

DWI System Improvements for Dealing with Hard Core Drinking Drivers

PROSECUTION



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DWI System Improvements for Dealing with Hard Core Drinking Drivers

Prosecution

Robyn D. Robertson and Herb M. Simpson

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The Traffic Injury Research Foundation

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TIRF is an independent, charitable road safety institute. Since its inception in 1964, TIRF has become internationally recognized for its accomplishments in a wide range of subject areas related to identifying the causes of road crashes and developing programs and policies to address them effectively.

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This report is the second in a series dealing with DWI system improvements. The first dealt with problems in the detection and apprehension of hard core drinking drivers. The current report examines ways to improve the prosecution of hard core drinking drivers. It would not have been possible without the assistance and participation of prosecutors from across the United States.

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The opinions expressed in this report are those of the authors and do not necessarily represent the views or opinions of the sponsor, the offices of the participating District Attorneys, or individual prosecutors who participated in this project.



List of Abbreviations Used in the Report

APRI	American Prosecutors Research Institute
BAC	Blood Alcohol Concentration
CCJ	Committee on Criminal Justice
CDAA	California District Attorneys Association
COSCA	Conference of State Court Administrators
DMV	Department of Motor Vehicles
DWI	Driving While Impaired. See footnote, page 2
FARS	Fatal Accident Reporting System
FBI	Federal Bureau of Investigation
FTA	Failure to Appear
HGN	Horizontal Gaze Nystagmus
NCIC	National Crime Information Center
NCSC	National Centre for State Courts
NDAA	National District Attorneys Association
NHTSA	National Highway Traffic Safety Administration
NIC	National Institute of Corrections
NTLC	National Traffic Law Centre
NTSB	National Transportation Safety Board
PBT	Preliminary Breath Test
PSR	Pre-sentence Report
SFST	Standardized Field Sobriety Test
SSS	Statutory Summary Suspension Hearing



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Executive Summary —●

Synopsis

- ◆ This is the second report from a major study designed to identify ways to improve the efficiency and effectiveness of the DWI¹ system for dealing with hard core drinking drivers.
- ◆ The present report underscores the need for system improvements by identifying key problems in the prosecution of DWI offenders and recommends practical solutions derived from prior research and validated by the experiences of several hundred prosecutors who participated in the project.
- ◆ Forthcoming reports will examine system improvements related to the adjudication/sanctioning and monitoring of hard core offenders.

Background

- ◆ Unprecedented declines occurred in the drinking-driving problem during the 1980s and early 1990s.
- ◆ These improvements have been largely attributed to changes in socially responsible individuals, who were drinking and driving less often and consuming less alcohol when they drove.
- ◆ Since the mid-1990s, however, declines in the problem have not been sustained, suggesting that the characteristics of the problem have changed.

¹ The abbreviation DWI (driving while impaired, or intoxicated) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) and DUI (driving under the influence), and in some cases they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with hard core drinking drivers.



- ◆ A very significant portion of the problem is accounted for by a high-risk group of drinking drivers referred to variously as hard core drunk drivers, chronic drunk drivers, persistent drinking drivers, or drivers with high blood alcohol concentrations (BACs).
- ◆ This dangerous group of offenders has since been declared a priority by virtually all major government and non-profit agencies in the U.S.
- ◆ In response to this concern, new programs and policies have been developed and implemented to deal with hard core drinking drivers -- e.g., many states have passed legislation imposing stiffer sanctions on offenders with BACs in excess of .15; forty-one states have passed some form of vehicle incapacitation law.
- ◆ Great strides have been made on the legislative front and continued efforts are needed.
- ◆ At the same time, there is growing evidence that legislation is not enough, since hard core repeat offenders are “slipping through the cracks” -- in part, because their familiarity with the system allows them to circumvent it.
- ◆ Changes are needed that will improve the efficiency and effectiveness of the DWI system for dealing with hard core drinking drivers.

Legislation and regulation are necessary but not sufficient for success.

Objectives

- ◆ This project has as its primary goal focusing attention on the need for improvements in the DWI system, by identifying priority problems and recommending practical solutions.
- ◆ The study is examining the entire spectrum of policies, programs and practices that target hard core drunk drivers -- from initial apprehension and charging by the police, through prosecution and adjudication, to the application of sanctions, and follow-up monitoring by probation and parole.
- ◆ The current report deals with the need for improvements in the prosecution phase of the DWI system.

Goal: Identify priority problems and recommend practical, cost-effective solutions.



Approach

- ◆ The project involved a series of steps designed to illustrate the need to improve the efficiency and effectiveness of the DWI system's response to hard core drinking drivers.
- ◆ A comprehensive literature review was used to generate problems identified by previous research. These problems were synthesized and condensed into a short-list of priority issues.
- ◆ This list formed the basis for discussion in a series of workshops held in six states with 28 prosecutors experienced with DWI prosecutions, from 23 different jurisdictions. Workshop participants verified, expanded and prioritized the problem list and developed a set of solutions.
- ◆ To increase the generality of these findings and obtain further information about such things as the frequency with which various problems are encountered, a major survey of prosecutors was conducted.
- ◆ A total of 390 misdemeanor and felony prosecutors from 35 states responded to the survey, ensuring the findings are representative of the problems facing prosecutors across the country.

Findings and Recommendations

- ◆ Prosecutors consistently acknowledge the need for improvements in the DWI system to enhance the prosecution of hard core drinking drivers.
- ◆ Evidentiary issues are the primary concern of prosecutors. Insufficient evidence, the poor quality of evidence, or other technical aspects associated with evidence have made the prosecution of repeat DWI offenders frustrating, discouraging and even intimidating to some prosecutors.
- ◆ A linchpin to successfully improving the efficiency and effectiveness of DWI prosecution is to improve the quality and quantity of evidence.



- ◆ In addition to the need for better evidence, a variety of other problems and needed changes to the prosecution system were identified by prosecutors.
- ◆ Prosecutors identified ten key problems that impede the effective prosecution of hard core drinking drivers, and recommended ways to overcome these problems. The problems, in order of priority, include: evidentiary issues, test refusal, motions and continuances, incomplete records, inadequate or inconsistent penalties, failure to appear, legislative complexities, expert witnesses, plea agreements, and prosecutor training.

◆ **Evidentiary Issues**

- *The problem:* The effective prosecution of DWI cases depends heavily on the quality and quantity of evidence gathered by an officer during a DWI investigation, the precision with which such evidence is documented, and the accurate presentation of that evidence in court. When the evidence is compromised by errors or omissions during its collection, documentation or presentation, it diminishes the prosecutor's ability to obtain a conviction.
- *The consequences:* The consequences of evidentiary problems are straightforward and profound. First, it means that the appropriate and needed sanctions and/or treatment are not imposed because of potential dismissals, acquittals, or unsatisfactory plea agreements. Second, it means that a conviction for an alcohol-related offense may be avoided by the defendant, which then prevents them from being identified as a repeat offender subsequently.
- *The solution:* Prosecutors recommend a number of solutions that can improve the quality of evidence collected, documented and presented in a DWI prosecution.

Prosecutors urge the consistent use of sobriety tests to facilitate the presentation of evidence in court. Moreover, they recommend the use of validated tests, in particular, the Standardized Field Sobriety Test (SFST), which must be administered according to protocol, to improve the strength of the evidentiary test results.



The need for greater training in DWI investigations and arrests has already been acknowledged by police officers (Simpson and Robertson 2001) and prosecutors agree that this would improve the collection and documentation of evidence.

Prosecutors also believe that better communication is required between them and police officers. Each professional group has a unique perspective with regard to the collection, documentation and presentation of evidence and they need opportunities for dialogue to improve understanding of their respective issues and, thereby, the effectiveness and efficiency of the system.

97% of prosecutors support initiatives that will improve communication with police officers.

◆ Test Refusal

- *The problem:* Test refusal in the broadest sense encompasses a variety of activities, including refusal to cooperate with police questioning, refusal to submit to SFSTs, refusal to take a Preliminary Breath Test (PBT) and refusal to take a chemical BAC test at the station following an arrest for DWI. The latter is the most critical issue because of the importance of the BAC test result to a successful prosecution. Almost $\frac{3}{4}$ of the prosecutors surveyed reported that a BAC is the single most convincing piece of evidence that can be presented to a jury.

$\frac{3}{4}$ of the prosecutors said that a BAC result is the single most convincing piece of evidence.

