseling, treatment and monitoring as soon as possible after arrest and before conviction. Every year in Wisconsin, more than 2,000 repeat drunk drivers in 13 counties receive services from that state's pretrial intervention programs, which Wisconsin refers to as pretrial intensive supervision programs (*ISPs*). A state department's long-term analysis of drunk driving recidivism by clients in Wisconsin's four longest running ISP programs found:
  - ISP clients were less likely to be re-arrested for drunk driving (22 percent of ISP clients from July-December 1998 had been re-arrested once vs. 37 percent for non-clients);
  - ISP clients who did recidivate went a longer time — average of 678 days — to re-arrest compared to 371 days for non-clients (*Wisconsin Department of Transportation, 2002*).
- **Mandate alcohol assessments or evaluations for all hardcore drunk driving offenders**, delivered in timely manner, to help ensure and expedite proper sentencing. An assessment is particularly critical in dealing with hardcore drunk drivers because it is a key source of information about their drinking and driving habits. A major purpose of assessment is to reduce recidivism by determining the nature of a drunk driver's alcohol involvement so appropriate treatment options can be identified and assigned.

**“Evaluation is the weak link. I put evaluators in my courtroom so the offenders can get evaluated on the day they are sentenced.”**

*Judge William F. Todd, Jr., at the National Hardcore Drunk Driver Project's judicial summit*

- **Conduct pre-sentence investigations or interviews** with drunk driving offenders to review the offender's record, the previous sanctions imposed, including all diversions, and the offender's compliance history. This information enables the judge to choose sanctions that effectively reduce recidivism and protect the public while also imposing rehabilitation requirements to treat the offender for alcohol problems.

- **Introduce measures to reduce failure to appear.** Failure of defendants to appear at hearings is another serious problem in prosecuting hardcore drunk driving cases, yet typically, only nominal penalties apply. Defendants who fail to appear frequently are not caught and therefore not sanctioned. When a defendant fails to appear, an arrest warrant is often issued, but the defendant may cross state lines and may never be found.

Prosecutors interviewed for a recent research study (*Robertson and Simpson, June 2002*) said hardcore drunk drivers are less likely to appear in court because they know all of the legal loopholes and the low risk of apprehension. The prosecutors also identified three ways to reduce failure to appear: hold in custody until trial any defendant who has previously failed to appear; impose significant bail to ensure appearance; and increase penalties to reflect the severity of the crime, especially those committed by repeat offenders. Increased penalties would usually require enabling legislation.

Some judges have proposed innovative solutions. Judge David Admire in King County, Washington, sends defendants a telephone reminder prior to their scheduled court appearances. Failure-to-appear rates have dropped from 42 percent to 18 percent (*Robertson and Simpson, December 2002*).

- **Impose meaningful fines** on offenders with funds, whenever possible, being returned to the locality where the arrest occurred and earmarked for drunk driving prevention to create a self sustaining program to reduce drunk driving.

Although the deterrent value of fines has received little study in the United States, fines are a common element in most DWI sanction combinations. However, while their deterrent value appears minimal, fines and other financial sanctions serve as retribution, which is one of the objectives of sentencing. Fines can also play an important role in helping pay for other costs associated with hardcore drunk drivers, such as enforcement efforts and treatment.

- **Employ the use of vehicle sanctions**, such as immobilization and impoundment, as a means of separating hardcore drunk drivers from their vehicles while they are receiving sanctions and rehabilitation. These sanctions often are applied administratively. Immobilizing an offender's vehicle (such as using a "club" to lock the steering wheel or a "boot" to lock a wheel), has the advantage of preventing the vehicle from being used by the hardcore offender while avoiding the procedural problems and costs involved with vehicle confiscation and storage. Impoundment is applied primarily against hardcore drunk drivers and its application varies among jurisdictions. Some target drivers who violate license suspension, while others use the sanction only after repeated DWI convictions.

- **Order the installation of offender-funded ignition interlock devices** on all cars under title of a hardcore drunk driver as a means of preventing the offender from driving drunk while receiving punishment and treatment. Because interlocks do not prevent an offender from driving another vehicle, this sanction should be used in conjunction with treatment for long-term reduction of recidivism. These devices can substantially reinforce the effectiveness of alcohol treatment and should be required during the entire treatment and follow-up period.