Unfortunately, as detailed in our enforcement report (Simpson and Robertson 2001), test refusal is by no means uncommon – officers experience some form of refusal in $\frac{1}{3}$ of their DWI investigations. Chemical test refusal rates vary substantially – from 2% to 71% (Jones et al. 1991; Tashima and Helander 2000) but the average for the nation has been estimated at approximately 20% (Jones et al. 1991). Of considerable importance, 92% of prosecutors reported that test refusal is more common among repeat offenders.



The variability in refusal rates appears to be a function of the penalty structure associated with chemical test refusal. The sanctions for test refusal are far less severe than those for taking the test and failing it.

The consequences: Chemical test refusal impedes the prosecutor's ability to sustain charges during the pre-trial process. Without hard evidence, the success of the case relies heavily on the accuracy and detail found in reports completed by the officer and the strength of his/her observations, much of which is open to interpretation without actual test results. At trial, the lack of BAC evidence also makes it more difficult for a prosecutor to refute alternative theories of the crime.

As a result, when a defendant is allowed to refuse testing, it is more likely that he/she will successfully avoid conviction on DWI charges altogether and/or avoid being identified as a repeat offender if they appear subsequently on another DWI charge.

Chemical test refusal also significantly impacts what penalties a prosecutor can request, so a conviction without a BAC result means that the offender often faces lesser sanctions.

- *The solution:* Prosecutors have identified several solutions for dealing with the problem of test refusal.

They recommend making test refusal a criminal offense. This ensures a record is available so that subsequent DWIs will be treated accordingly. To date, only 11 states have passed legislation making test refusal a criminal offense or sentencing enhancement.

Whether test refusal is an administrative or criminal offense, prosecutors recommend that the penalties be sufficient to remove the benefits of refusing. Nominal penalties for refusal encourage this behavior, especially when compared to the substantial penalties faced upon conviction of DWI charges.

To date, only 11 states have legislation making test refusal a criminal offense or sentencing enhancement.



◆ Motions and Continuances

- *The problem:* Motions are written arguments initiated by either the prosecution or the defense regarding how a particular case should proceed. Governed by strict procedural rules, they are commonly initiated during pre-trial proceedings (but are not limited to this phase) and cover a broad range of issues including: discovery, the admissibility of evidence, limits placed on the use of particular kinds of evidence, and requests for continuances.

Although motions have a purpose and function in ensuring the fairness of the trial process, they can be overused or used in a “frivolous” manner in an effort to delay proceedings. Prosecutors often encounter difficulty, particularly when responding to evidentiary motions, since the availability of, and access to, legal research and reference materials may be lacking.

- *The consequences:* Excessive motions can both complicate and prolong the trial process, and when prosecutors are unable to respond adequately to motions filed, the defense is more likely to be successful in obtaining a dismissal or acquittal. Moreover, the lack of adequate legal resources needed to respond to technical motions may result in the exclusion of valuable evidence and greatly diminish a prosecutor’s ability to obtain a conviction.

Excessive continuances increase the time between the commission of the offense and imposition of sanctions, and diminish the likelihood of a conviction, thereby eroding any deterrent effect.

- *The solution:* Prosecutors identified two principal ways to reduce the impact of frivolous motions and unreasonable requests for continuances.

They would like better access to current materials that would assist them in promptly responding to some of the more complex motions filed by the defense. In addition, prosecutors would like to see more timely information – newsletters or journals – that keeps them abreast of new rulings, especially with regard to scientific evidence. Although some progress has been made in this area, it is evident that more needs to be done to improve the efficiency



with which needed state-specific information is transmitted to, or can be accessed by, prosecutors.

To ensure that a case is processed in a reasonable timeframe almost half of the prosecutors in the survey (45%) want to see case processing guidelines adhered to more closely.

◆ Records

- *The problem:* Records containing data and information pertinent to the prosecution of DWI cases are maintained by a diversity of agencies. Such records vary in terms of how up-to-date the information is, their content (both in terms of the nature of the information and its scope), accuracy, completeness as well as ease and timeliness of access.

- *The consequences:* Inaccessible, incomplete or inaccurate records and associated documentation impede the proper identification of repeat offenders and result in ineffective or inappropriate sanctioning. The gravity of this problem was illustrated by the findings from a recent study conducted at Brown University on the accuracy of DWI charges filed by Rhode Island police agencies.

As many as 40% of repeat DWI offenders are incorrectly charged as first offenders.

Approximately 40% of DWI offenders were incorrectly charged as a first-offender instead of a repeat offender (Grunwald et al. 2001). Nationally, our survey results show that prosecutors estimate at least 15% of defendants are incorrectly charged as a first-offender. Those offenders that are not charged appropriately face lesser sanctions and are often able to negotiate diversion programs or minimal plea agreements.

- *The solution:* Prosecutors want all key agencies to maintain appropriate records for the look-back period specified in DWI statutes. Prosecutors are often unable to locate the paper record of offenses that should be included in the look-back period and, consequently, defendants are not consistently identified as repeat offenders and subject to the appropriate sanctions.

Prosecutors support standardized court reporting practices and the development of guidelines that establish the minimum necessary information



that should be included in these reports. This would greatly facilitate the prosecution of repeat offenders.

Driver abstract forms should be standardized so that prior convictions can be clearly established. This will enhance charging and sentencing. Almost all (94%) prosecutors surveyed agree that standardized record-keeping practices and driver abstracts would improve the prosecution of out-of-jurisdiction or out-of-state drivers.

94% of prosecutors believe that standardized record-keeping practices would improve the prosecution of out-of-state and out-of-county drivers.

Prosecutors also believe that records of diversion programs should be maintained so that repeat offenders can be identified and prohibited from evading harsher sanctions.

◆ Inadequate or Inconsistent Penalties

- *The problem:* Prosecutors believe that the penalty structure available to judges and/or the sanctions imposed in many DWI cases are inadequate (or applied inconsistently). DWI statutes in some states do not include significant tiered penalties for repeat DWI offenses. Tiered penalties refer to increasing penalties for each subsequent offense, regardless of whether or not there is a corresponding increase in the severity of the offense.

However, even in states that do have tiered sanctions for repeat offenses, these elevated penalties are not consistently imposed and/or may not be severe enough to deter repeat offenses. This can be a result of inadequate resources for sanctioning offenders, the outcome of plea agreements, judicial discretion and/or the cultural atmosphere of some jurisdictions, and a lack of opportunities for judicial training. Even in cases where mandatory minimum sanctions are specified by statute, they may not be consistently imposed for the same reasons.

- *The consequences:* The consequence of inadequate or inconsistently applied penalties is that offenders are not sanctioned effectively, thereby diminishing the specific and general deterrent effects. It is especially important to impose effective sanctions for repeat offenses to deal with the



persistence of the behavior. Because repeat offenders often avoid detection and apprehension, and can also avoid conviction even when apprehended, it is essential that effective sanctions are imposed in those cases where offenders are convicted.

- *The solution:* Prosecutors support the continued development of tiered penalties for repeat drinking drivers. They also believe that penalty structures should be carefully examined to ensure they will effectively deter future offenses. Those states that do not currently rely on tiered penalties for DWI offenses are strongly encouraged to examine this option. Those states that do have tiered penalties are urged to review the penalties in place and determine if they need to be enhanced.

Prosecutors believe that tiered strategies should include the development of stricter sentencing guidelines for repeat offenses to ensure that the sanctions specified in the legislation are imposed. Although it is important for judges to be able to adjust sentences according to case specifics, the sentencing guidelines should be the rule, rather than the exception. Three-quarters of the prosecutors surveyed (75%) strongly supported stricter sentencing guidelines that mandate harsher sanctions for repeat offenses.

Prosecutors feel that the development of more dedicated DWI courts and judges would improve the effectiveness of the criminal justice system's response to hard core drinking drivers because prosecutors and judges will work exclusively on DWI cases and thereby become more proficient and consistent.

The inadequate and/or inconsistent imposition of sanctions can arise indirectly from a lack of familiarity with technical issues pertaining to DWI, or more directly from a lack of confidence in the effectiveness of the penalties. These problems can be addressed in part by education and training. Almost all prosecutors (91%) surveyed believe that more DWI educational opportunities, such as workshops and conferences involving all criminal justice professionals, would be beneficial.



◆ Failure to Appear

- *The problem:* To avoid prosecution and/or conviction, offenders will sometimes simply fail to appear for arraignment or trial. When a defendant fails to appear, a bench warrant ordering the arrest of the defendant is issued by the presiding judge. However, as documented in our previous report on enforcement (Simpson and Robertson 2001), there are substantial problems associated with executing warrants. Accordingly, those who fail to appear are not likely to be apprehended or sanctioned. Warrants that are not executed for failure to appear relating to DWI offenses translate into defendants that are never prosecuted.