They should not be used as a substitute for licensing sanctions but rather in concert with licensing actions. Ignition interlock devices should be required:

- To be installed by an approved technician, with all of the costs paid by the offender;
- As a condition of license reinstatement after a period of suspension;
- Whenever there are exceptions to license suspension or revocation, such as conditional licenses;
- For an appropriate time period of at least 6 months or longer after incarceration or until the offender has completed treatment satisfactorily and can prove through probationary monitoring that he or she is capable of driving responsibly.

When used as part of a comprehensive program of monitoring and reporting, interlocks reduce recidivism by 40 to 95 percent as long as the interlock remains on the car (*Marques 2001*). But in absence of other measures, the effect on recidivism disappears when the device is removed.

**“In my court every offender, including first offenders, gets ignition interlock.”**

*Judge Richard D. Culver at the National Hardcore Drunk Driver Project's judicial summit*

At least 41 states, the District of Columbia and Puerto Rico have either mandatory or discretionary interlock laws. However, as the DeYoung study shows (see box), ignition interlocks remain underutilized.

**Study Finds Ignition Interlocks Underutilized.** A 2002 study conducted by David DeYoung for the California Department of Motor Vehicles found a number of problems with that state's implementation of its ignition interlock device law. That law requires a person convicted of driving on a DUI-suspended driver's license to install an interlock on any vehicle owned or operated by that person. It also authorizes, but does not require, the court to order installation of an interlock device upon conviction of a DUI. Repeat offenders can apply to the DMV for

a restricted driver's license after serving half of their license suspension period if they install an interlock device.

DeYoung's study found that judges order interlocks for only a fraction of the convicted driving-while-suspended offenders and that the majority of offenders who are ordered by the court to install an ignition interlock in their vehicle do not do so. In fact, according to a Jan. 21, 2003, article in *The Appeal-Democrat*, Marysville, California, the California Association of Ignition Interlock Service Professionals monitored the number of orders issued by California courts for mandatory installation of the interinterlock devices and found that of the 1,707 cases in which the device should have been mandated, only seven cases were mandated.

The DeYoung study suggested program modifications that included: finding a way to fund the devices for indigent offenders; finding another sanction for offenders who have no vehicle; and restructuring the monitoring of offenders who are ordered to install the devices.

- **Place hardcore offenders on intensive monitoring, supervision and probation** that runs concurrently with the offender's rehabilitation program to ensure successful completion. Intensive supervision probation is one of the most promising strategies for hardcore drunk drivers. These programs usually require an offender to meet with a probation officer two or three times a week and use several interventions, which can include alcohol abuse treatment, ignition interlocks, home detention, victim impact panels and community supervision. An average duration of the program is four to five months and may be followed by a period of "normal" probation.

"Probation is an important aspect of managing the offender. It keeps him on the hook since the sentence is just dangling before him. Probation is the key to a court being able to do something about recidivism."

*Judge Karl Grube at the National Hardcore Drunk Driver Project's  
judicial summit*

- **Consider staggered sentencing with intensive probation.** As it is being implemented in Minnesota, the court divides or staggers the repeat offender's jail sentence into three equal periods with probation between each period. They serve the first period of incarceration, but the second and third periods can be forgiven if the offender proves to the sentencing judge that he or she is meeting rehabilitation criteria. A 2003 preliminary analysis by the Minnesota House of

Representatives research department found that staggered sentencing reduced DWI recidivism by nearly 50 percent, while saving considerable jail resources. Staggered sentencing programs were pioneered by Judge James Dehn in Minnesota. For more information on his program, see the Innovative Program section of this report.

- **Consider home confinement with electronic monitoring** and sobriety testing, where appropriate. It relieves jail overcrowding and is a low cost, acceptable alternative to jail if the sanction period is longer than jail and if it is used in conjunction with treatment and other behavior reinforcing mechanisms.

Under home confinement, offenders are ordered by the court to be at home during specified hours, allowing for pre-scheduled periods of work or treatment. It permits the offender to stay in the community, maintain employment and avoid the stigma of incarceration. The costs of equipment, installation and monitoring should be paid by the offender.

Numerous research studies have found home confinement with electronic monitoring to be effective. A study of the Los Angeles County Electronic Monitoring/Home Detention program found one year after entering the program the recidivism rate for offenders was cut by about 33 percent. Offenders said the program was effective because it offered monitoring, structure and support for an extended time period (*Jones, Lacey, and Wiliszowski 1996*).