According to prosecutors in our survey approximately 22% of defendants fail to appear at some point in a typical DWI case. However, hard core drinking drivers are more familiar with the loopholes in the justice system and are more likely to fail to appear for either arraignment or trial because they are aware of the low risk of apprehension – indeed, 65% of prosecutors say that this behavior is more common among repeat offenders.

22% of defendants fail to appear at some point in a DWI case; 65% of prosecutors say this is much more common among repeat offenders.

- *The consequences:* By failing to appear on DWI charges, the defendant, if guilty, can often evade prosecution and conviction, most often because the police are unable to locate them. Limited resources impact the number of warrants that officers are able to execute, meaning that few offenders are returned to custody to face charges.
- *The solution:* Prosecutors identified three ways that the problem of failure to appear can be addressed. Defendants that have failed to appear on one or more occasions should be held in custody until trial. Another approach is to impose significant bail to ensure appearance when it is not practical to hold the defendant in custody.

As well, penalties for failure to appear need to be increased to reflect the severity of the crime, especially those committed by repeat offenders. In this context, efforts must also be made to ensure that the increased penalties can be imposed. Their mere presence will do little to deter offenders if they cannot be enforced.



◆ Legislative Complexities

- *The problem:* The remarkable growth in DWI legislation over the past two decades is unparalleled. This has strengthened DWI laws but has also served to complicate an already complex system.
- *The consequences:* The complexities in legislation at various levels have produced incompatibilities and inconsistencies within the system. In turn, this has created loopholes that provide opportunities for repeat offenders, in particular, to avoid identification and prosecution.
- *The solution:* Prosecutors have recommended a comprehensive legislative review to identify and correct inconsistencies and loopholes. Participation and cooperation from a broad range of sectors is needed to ensure the review is comprehensive and effective. Important stakeholders in this process include criminal justice professionals – police, prosecutors, judges, probation and parole officers – as well as representatives from the DMV and other agencies charged with maintaining key records, individuals from Traffic Safety Commissions who are often in a key position to implement and coordinate strategies between various groups, legislators and their representatives from the state and local levels who have an active role in this issue, and members of interest groups.

◆ Expert Witnesses

- *The problem:* Scientific and technical evidence from expert witnesses is often needed by prosecutors to support their case. Indeed, prosecutors estimate that they require some form of expert testimony in 56% of cases, especially those involving breath and blood analysis, retrograde extrapolation, or HGN. Such testimony may be unavailable due to a lack of funding, scheduling problems, or judicial decisions to exclude expert testimony.
- *The consequences:* When expert witnesses are either unavailable or not permitted to testify at DWI trials, the prosecutor loses valuable evidence that may have resulted in the conviction of a guilty defendant. Further, without an

Prosecutors estimate they require some form of expert testimony in 56% of cases.



expert witness to qualify the evidence or explain results, technical evidence may be incorrectly interpreted, or attributed greater or lesser weight than it should have, resulting in an inappropriate verdict. This may result in guilty defendants being acquitted instead of being sanctioned and, by avoiding conviction, they also avoid being identified as a repeat offender if apprehended again.

- *The solution:* To facilitate the prosecutor's decision about the potential need for expert testimony and to facilitate the identification and contact of experts in the event testimony is deemed necessary, it was recommended that a databank be created containing a record of expert testimony on various technical issues as well as the witnesses who provided it. The National Traffic Law Center (NTLC) does have some information on this subject. Additionally, some prosecutors feel that the State should hire a small number of expert witnesses on a permanent basis who can be called upon to testify at DWI trials on a priority basis.

Currently, in order to admit some newer scientific testimony, the prosecutor may be required to request a hearing, pursuant to *Frye v. U.S.* (1923) 293 Fed 1013. The *Frye* rule requires a demonstration to the court of the reliability and general scientific acceptance of the evidence prior to it being introduced in court. It is often difficult to have this evidence admitted because caseload demands and time constraints often prohibit these hearings. Prosecutors believe that once a Court of appropriate jurisdiction has recognized the admissibility of the evidence, the hearing requirement in each DWI trial to get this evidence admitted should be eliminated.

◆ **Plea Agreements**

- *The problem:* Despite the efficiency merits of plea agreements – negotiated settlements that can result in reductions of the charge and/or the sentence – it is commonly agreed that the use of plea agreements “undermines the integrity of the justice system” and the deterrent effect of criminal sanctions by allowing offenders to avoid mandated penalties. This may be especially true in the case of repeat drinking drivers. Anecdotal reports and survey



results from some prosecutors indicate that up to 75% of DWI cases are resolved with some form of a plea agreement.

- *The consequences:* The plea process can significantly reduce the penalties associated with a DWI offense and, thereby, both its specific and general deterrent effect. In addition, pleas to lesser charges prevent prosecutors from elevating charges from misdemeanors to felonies because prior convictions involving pleas may not be counted. Finally, this process detracts from the ability of the criminal justice system to identify repeat offenders, especially those that are allowed to plead to a non-alcohol offense.
- *The solution:* Prosecutors generally tend to be satisfied with the frequency of plea agreements and, on balance, believe that the negative consequences of reduced penalties are tolerable, relative to the benefits associated with plea agreements – namely, an efficient processing of cases. If caseloads were reduced substantially, plea agreements would be needed less. For this reason, only 18% of prosecutors surveyed would like to see the frequency of plea negotiations reduced.

However, prosecutors would like to see the contents of plea arrangements restricted – i.e., remove the opportunity for pleas to non-alcohol offenses and pleas in high-BAC cases, and they support the requirement for prosecutors to state the reasons for plea agreements on the court record if pleas are used in these instances.

◆ Prosecutor Training

- *The problem:* DWI cases have been referred to as a training ground for prosecutors as they are often handled by those new to the job. This is unfortunate given the complexities of DWI laws and the specialized defense attorneys that new prosecutors face. Almost half (48%) of the prosecutors in our survey reported that they did not receive adequate training or preparation in the prosecution of DWI cases before assuming their position. As well, some prosecutors indicate that it is difficult to hire and retain good prosecutors in this area

Half of the prosecutors said they did not receive adequate training or preparation in the prosecution of DWI cases.



– relatively high turnover rates exist in many offices. Although some prosecutors find working on DWI cases extremely challenging and rewarding, others are disappointed with the lack of recognition or reward involved.

- *The consequences:* Newer, less experienced prosecutors are more likely to hesitate to proceed to trial and may be more likely to negotiate an unsatisfactory plea. And, if a prosecutor is unsure about handling a misdemeanor DWI case, they are even less likely to feel confident about pursuing a felony DWI. Consequently, many offenders are not being sanctioned appropriately or are not being sanctioned at all.
- *The solution:* Almost all prosecutors (94%) would like to receive more training in the area of DWI prosecution and feel this would be a benefit – they would be better able to win convictions of guilty offenders.

Prosecutors would also welcome the opportunity to meet with other DWI prosecutors from surrounding jurisdictions and/or states in order to discuss common problems encountered in DWI prosecution, new case law, and new tactics for approaching these cases. Prosecutors would also like greater access to educational and reference materials.

Prosecutors also support the development of specialized training courts that would allow them to practice and learn in mock trial situations. Some attorneys also recommend the use of “turn-over” binders, which contain relevant notes and explanations with respect to specific issues involved in DWI cases. When the attorney moves on to another department, he/she would turn over the binder of relevant information to the next DWI prosecutor.

Prosecutors believe that the introduction of vertical prosecution – one prosecutor handling the case from start to finish – would improve the efficiency and consistency with which DWI cases are processed. Because more than one prosecutor may be involved in a DWI case this may create inconsistencies in prosecution, especially when a misdemeanor case becomes a felony.

Finally, prosecutors also believe, that in some instances, more recognition should be given to those who successfully and consistently prosecute DWI cases.



Summary

It should be evident from reading this report that the prosecution of a DWI case involves highly technical evidence, complex and often overlapping legal issues, and relies heavily on work completed by other agencies. The unprecedented growth in DWI legislation in the past decade has made an already complicated system even more so. Indeed, it has become so complex and technical that it is often frustrating, discouraging and even intimidating to some prosecutors. There is a need to streamline and simplify the prosecutorial process to improve its effectiveness and efficiency. This is a primary concern to prosecutors and a linchpin to successfully improving the DWI system.

In addition to this general recommendation a variety of specific changes to the DWI system can improve the prosecution of hard core drinking drivers. These improvements are organized below in terms of the general method by which this can be achieved.

◆ **Training and Education**

Prosecutors identified several areas in which training can improve the prosecution of hard core drinking drivers:

- ◆ enhanced on-the-job training of new prosecutors in the complexities of DWI evidentiary issues, trial proceedings, and legislation in general;
- ◆ specialized training courts that would allow prosecutors to learn to prosecute using technical, scientific evidence, to cross-examine witnesses with regard to scientific evidence and refresh their trial skills periodically;
- ◆ enhanced training of police officers at the academy in conjunction with more on-the-job experience in the collection of evidence to improve its quality and quantity; this is particularly important in the prosecution of the alcohol tolerant repeat offender; and
- ◆ continuing education for the judiciary to provide contemporary information on the effectiveness of alternative sanctions.



◆ **Communication and Cooperation**

Prosecutors believe that improved communication and cooperation with other professionals involved in the DWI system will facilitate the prosecution of hard core drinking drivers. They support:

- ◆ workshops with police officers, that would highlight evidentiary requirements for obtaining a conviction, keep officers informed about new case law, and allow police the opportunity to share with prosecutors the complexity, dynamics and realities of the arrest environment;
- ◆ the mentoring of newer prosecutors by those who have more experience;
- ◆ facilitating the use of blood evidence based on its greater reliability and validity;
- ◆ the use of a 'turnover' binder which contains learning notes on key issues and procedures in DWI cases. This binder would provide a source document for new or replacement prosecutors;
- ◆ the development of vertical prosecution that would allow one prosecutor to handle a DWI case from start to finish and eliminate confusion and unnecessary delays; and
- ◆ dialogue with legislators, criminal justice professionals and other stakeholders external to the justice system to undertake a comprehensive review of current DWI legislation and practices in order to improve the effectiveness and efficiency of the system.

◆ **Record Linkages, Availability and Access**

Records containing data and information pertinent to the prosecution of DWI cases are maintained by a diversity of agencies. Such records vary in terms of how up-to-date the information is, their contents (both in terms of the nature of the information and its scope), accuracy, completeness as well as the ease and timeliness of access.

Prosecutors require timely access to accurate, contemporary and comprehensive records to facilitate the filing of DWI charges and the subsequent prosecution of offenses. The importance of this has been underscored by numerous agencies, and



remains a critical need to improve the prosecution of hard core drinking drivers.

Prosecutors support the following changes to record systems:

- ◆ uniform driver abstracts;
- ◆ uniform look-back periods for driver and associated records that are consistent with look-back periods specified in criminal legislation;
- ◆ consistent and uniform records on offenders participating in diversion programs; and
- ◆ standardized court reporting practices.

◆ **Technology**

Prosecutors believe that greater use of technology can improve the efficiency and effectiveness with which they prosecute hard core drinking drivers:

- ◆ consistent, computerized access to Westlaw and related legal web sites as well as greater access to legal research materials and court rulings such as the Brief Bank maintained by NTLC; and
- ◆ development of an expert witness databank that tracks testimony and expert opinion on various kinds of evidence as is currently done in Connecticut.

◆ **Legislation and Regulation**

Prosecutors also identified a number of legislative changes that would improve the prosecution of hard core drinking drivers:

- ◆ increase bail amounts for defendants who have previously failed to appear, or require that these defendants be held for arraignment with higher bail amounts as a condition of release;
- ◆ reduce or eliminate hearing requirements once a court of competent jurisdiction has ruled as to the admissibility of certain kinds of evidence (e.g., HGN results);



- ◆ criminalize test refusal and allow evidence of refusal to be admitted in court or make refusal a rebuttal presumption of fact;
- ◆ increase penalties for test refusal and for failure to appear;
- ◆ greater use of tiered penalty systems that specify increased sanctions for repeat offenders; and
- ◆ stricter adherence to case processing guidelines to minimize unnecessary continuances or delays.



1.0 Background —●

Unprecedented declines in the drinking-driving problem occurred during the 1980s (NHTSA 1997; NTSB 2000; Simpson 1993; Sweedler 1994; U.S. Department of Health and Human Services 1988). Progress continued through the early 1990s, although the gains were far less impressive (NHTSA 1997; NTSB 2000). Progress halted altogether in the late 1990s (NHTSA 2000). Even more worrisome is the fact that alcohol-related crashes actually increased in 2000 (NHTSA 2000), and preliminary estimates for 2001 show this is unchanged (U.S. DOT 2002).

Various explanations have been offered as to why the substantial gains in the 1980s were not replicated in the 1990s (Simpson et al. 1994; Stewart and Voas 1994). One widely accepted explanation is that the characteristics of the drinking-driving problem changed (Beirness et al. 1998; Mayhew et al. 2000) and that continued progress on a similar scale would be challenging because of this.

The profound improvements observed in the 1980s have been attributed primarily to changes in the practices of so-called socially responsible individuals -- they were drinking and driving less often and had lower blood alcohol concentrations (BACs) when they did drink and drive. The same could not be said for a group of individuals who frequently drive after drinking, usually with very high BACs. This high-risk group of individuals did not show the same level of change and, as a consequence, now account for a significant part of the alcohol-crash problem. For example, in 2000, drivers with BACs of .15 and above accounted for nearly 80% of the drunk drivers killed in the U.S. (NHTSA 2000). As a spokesperson to the National Safety Council recently stated, "We've already deterred virtually all of the social drinkers. We're now down to the hard core of people who continue to drink and drive in spite of public scorn..." (Pickler 2001).

The importance of this high-risk group was extensively documented early in the 1990s in a report entitled, "The Hard Core Drinking Driver" (Simpson and Mayhew 1991), even though the legacy of concern about this group certainly pre-dates that report (e.g., Glad 1987; L'Hoste and Papoz 1985). By the end of the 1990s there was widespread



recognition that addressing the problem of hard core drinking drivers should be a national priority. Groups such as the National Transportation Safety Board, the National Highway Traffic Safety Administration, the Century Council, the American Legislative Exchange Council, Mothers Against Drunk Driving, and the National Commission Against Drunk Driving declared that the key to continued progress in the fight against drunk driving was dealing effectively with hard core offenders.

As more and more agencies accepted the importance of dealing with hard core drinking drivers, a variety of descriptive labels for this group was created -- e.g., "persistent drinking driver", "chronic drunk driver" and "high-BAC driver". Despite the variation in terms, all of them referred to individuals with a common set of characteristics -- they frequently drove after drinking; they usually had high BACs (often defined as a BAC in excess of .15); they had a history of arrests and/or convictions; and, many were alcohol dependent (Hedlund 1995; Simpson 1995; Simpson and Mayhew 1991).

Research shows that such individuals comprise a very small percentage of the population of nighttime drinking drivers -- less than 1% -- but they account for a very large percentage of the alcohol-related crashes occurring at that time -- in excess of 50% (Simpson and Mayhew 1991).

The magnitude of the problem created by the hard core and the apparent inability of the existing DWI¹ system to change their behavior led to a growing interest in identifying countermeasures that might be effective with this group. A number of proven and promising solutions were described in a second major report on this issue entitled, "Dealing with the Hard Core Drinking Driver" (Simpson et al. 1996).

Since that report was issued, many of the recommended measures have been implemented. Indeed, the 1990s proved to be a watershed for legislation targeting the hard core. Twenty-seven states passed legislation that imposes stiffer sanctions on offenders with BACs in excess of .15 (the BAC level at which the aggravated charges

¹ The abbreviation DWI (driving while impaired, or intoxicated) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) and DUI (driving under the influence), and in some cases they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with hard core drinking drivers.



apply varies from .15 to .20 across the states; McCartt 2002), explicitly recognizing the dangers posed by drivers with high BACs. Other states increased the charge from a misdemeanor to a felony, based on such things as prior convictions and aggravating factors, explicitly recognizing the dangers posed by repeat offenders.

And, this trend does not appear to have lessened. According to the Century Council, “in the 2000 legislative session, 42 states introduced nearly 300 pieces of legislation focusing...on the hard core drunk driver” (The National Hardcore Drunk Driver Project 2001). Forty-three states now have passed legislation for either the mandatory or discretionary use of alcohol ignition interlocks; and 41 have passed some form of vehicle incapacitation law (i.e., license plate removal, vehicle impoundment, immobilization, or forfeiture).

It is evident that great strides have been made on the legislative front. However, there is still room for improvement in the legislative arena and continued efforts are required to promote the needed changes.