Based on information gathered from the 2003 Combating Hardcore Drunk Driving sourcebook, 36 states and the District of Columbia permit this sanction.

- **Utilize dedicated detention facilities**, where available. They provide confinement in conjunction with supervised alcohol treatment services. Detention usually ranges from two weeks to 90 days. These facilities, dedicated to DWI offenders, offer a sentencing alternative for multiple DWI offenders and help ease over crowding at traditional correctional facilities.

Some DWI jails, which are used throughout the country, operate similar to residential treatment programs. Others operate as lock-up facilities with a heavy emphasis on treatment and reform. In some cases, offenders are permitted to volunteer for these types of facilities.

In Suffolk County, the courts and the penal system work together, giving the offender a choice of either being sentenced to the state penitentiary for two or three years or fulfilling their sentence through a DWI program that involves spending 6 months in the Suffolk County DWI jail followed by a 5-year intensive probation program. If they violate the terms of their sentence or probation at any time during the program, they must return to the state

penitentiary and serve their full sentence. This program has been highly successful because of the combination of long-term treatment combined with close supervision and follow-up over a long period of time. The offender is highly motivated to change his or her behavior.

- **Supplement incarceration with treatment and aftercare.** When confinement is necessary, including home confinement, researchers recommend counseling and treatment to deal with addiction and lifestyle changes as deemed necessary by a thorough assessment of the offender. Incarceration alone, although feared, does not teach alternative behavior for individuals with alcohol-related problems. A research study in California found first-time offenders sentenced to jail had almost double the number of subsequent DWI convictions as offenders assigned to treatment and license restriction (*DeYoung 1997*).
- **Avoid substituting community service for harsher sanctions.** As a stand-alone alternative to harsher sentencing, community service appears to have little beneficial effect on hardcore offenders. The Century Council, NTSB and MADD all recommend eliminating the federal traffic safety provision establishing community service as an alternative to incarceration as outlined in TEA-21. Difficulties of the program include finding suitable jobs, liability risk, the cost of supervision and the offender's failure to provide the service. Treatment professionals note community service may not be effective because it focuses on punishment without addressing underlying behavior contributing to alcohol abuse.

## DWI COURTS

Special DWI courts, which are gaining popularity around the country, provide focused, comprehensive attention to the issues of drunk driving and enlist many of the strategies needed to build a box around hardcore drunk drivers. In most courts, a heavy caseload of DWI offenders is intermingled with a variety of proceedings ranging from car theft to murder. DWI courts, which offer extensive supervision, rehabilitation and treatment programs, allow the judge and prosecutor to specialize in DWI cases and keep those cases from getting lost on the docket. DWI courts provide extended judicial monitoring of hardcore drunk driving offenders and have been developed to place drunk driving offenders into programs designed to promote recovery, reduce recidivism and effect behavioral change. These courts usually include close supervision from judges and treatment providers, including regular BAC testing and offender accountability. This approach has yielded promising results in various parts of the country. It is supported by a majority of judges surveyed, who recommended the use of DWI courts be expanded (*Voas and Fisher 2001*).



## OTHER ACTIONS JUDGES CAN TAKE TO BETTER PREPARE THEMSELVES FOR hardcore DRUNK DRIVING CASES

- Be aware that hardcore drunk drivers often look and behave differently in court from their irresponsible behavior on the road.
- Encourage and participate in judicial DWI seminars and request a hardcore drunk driver focus. Take advantage of judicial educational opportunities across the country. For example, The National Judicial College in Reno, Nevada, offers a course called “DUI Primer for New Judges: Impaired Driving Case Fundamentals.”
- Develop or obtain an up-to-date list of all local alcohol treatment programs with descriptions of the services they provide.
- Create and maintain a list of sentencing options. “I have been accused of cookie cutter justice,” said Judge William F. Todd, Jr., of Rockdale County, Georgia. “But I keep my sentencing information on Excel. It helps me to be consistent in sentencing. A person’s BAC level and number of prior offenses determines their jail sentence.” (See Appendix B for a sample of DUI statistics he gathers for sentencing considerations.)
- Refer to other resources, such as:

DWI information and sentencing tools available through the internet. One such tool is New Mexico’s DWI Sentencing Calculator for magistrates and municipal court judges. The interactive program from the University of New Mexico Judicial Education Center provides the minimum and maximum sentencing requirements and options according to state statute after the judge enters the circumstances of a particular case. The program, which is based on New Mexico law, allows judges to quickly calculate the sentence ranges applicable to a particular case (New Mexico Judicial Education Center 2003). However, for hardcore offenders, no automated approach can replace reasoned judgment based on a careful evaluation of the nature of the offender’s problem.