At the same time, legislation and regulation, although necessary for success, are not sufficient. This is poignantly illustrated by the case of ignition interlocks. An impressive body of literature (Beirness 2001) has demonstrated that interlocks significantly reduce DWI recidivism. As noted above, this has led to 43 states passing the requisite legislation to enable their use with offenders. To date, however, only about 40,000 units are in use in the United States -- this represents just 3% of eligible offenders. Even in jurisdictions where the law removes judicial discretion by making interlocks mandatory for repeat offenders, very few have been installed (Beirness 2001). Part of the reason for this is that the law is ignored (Tashima and Helander 1998) for various reasons, such as a lack of adequate resources and the perceived cost. Whatever the reasons, the fact is that an effective sanction, although legislated, is not being consistently applied.

Legislation and regulation are necessary but not sufficient for success.

The case of the interlock is, unfortunately, not unique. It is illustrative of a wider range of problems in the DWI system, which reduce its effectiveness and efficiency in dealing with hard core drinking drivers. Indeed, there are problems throughout the system -- in enforcement, prosecution, sanctioning, monitoring

Problems throughout the DWI system diminish its effectiveness.



(Hedlund and McCartt 2001). Such problems impact efforts to keep hard core offenders off the road and/or to change their behavior.

Some of the problems are not new -- e.g., detecting hard core offenders who are alcohol tolerant and may not show obvious signs of impairment at the roadside. Some of the problems are not new but have been given a contemporary twist as a result of recent changes in the DWI system -- e.g., refusal to take a test for alcohol has increased in some jurisdictions because of the ever-escalating consequences of having a BAC over the statutory limit. And, some of the problems are new, arising from the increased complexity of drunk driving laws --arguably the offense with the most extensive and complex criminal statutes.

Despite the failings within the system, it is important to keep in mind that it works relatively well -- there were approximately 1.4 million arrests for alcohol-related driving offenses in 2000 (FBI 2000); fewer people are drinking and driving (Balmforth 2000); and, significant declines in the problem occurred, at least during the 1980s and early 1990s (NHTSA 1997).

At the same time, it is evident that much more needs to be done. As described in our recent report (Simpson and Robertson 2001), many drunk drivers go undetected and some who are detected avoid arrest. Overloaded courts engender plea agreements, which compromises the level of sanctions applied to offenders; poor quality of evidence impedes effective prosecution; and, savvy repeat offenders simply ignore the imposed sanctions. These problems illustrate the need for improvements in the DWI system, which is the primary goal of this project.



2.0 Objectives —●

The primary goal of this project is to underscore the need for improving the effectiveness and efficiency of the DWI system for dealing with hard core drinking drivers by determining where they “slip through the cracks”, and how these gaps can be filled. The project is:

Project goal:
underscore the
need for
improving the
DWI system.

- providing comprehensive documentation of precisely where the system is failing, and why; and,
- offering practical solutions to these problems.

The need for change arises in part because of the disconnect between policy and action -- many of the laws and regulations are in place but for various reasons they are not being applied or implemented in a meaningful fashion. As a consequence, the efficiency and effectiveness of the DWI system is being compromised at many levels. This ultimately reduces the general and specific deterrent effects of the DWI system -- i.e., it sends a message that the chances of getting caught are slight; that if caught, the chances of being convicted are marginal; and, even if convicted, there is a reasonable chance that the penalties will not be enforced.

There are a multitude of problems associated with the system’s response to hard core drinking drivers. However, some problems have more far-reaching consequences than others, so this project has as an objective the identification of *priority issues*. Moreover, not all problems are amenable to change in the short-term (e.g., the sympathetic attitude of jurors who do not consider drunk drivers to be “criminals”), or they are difficult to change because they are rooted in constitutional issues. As a consequence, this project has as an additional objective the identification of *practical, cost-effective solutions*.

**Objectives: Identify
priority problems
and recommend
practical, cost-
effective solutions.**

The project is examining the entire spectrum of policies, programs, and practices that target hard core drinking drivers -- from initial apprehension and charging with a DWI



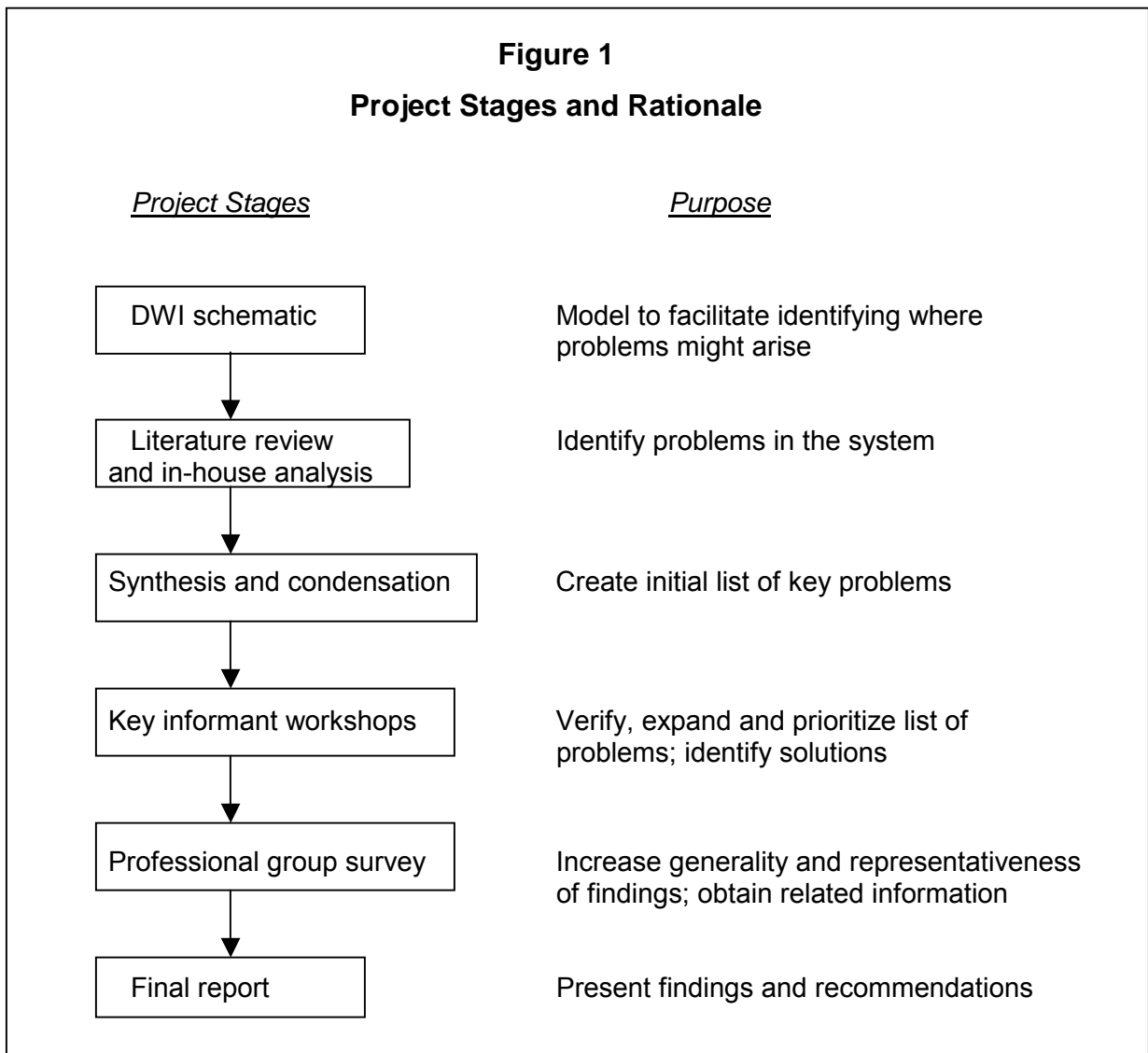
offense (Simpson and Robertson 2001), through prosecution and adjudication, to the final application of sanctions and follow-up monitoring. This is critical because it has been clearly demonstrated that hard core offenders can “slip through the cracks” at many stages in the process. This comprehensive analysis of the system will provide timely and practical insights into how the criminal justice system is failing and, more importantly, how it can be improved.

This report highlights the need for improvements at the prosecution phase of the DWI system. It documents problems and solutions associated with the prosecution of hard core drinking drivers. An earlier report (Simpson and Robertson 2001) focused on the detection and apprehension of hard core drinking drivers and the enforcement of DWI laws. Copies of that report are available at www.trafficinjuryresearch.com. Subsequent reports will focus on the adjudication/sanctioning, and monitoring phases.