A Virtual DWI Trial is also offered online by the University of New Mexico Judicial Education Center and, again, is based on the laws in New Mexico. According to the website, the program addresses common issues in a criminal trial and issues unique to DWI through a DWI trial simulation. Judges can make procedural and legal decisions in a situation similar to what they will deal with in everyday life, and thus gain experience in the (virtual) courtroom. The simulated DWI trial uses video testimony where the user acts as judge,

reading or listening to testimony, ruling on objections, and when the testimony is over, making a judgment on the charge or charges. Then the user sentences the defendant on each charge. After sentencing the user receives helpful feedback on all of his or her rulings, judgment and sentence. It takes approximately 30 minutes to an hour to go through the trial. The website is <http://jec.unm.edu/dwi/index.asp>.

**DWI/DUI Benchbooks.** For example, Colorado's DUI Benchbook is written by judges, for judges and covers the step-by-step procedures for conducting a DUI trial. New Mexico's DWI Benchbook is intended to serve as a comprehensive resource guide for trial courts in handling criminal proceedings involving DWI and other alcohol-related offenses.

## INNOVATIVE PROGRAMS/PROMISING PRACTICES

### STAGGERED SENTENCING WITH INTENSIVE PROBATION DISTRICT COURT, ISANTI COUNTY, MINNESOTA

Justice James Dehn's approach to DWI sentencing splits an offender's jail sentence in thirds. The offender serves the first segment immediately. After the first segment of incarceration is completed, the offender leaves jail on intensive supervision probation for a year before serving the second segment. Following this the offender receives another year out of prison on intensive supervision probation before serving the last portion of his or her sentence.

The process can be ended prematurely in the event that the offender proves to Justice Dehn that he or she has reformed. When this occurs, Justice Dehn waives the rest of the offender's sentence. However, if the offender commits another DWI offense while out of jail, he or she is sent immediately to jail to serve out the remainder of the sentence.

The staggered sentencing model has four key components (*Cleary 2003*):

1. **A staggered incarceration period.** Under this program, the court places the offender on probation for several years and orders the executed period of incarceration to be served in two or more installments during that period. Those installments are spaced several months to one year apart, and the offender is given specific dates to report for incarceration. The first incarceration period begins immediately.
2. **Active participation by the offender.** If the offender can remain abstinent and is involved in a sobriety group (such as Alcoholics Anonymous), the offender can file a motion about one month before the next scheduled jail date to request forgiveness of all (or a portion) of the next period of incarceration (can also request to have a segment of the alcohol monitoring period forgiven or reduced.) An offender who doesn't file a motion must serve the next incarceration segment as scheduled. A failure to appear to serve an incarceration segment would be a probation violation and could result in additional sanctions being imposed.
3. **Remote electronic alcohol monitoring (REAM)** is ordered at the initial sentencing, usually in segments of 30 days per year, with frequency and timing determined by the specific circumstances of the offender. The monitoring results are weighed heavily in subsequent hearings.

4. **Clearly articulated consequences for specific violations** are laid out at the initial sentencing. For example, usually an offender is informed that any arrest for a new DWI violation will result in the revocation of the person's probation and immediate incarceration for the entire period of stayed sentence remaining.

For the past few years Judge Dehn has used this staggered sentencing approach on an experimental basis. Out of 60 persons sentenced in this manner, only three (*as of April 2002*) committed subsequent DWI offenses in four years. Other Minnesota judges (*as many as 15*) are planning to implement staggered sentencing as a way to reduce recidivism.

### **DWI INTENSIVE SUPERVISION PROGRAM (DISP) 4TH JUDICIAL DISTRICT IN OREGON**

Judge Dorothy Baker works exclusively with drunk driving offenders. Her approach to handling drunk drivers is called the DWI Intensive Supervision Program (*DISP*). The focus of this program is to treat each case individually and tailor the sentence to the individual in order to change that person's life.

The first step for any offender in Judge Baker's program is to abstain from alcohol use. A change in lifestyle is the program's second step. Before any of this can occur, the offender must submit to a plea agreement. Judge Baker then reviews the case with the offender from a broad legal perspective, followed by an in-depth examination of the offender's lifestyle, including the nature of the offender's alcohol abuse. The information gleaned from the interview aids Judge Baker in determining an effective sentence.

During the three years of Judge Baker's program, offenders must abide by the following regulations:

- Work at least 35 hours per week;
- Be involved in a non-alcohol-related social activity;
- Undergo lie-detector tests;
- Meet with a parole officer;
- Participate in a follow-up meeting with Judge Baker 45–90 days after sentencing; and
- Sign a pledge, along with the rest of the offender's household, that there will be only one car per licensed driver and that all keys to the car will be kept away from the offender. Additionally, no drugs or alcohol will be allowed in the home.

The results of Baker's program are encouraging. In the past three years her program has maintained a slightly greater than one percent recidivism rate.

## INDIVIDUALLY TAILORED SANCTIONS HANCOCK COUNTY, INDIANA SUPERIOR COURT #2

Judge Richard D. Culver's program receives all of the DWI and alcohol offenses as the result of a local rule that routes those cases to Superior Court #2. Three full-time alcohol and drug certified probation officers assist Judge Culver by overseeing the alcohol and drug offender cases.

The goal of Judge Culver's program is to achieve rehabilitation without endangering public safety. The court designs an appropriate sentence by choosing from a menu of alternative programs that promote rehabilitation while also preserving public safety. The menu of sentencing alternatives includes jail sentences, electronic home detention, probation, ignition interlock, abstinence, Alcoholics Anonymous, outpatient substance abuse counseling, inpatient treatment and a jail intervention program that provides counseling for those in custody. The court also uses a sober life program that includes counseling and Antabuse, a medication to prevent drinking. The goal of each sentence is to impose a fair penalty for the defendant, protect society from relapse, and provide treatment to break the cycle of recidivism.

Programs are tailored to each offender and center on personal responsibility. If an offender's drug test shows a violation, a warrant officer will arrest the offender within 48 hours. The program integrates involvement from the entire community — law enforcement, defense counsel and prosecuting attorneys as well as the offenders' families who agree to provide support for Culver's efforts.

## COMBINING TRADITIONAL AND ALTERNATIVE SANCTIONS ROCKDALE COUNTY, GEORGIA

Judge William Todd developed a program to use in the State Court of Rockdale County, Georgia that combines traditional and alternative sanctions that are individually tailored to the drunk driving offender's needs. The program works to ensure consistency by keeping detailed records of the facts of each drunk driving case including the sentence handed down.

The program carefully includes a pre-sentence investigation done by Judge Todd who draws upon a database that his court created and maintains. Judge Todd considers specifics of a case (*i.e. the past record, BAC, presence of other drugs, crash/injuries*) in determining jail time. In sentencing, Judge Todd relies on rehabilitative measures such as counseling, victim impact panels, Alcoholics Anonymous meetings, and essays.

For those offenders sentenced to probation, Judge Todd works to monitor compliance with probation conditions by employing restrictive measures such as work release, house arrest, frequent meetings with a parole officer, random alcohol and drug testing, alcohol treatment,

ignition interlock devices and the seizure of license plates. He backs up his program with swift punishments for parole violations including arrest warrants, weekly hearings, and stricter probation modifications. Conversely, compliance is rewarded with gradual easing of restrictions.

Judge Todd's program was evaluated for the National Highway Traffic Safety Administration (*NHTSA*). The study compared Judge Todd's court with another local court where only the minimum sentence was imposed. The study found that recidivism in Judge Todd's program was far lower (about one-half) than that of the other local program using minimum sentences. The study also concluded that the Todd Program could be implemented in other courts that are interested in developing a program to reduce recidivism among drunk driving offenders (*Jones and Lacey, 1998*).

## CONCLUSION

Judicial leadership, persistence and creativity can lead to significant reductions in hardcore drunk driving. More lives will be saved — and changed — as more judges become aware of the idiosyncrasies of hardcore drunk driving cases and implement the strategies, tactics and programs needed to combat them.