3.0 Approach

The overall approach to the project involves a series of steps designed to produce an increasingly refined, valid and representative list of ways to improve the efficiency and effectiveness of the DWI system's response to hard core drinking drivers. The project stages are outlined in Figure 1. This approach is being used to study all four phases of the DWI system -- enforcement, prosecution, adjudication and sanctioning, and monitoring.



The first task was the development of a flow-chart, that represents schematically and generically how a DWI case proceeds through the system. The purpose of the schematic was to provide a model that would facilitate identifying where problems might arise. This representation of the system was reviewed and revised based on comments from a number of experts familiar with the DWI system.

Next, a comprehensive literature review was undertaken to determine what problems had already been identified by previous research. This set of problems was expanded by our own experience and knowledge of the system.

The expanded list of problems was synthesized and condensed to produce a short-list of key problems in each phase of the DWI system (i.e., enforcement, prosecution, etc.).

This final list of problems was then presented to a variety of representatives from the appropriate professional group in a series of workshops in several states -- participants were asked to verify, expand, and prioritize the list of problems as well as to identify solutions. The judgments of these professionals were collated to produce a rank-ordered list of priority problems as well as a set of associated solutions.

To increase the generality and representativeness of these findings and to obtain further information and insights into these issues, a larger and more representative group of professionals was surveyed. They were asked to rank-order the list of problems, to provide other relevant information, such as how frequently they encounter these problems, and to elaborate on the best ways to solve them.

The details of the process and its results are described in a series of reports -- this is the second in that series and it deals with prosecution.



4.0 The DWI System

To assist in identifying what type of problems might arise in the DWI system and where they are most likely to occur, a flow-chart was developed, which represented how a typical DWI case proceeds from detection through monitoring. Development of the schematic was greatly assisted by similar previous efforts (e.g., Jones et al. 1998). The schematic was intended to be generic and not meant to incorporate the variations and nuances of individual states' systems.

The schematic was presented to a number of professionals working within the DWI system to verify its accuracy and then modified as needed. It appears in Appendix C.

Even a cursory review of the schematic makes it evident that the DWI system is anything but simple. It is also evident that the processing of cases in the DWI system involves several phases which are relatively distinct and sequential but highly interrelated -- enforcement, prosecution, adjudication/sanctioning, and monitoring. Each of these phases is the primary responsibility of a different group of professionals -- enforcement is the responsibility of the police, prosecution the responsibility of district attorneys (or their equivalent²), adjudication and criminal sanctioning the responsibility of the judiciary, and monitoring of criminal dispositions is the responsibility of probation and parole officers³.

This convenient division of the system was used to structure the approach to the project, which is being completed in four segments to make the task manageable. The first segment on enforcement was covered in an earlier report (Simpson and Robertson

² The term "District Attorney" is used throughout this report for convenience although the equivalent position may have a different title in various jurisdictions.

³ The abbreviation DWI (driving while impaired, or intoxicated) is used throughout this report as a convenient descriptive label, even though some states use other terms such as OUI (operating under the influence) and DUI (driving under the influence), and in some cases they refer to different levels of severity of the offense. We have used DWI not only to maintain consistency throughout the report but also because it is more descriptive of the offense usually associated with hard core drinking drivers.



2001). This second report deals with prosecution. The third report will deal with criminal adjudication/sanctioning; and the fourth with monitoring.

Although this segmentation of the system is convenient, it is both arbitrary and somewhat misleading because the responsibility of each professional group extends well beyond the segment in which they have been placed (Hedlund and McCartt 2001). For example, prosecutors are not just involved in the prosecution of drinking drivers – the evidence and recommendations presented to the judge by the prosecution is often an integral part of the sanctioning of the offender by the judiciary.

Moreover, the problems identified in one segment are not necessarily limited to it but can have reverberations throughout the system. We acknowledge these complexities explicitly and are sensitive to the erroneous impressions that can be created by simplifying a truly complex and dynamic system. We have avoided misleading simplification wherever possible.

4.1 The Prosecution Process

DWI prosecution typically elicits an image of a defendant being cross-examined in court. However, the prosecution of a DWI case, colloquially referred to as a “deuce”, “dee-wee”, or “dewie”, depending on the state, is in fact a very complex and detailed process of which court proceedings are only one element. As a result, the typical time frame to process a DWI case is three to four months, if the case is resolved with a plea agreement. When a case goes to trial, it may take six months or longer depending on the caseload of the court of jurisdiction. The prosecution process is illustrated in the schematic on page 12 and described in the following sections.

The explanation of the prosecution process provided here is meant to give the reader a general idea of the procedures used to prosecute alleged impaired drivers and is not intended to elaborate on the detailed and complex procedures associated with a specific DWI prosecution in individual states. It is meant to provide a contextual basis for the report and assist the reader in locating the identified problems within the prosecution process in a chronological manner. The detailed information found in this section



benefited substantially from the technical advice of Cregor G. Datig, Supervising Deputy District Attorney in Riverside County, California, and Todd F. Sanders, former Director of the National Traffic Law Center.

There are seven distinct but interrelated stages associated with DWI prosecution that are identified in the schematic – filing a DWI charge (3.3 in the schematic); arraignment (3.4); pre-trial process (3.5); trial process (3.6); verdict (3.7); sentencing (3.8); and the appeal process (3.9). At each of these stages certain requirements or conditions must be met before the prosecutor can proceed to the next stage. Additionally, decisions made at each stage will have great significance for the stages that follow.

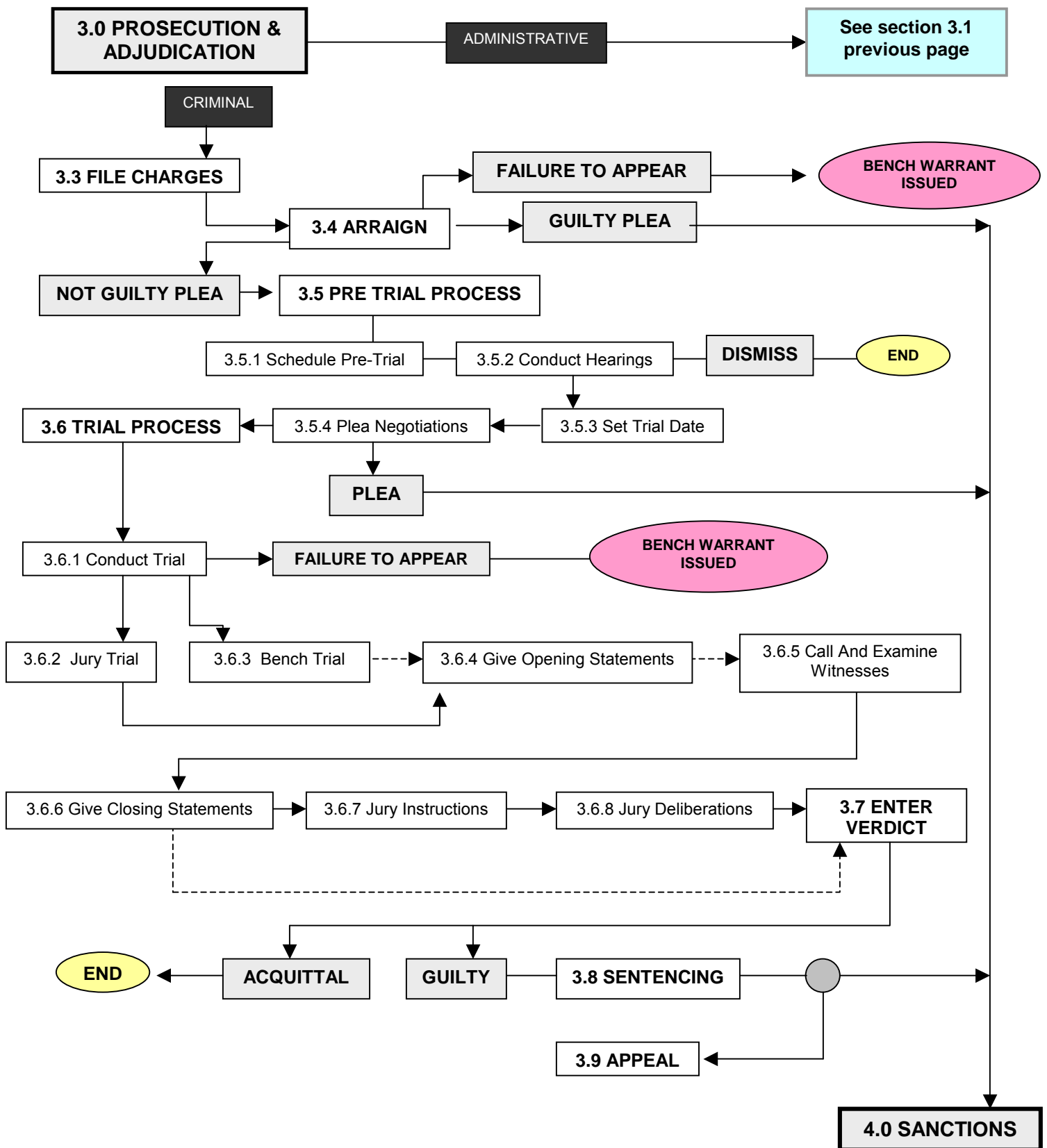
4.1.1 Filing a DWI charge(s)

The initiation of a DWI prosecution begins with the arrest of a suspect at the scene by an officer. The officer may file DWI charges, depending on the state, or forward the results of the DWI investigation to the District Attorney's office. After reviewing the evidence, the prosecutor assigned to the case will determine what charge(s) to file. Charges filed directly by the police may be reviewed and subsequently amended by the prosecutor, if necessary. In many states the prosecutor has a 10-day window to verify that the appropriate charges have been brought or to amend the charges. In this time period the prosecutor must verify that the criminal history and driver information is correct and also search for prior offenses, both within the state of offense and out-of-state, if necessary or deemed warranted.