To keep these drivers in check and increase the chances that they don't drive drunk again, judges need to find ways of efficiently but thoroughly thinking through a driver's sentence. By means of comprehensive sentencing, judges can build a box around the hardcore drunk driver that not only protects the public but demands behavioral changes. The strategies and sanctions that form this box protect the public by effectively quarantining the offender, either physically or by restricting access to an automobile. The strategies and sanctions that form this box demand behavior change, which is the offender's only means to exiting and returning to a normal, unrestricted life.

Every judge may have his or her own methods for modeling and constructing a sentencing box, but the important thing is that the strategies and sanctions work together. Judges can build an effective sentencing box if they:

- Recognize high BAC as an indicator of HCDD;
- Restrict plea bargaining;
- Restrict diversion programs;
- Consider pretrial intensive supervision programs;
- Mandate alcohol assessments or evaluations for all hardcore drunk drivers;
- Conduct pre-sentence investigations or interviews;
- Impose meaningful fines;
- Introduce measures to reduce failure-to-appear;
- Employ the use of vehicle sanctions;
- Order the installation of offender-funded ignition interlock;
- Place hardcore offenders on intensive monitoring, supervision and probation;
- Consider staggered sentencing with intensive probation;
- Consider home confinement with electronic monitoring and sobriety testing;
- Utilize dedicated detention facilities;
- Supplement incarceration with treatment and aftercare;
- Avoid substituting community service for harsher sanctions.

Judges should also support:

- State laws making look-back periods a minimum of 10 years;
- Statewide tracking and recordkeeping;
- Effective case flow management.

Every hardcore drunk driving case presents a vexing challenge as well as a tremendous opportunity to change and save lives. Not every element works for every defendant, nor does every program work for every judge. But the strategies, tactics and programs described here provide a resource for judges and judicial educators as they address the complexities of reducing hardcore drunk driving.

# THE NATIONAL HARDCORE DRUNK DRIVER PROJECT

## THE NATIONAL AGENDA: A SYSTEM TO FIGHT HARDCORE DWI

**The Goal:** To protect the public by reducing the recidivism of hardcore drunk drivers.

**The Strategy:** Mobilize an effective campaign to curtail hardcore drunk driving based on a coordinated system of mutually reinforcing components. Special criminal charges of Aggravated DWI and Hardcore DWI, with associated sanctions and remedial treatment, can provide the focus for such a system.

**The Rationale:** A coordinated system is necessary to provide the framework needed to close loopholes in existing laws and programs, enact needed legislation, and ensure that the responsible agencies and organizations work together effectively to address the problem.

For those states choosing to adopt them, special charges reinforce a coordinated system by requiring immediate identification and stipulating appropriate punishment and treatment that, combined, act to reduce recidivism. By calling attention to the serious nature of the crime, a higher level charge acts as a general deterrent.

**Objectives and Tactics:** Research shows that a system to deter, detect, punish and change the behavior of hardcore drunk drivers should be based on swift identification, certain punishment and effective treatment. An important factor for success is an accountable statewide planning group or panel, with representatives from pertinent state agencies and interested organizations, to spearhead change and monitor effectiveness.

## APPENDIX A

### SWIFT IDENTIFICATION

- Focused Enforcement Strategies and Support Technologies
- Statewide DWI Reporting System
- More Severe Consequences for Refusal to Submit to Chemical Test

### CERTAIN PUNISHMENT

- Administrative License Revocation (ALR)
- Administrative Vehicle Immobilization or Plate Seizure
- Mandatory Alcohol Ignition Interlock
- Home Confinement with Electronic Monitoring
- Judicial Education and DWI Courts

### EFFECTIVE TREATMENT

- Early Intervention
- Assessment-Based Programs
- Mandatory Participation
- Intensive Monitoring/Supervision
- Dedicated Detention Facilities



# DUI STATISTICS CRITERIA

This is the sheet Judge William F. Todd, Jr. uses in the courtroom for DUI cases. He compiles this statistical information into a bench book, which he then uses as a history of previous cases when discussing sentencing with attorneys during pre-trials.

Name: \_\_\_\_\_  
Case No.: \_\_\_\_\_  
Address: \_\_\_\_\_  
Date of Offense: \_\_\_\_\_  
Driver's History: \_\_\_\_\_  
Date of Sentence: \_\_\_\_\_  
Lifetime DUI's: \_\_\_\_\_  
DUI's in 5 Years: \_\_\_\_\_  
Alcohol Reading: \_\_\_\_\_  
Sex: \_\_\_\_\_

Age: \_\_\_\_\_  
Race: \_\_\_\_\_  
County Resident: \_\_\_\_\_  
Where Was Defendant Drinking? \_\_\_\_\_  
Accident Involved:  Yes  No  
Jail Time: \_\_\_\_\_ Days  
Marital Status: \_\_\_\_\_

## APPENDIX B

Fine Amount: \_\_\_\_\_  
Work Release:  Yes  No Number of Days \_\_\_\_\_  
Employed:  Yes  No  
Dependent Children: \_\_\_\_\_  
AA Meetings:  Yes  No  
Were You Driving Your Own Car?  Yes  No  
Victim Impact Panel: \_\_\_\_\_  
House Arrest:  Yes  No Number of Days \_\_\_\_\_  
Electronic Monitoring:  Yes  No  
Breath Test:  Yes  No  
Drug Test:  Yes  No  
DUI Risk Reduction:  Yes  No  
Drug/Alcohol Evaluation:  Yes  No  
Interlock Device:  Yes  No  
Nolo Plea:  Yes  No  
Repeat Offender:  Yes  No

NOTES: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



## SENTENCING BOX STRATEGIES AND SANCTIONS

Every judge may have his or her own methods for modeling and constructing a sentencing box, but the important thing is that the strategies and sanctions work together. Judges can build an effective sentencing box if they:

- Recognize high BAC as an indicator of HCDD;
- Restrict plea bargaining;
- Restrict diversion programs;
- Consider pretrial intensive supervision programs;
- Mandate alcohol assessments or evaluations for all hardcore drunk drivers;
- Conduct pre-sentence investigations or interviews;
- Impose meaningful fines;
- Introduce measures to reduce failure-to-appear;
- Employ the use of vehicle sanctions;
- Order the installation of offender-funded ignition interlock;
- Place hardcore offenders on intensive monitoring, supervision and probation;
- Consider staggered sentencing with intensive probation;
- Consider home confinement with electronic monitoring and sobriety testing;
- Utilize dedicated detention facilities;
- Supplement incarceration with treatment and aftercare;
- Avoid substituting community service or harsher sanctions.

## APPENDIX C

Judges should also support:

- State laws making look-back periods a minimum of 10 years;
- Statewide tracking and record keeping;
- Effective case flow management.



## BLOOD ALCOHOL EDUCATION

Although every state has DWI/DUI laws that indicate what the illegal blood alcohol concentration (BAC) limit is, national surveys have indicated that over 70% of people polled do not know the BAC limit in their state. Additionally, there is an awareness gap relating to how alcohol affects an individual's BAC and how long of a time period is necessary for it to return to zero.

Not only is this information necessary for individuals to make responsible decisions relating to consumption of beverage alcohol and driving, but many times, this information could be helpful in the adjudication of DWI/DUI cases. As a result, judges, judicial educators and the general public need to have access to BAC education.

The Century Council, in cooperation with the University of Illinois at Urbana-Champaign, created the Blood Alcohol Educator (BAE) CD-ROM to address the need to educate adults about their state laws and how drinking affects an individual's BAC level.

## APPENDIX D

Endorsed by countless national organizations and companies, law enforcement and traffic safety organizations and campus administrators, the BAE is an interactive user-friendly program available in both English and Spanish. Before entering the program's virtual bar, visitors must click on their home state to learn their state's legal limit. Upon entering, visitors learn about how alcohol influences their individual BAC level based on their gender, weight, type of drink, and their rate of consumption and learn how eating a full meal can affect their BAC. The program also displays how the same amount of alcohol affects individuals of a different weight and gender and will clock the time until an individual's BAC level will return to zero. The program also highlights the fact that regardless of the drink (beer, wine or distilled spirits) the effects on an individual are the same.

The Century Council offers this educational program free of charge either on CD-ROM or via the internet at [www.B4UDrink.org](http://www.B4UDrink.org). To order a CD-ROM contact the Council at (202)637-0077 or order on-line at [www.centurycouncil.org](http://www.centurycouncil.org).



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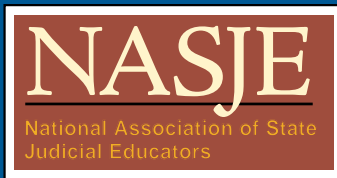
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