4.1.2 Arraignment

When facing misdemeanor DWI charges, the accused is not usually held in custody, so arraignment does not typically occur immediately. Many defendants are released into the custody of a third party at the time of the investigation. Most often, after the vehicle has been impounded or otherwise secured, the accused is sent home. The accused is typically issued an appearance notice by the investigating officer, subsequent to the police investigation, to appear in court at a specific time to answer for the charge(s). A summons may also be issued by the court if an appearance notice is not issued by the





officer. This may be sent by mail to the residence of the accused giving notification of when he or she is to appear in court.

In serious felony cases the accused is often held in custody until arraignment. In most states, an accused must be arraigned on the charge(s) within 48 hours of the arrest. In states with a two-tiered court system, this hearing takes place in a lower court. In states such as California, where the courts have been consolidated, the arraignment takes place in any Superior Court of criminal jurisdiction. Arraignment, or bail hearings may be heard by a criminal court judge, or an individual appointed by the judge (e.g., commissioner) to handle lesser functions such as bail and pre-trial hearings.

It is not necessary for the prosecutor to be present at a bail hearing for misdemeanor DWI charges, or even felony charges, unless they wish to address a specific issue at this time, such as the accused posing a threat to the community or being a flight-risk (meaning the defendant is not likely to appear for trial). At this time, the prosecutor may make a specific recommendation regarding bail. However, the judge is under no obligation to accept this recommendation. The prosecutor may also wish to amend the charges at the bail hearing and, while this is possible, it is very uncommon.

Following arraignment, misdemeanor charges may be dismissed if it is later determined that there is insufficient evidence to proceed to trial. When a case is dismissed, the accused is released without further obligation to the court. The prosecutor may have the option of re-filing charges at a later time if further evidence is discovered that would support the charges. Where there is sufficient evidence to proceed, a date is scheduled for pre-trial proceedings. Following the posting of bail, the accused is released from custody.

4.1.3 Pre-trial Process

The pre-trial process involves a number of elements that affect the outcome of the case. These elements include discovery, plea negotiations, trial election by the accused, and pre-trial motions. In felony cases a preliminary hearing may also be necessary. In some states, this hearing may be preempted by a grand jury indictment when circumstances warrant such action.



Discovery. Discovery is an important part of the trial process and is typically regulated by statute. Consequently, the rules of discovery may vary from state-to-state. In all states, the prosecutor has a legal obligation to turn over any and all exculpatory evidence – evidence that tends to exonerate a defendant from fault or guilt or mitigate punishment – to the defense in order to allow the accused to prepare adequately for trial and defend the charges.

In some states, discovery is a one-sided process, meaning that the defense has no obligation to turn over its evidence to the prosecution. In these states, the defense is not obliged to turn over any reports or evidence until the defense has an opportunity to present this evidence in court. At this time, the prosecution may request an adjournment to fully review this new evidence and prepare any necessary cross-examination.

Other states have moved towards a policy of reciprocal discovery, meaning that both the prosecution and the defense are obliged to turn over any and all evidence to the other side. This, of course, excludes any statements made by the accused that would violate attorney-client privilege or the defendant's right not to give evidence against him/herself. The purpose of this policy is to ensure that the truth is brought to court and that the trial process is open and fair for both parties. In many states, discovery is typically completed within 30 days of the commencement of trial.

Plea negotiations. Plea negotiations are another important element of the pre-trial process and may be initiated at any point following the filing of the charges with the court. The two most common forms of plea negotiations are charge bargaining and sentence bargaining. Typically, there is no statutory preclusion as to when these negotiations may be commenced or halted. The point at which negotiations most often occur is usually a function of local practice. Most often, plea negotiations take place prior to the commencement of the trial. However, an agreement may be reached at any point prior to the reading of the verdict.

Charge bargaining usually involves a reduction of the charge(s) in return for a guilty plea. Most states have no anti-plea bargaining legislation in place (NTSB 2000), meaning that in some states the accused may be able to plead to a non-alcohol offense, a lesser charge than DWI. These policies vary from state-to-state and are governed by



statute, or the particular policy of the District Attorney. In five states (CA, FL, MI, OR, PA) plea negotiations are not permitted in specific circumstances, such as cases involving death or serious injury and/or a BAC in excess of a specified amount. A total of 11 states have enacted plea bargaining restrictions (AZ, AR, CO, KS, KY, ME, MS, NM, NY, WY), although, some of these states will permit a defendant to plea to a lesser degree of a DWI charge (e.g., a first-offense instead of a repeat offense).

Sentence bargaining is also common in DWI cases. The prosecution and defense may agree to an appropriate sentence that is presented to the court as part of the plea agreement. The judge is fully aware of the details of the agreement and may choose to either accept or reject it. The judge may decide that the agreed upon sentence is too lenient and reject the agreement. If this occurs, the accused is generally given an opportunity to withdraw the plea because plea agreements are governed by contract principles. This means that the accused did not consent to a harsher sentence and, therefore, is not bound by the agreement.

Plea negotiations that do not specifically include an agreement with relation to sentencing result in the accused “taking their chances” with the sentencing judge. In these instances, the accused must abide by the sentence the judge imposes.

When a plea agreement is reached prior to trial, the plea is entered on the court record. The accused may be sentenced immediately following the entering of the plea, or a date may be set for sentencing. If sentenced immediately, the accused is sentenced in accordance with the plea agreement, if one has been stipulated. If a particular sentence was not part of the agreement, the judge will sentence the offender according to the severity of the offense.

A large majority of DWI cases are resolved through plea negotiations. As described in Section 6.0 below, our survey of prosecutors reveals that approximately 67% of those who plead guilty do so with a negotiated plea agreement in place. When no plea agreement is arranged, a trial will be scheduled.

Trial election. The accused may also elect, at some point prior to the trial, to have either a trial by judge or a trial by jury. If the case involves a felony offense, the



matter will be tried in the Superior Court. If only misdemeanor charges have been presented, the matter may be tried in either a court of record or a lower court (e.g., a municipal or justice court). This election is available for both felony and misdemeanor cases, unless the case involves a very minor offense, in which case the defendant may only be afforded the opportunity for a bench trial by a judge. In other states, the accused cannot demand a jury trial on a misdemeanor charge until he/she is first convicted and then appeals the case for a trial *de novo* in a court of record. The accused may exercise this right up to the point when jeopardy is attached. Jeopardy refers to the fact that the accused can be tried only once for an offense and is usually considered attached once the first witness is sworn in a bench trial, or the jury is sworn in a jury trial.

Pre-trial motions. Motions are written arguments initiated by either the prosecution or the defense regarding how a particular case should proceed. The filing of motions is governed by strict procedural rules and commonly takes place during, but not limited to, the pre-trial process. Motions cover a broad range of issues including discovery, evidence, and requests for continuances.

The purpose of pre-trial motions is to determine what evidence will be admissible and how the case will proceed. The use of motions is an integral part of the pre-trial process and each motion performs a necessary function. However, in some instances, “frivolous” motions may be filed in an effort to delay or complicate a case. This unnecessary use of motions is a matter of concern for prosecutors.

There are a number of different kinds of motions that are routinely filed in a DWI case: notice pleadings, motions *in limine*, and motions to suppress evidence.

The prosecutor will file notice pleadings that essentially stipulate what charge(s) the accused will answer to, the time and location of the alleged offense, and the name of any victim(s) in the case.

Both the prosecution and the defense may also make motions *in limine*. These pre-trial motions help determine what evidence should be included or excluded on the basis of relevance to the case. For example, the prosecution may want to include the criminal history of the accused, or evidence of prior bad acts. The defense will argue that this



evidence should be excluded because it is highly prejudicial and/or not relevant to the case.

Conversely, the defense may indicate that it intends to call expert witnesses regarding the effects of alcohol on the body or the psychiatric condition of the accused. The reason for this kind of testimony would be to mitigate the criminal responsibility of the accused. Similarly, the defense may argue that evidence of third-party negligence (e.g., the poor condition of the roads contributed to an accident) is relevant. The prosecution may attempt to exclude this evidence as being irrelevant, and would do so through a motion *in limine*. Motions *in limine* are brought equally by the prosecution and the defense and may also be argued immediately preceding the commencement of the trial, or prior to the evidence in question being proffered.

The defense may also make a motion to suppress evidence, often based on an alleged violation of Constitutional Rights, typically under the 4th and/or 5th Amendments. It is also common for the defense to make a speedy-trial motion if a substantial delay has occurred since the commission of the offense, a delay to which the defense did not agree or stipulate. If the unexcused delay has been so significant as to prejudice the defendant's ability to present evidence in his/her defense (e.g., witnesses are missing or evidence has been destroyed), the defendant may seek dismissal of the charges. Even if denied, this motion may have the collateral effect of limiting the time a prosecutor will have to prepare the case.

Although the accused has the right to be present for pre-trial proceedings, he/she is not always required to attend. Often the accused will waive their participation in these proceedings and the defense attorney will appear alone to respond to and argue the motions filed.

In felony cases, a preliminary inquiry is also held prior to the commencement of trial in order to determine if there is sufficient evidence to proceed with the case. The prosecutor must present a sufficient amount of evidence to clearly establish the key elements of the offense. However, it is not necessary that all of the evidence be presented at this time and the prosecutor need not prove the case beyond a reasonable doubt at this stage. If the prosecutor cannot present sufficient evidence of the alleged



crime at this time, the judge may dismiss the case. However, this does not exclude the possibility of the prosecutor re-filing the charges at a later date if more evidence is discovered.

In limited instances, the prosecutor may choose to seek a grand jury indictment directly, most often for felony charges, instead of proceeding with an arrest and subsequent preliminary hearing. Depending on the jurisdiction, a grand jury may be composed of over 20 members of the public, and these proceedings are secret. Essentially, the prosecutor will present evidence of the alleged offense to the grand jury and ask the jury to return an indictment. In these instances, the grand jury determines if there is sufficient evidence to warrant the matter proceeding to trial. The participation of the accused and the defense attorney is not necessary to obtain an indictment.

The prosecutor will often proceed with a grand jury instead of a preliminary inquiry when the alleged offense involves a public figure and there is concern that a public preliminary inquiry will damage the reputation of the accused. A public accusation could be detrimental to the reputation of the accused if he/she were later acquitted of the charges. The prosecutor may also elect to proceed by grand jury if the accused is delaying the preliminary inquiry repeatedly, or if the prosecutor does not wish to make the accused aware that criminal proceedings have been instituted against him or her. As mentioned above, the use of a grand jury is extremely rare in DWI cases.

4.1.4 The Trial Process

Depending on the trial election of the accused, it may be necessary to select a jury prior to the commencement of the trial. After the jury is selected and sworn in, the trial will begin.

At trial, the prosecution will make an opening statement identifying their theory of the crime and highlighting the evidence that will be presented to support this theory. Following this, the defense has an opportunity to make an opening statement which may present an alternate interpretation of the evidence and highlight facts that will support this alternate theory. For example, the prosecution will argue that the accused was intoxicated and guilty of the alleged offense, whereas the defense may argue that the



accused was diabetic and having an insulin reaction, which caused them to act in an intoxicated manner.

It is also common for the defense to reserve their opening statement until after the prosecution has presented its entire case. By doing this, the prosecution is not alerted to what defense theory or arguments will be presented and this makes it somewhat more difficult to rebut potential arguments during their case *in chief*. For example, the defense may argue that the accused had health problems that affected the test results, that the accused was overly-tired, or that the breath-testing equipment was not working properly so the results are invalid. Knowing what defense strategy is going to be employed will determine how the prosecution presents its case and what pieces of evidence are more strongly emphasized. When the defense reserves its opening argument, the prosecution is essentially “left in the dark” – i.e., they don’t know what strategy the defense will be using; what elements they should be attempting to refute. This strategy, however, does have the potential drawback of allowing the prosecution’s opening statement not only to be the first thing the jury hears, but also to go unchallenged until later in the case.

After opening statements, the prosecution will present evidence supporting their theory of the case. This evidence may include police testimony, BAC test results, videotape of the arrest or booking, expert witness testimony substantiating Horizontal Gaze Nystagmus (HGN), blood, breath or urine evidence, and citizen eye-witness testimony. This evidence must establish all the elements of the offense and be sufficient to prove the case beyond a reasonable doubt. The defense will have an opportunity during this time to cross-examine any witnesses presented by the prosecution in an effort to establish reasonable doubt.

The evidence presented by the prosecutor does not need to be tendered in any particular order. Some prosecutors present their strongest evidence first, whereas others present it last. A prosecutor may also choose to present the evidence in a chronological order, so as not to confuse the judge or jury. Often, the method used is a stylistic choice of the prosecutor.

After the prosecution rests – is finished presenting their case – the defense will determine if it is strategically appropriate to present a defense. This may depend on



how strong a case was presented by the prosecution. If the defense feels that the prosecution has not met the burden of proof to obtain a guilty verdict, they may decide not to present any evidence. At this time the defense may make a motion for a directed verdict of acquittal, meaning a request to the judge to acquit the accused based on the prosecution's failure to establish a *prima facie* case. The defense has no obligation to present any evidence and the jury is instructed at the end of the case not to draw any inference from the fact that the defendant elected not to present any evidence.

If the defense decides it is necessary to present evidence, they have an opportunity to call witnesses and enter evidence in support of their theory of the case. The prosecution will also have an opportunity to cross-examine any defense witnesses. When the defense presents any new information or reports that were not turned over to the prosecution in discovery, the prosecution may request a brief adjournment to properly review the new evidence and prepare for cross-examination of any witnesses.

Following the presentation of its evidence, the defense will rest. The prosecution has an opportunity to present rebuttal evidence at this time, and in limited circumstances, the defendant can then present surrebuttal evidence. Both parties will make closing arguments, again highlighting evidence that supports their respective theories of the case.

4.1.5 The Verdict

At this time, the judge will consider all the evidence presented and make a decision regarding the guilt of the accused. In a jury trial, the judge will instruct the jury about the law that applies in the case, including the elements of the offense. The judge or jury will then deliberate and return either a finding of guilty or not guilty. A not guilty finding does not necessarily mean that the defendant was innocent; rather, it is an indication that the prosecution did not prove its case beyond a reasonable doubt. If the jury is unable to agree on a verdict, they may be declared a "hung jury" and a mistrial may occur. In this situation, the court may order the case to be tried again before a different jury, may urge the parties to attempt to reach a plea agreement, or may dismiss the case.



4.1.6 Sentencing

Upon conviction, the judge can order a pre-sentence report (PSR) if deemed necessary. PSRs are more commonly used for felony cases than misdemeanors. This report is usually prepared by a probation officer and specifies the nature of the offense and outlines available programs and resources that are appropriate for a disposition. The judge may also order the offender to undergo an alcohol evaluation at this time. The probation officer will contact the prosecutor when preparing the PSR for information about the case, including the prior criminal history of the offender. Prior convictions, although not typically permitted as evidence at trial due to their prejudicial nature, are often considered an aggravating factor for the purposes of sentencing.

After reviewing the PSR, the judge will then sentence the offender. The judge usually has considerable discretion at the sentencing stage and the disposition imposed may vary widely between offenders. However, most states have mandatory minimum sentences for repeat offenders, and a judge must impose at least the minimum sentence.

4.1.7 Appeal

Following a conviction, the accused may appeal the case, if it is deemed warranted, and appeals are fairly frequent in DWI cases that go to trial. Notices of appeal are filed in the court where the defendant was convicted but heard in an appellate court. Most commonly, a point of law is argued that affects the admissibility of evidence. Appellate courts will usually give deference to the decision of the trial court judge regarding the admissibility of evidence. However, if the evidence is insufficient to support the conviction as a matter of law, or the trial judge's interpretation of the applicable law was clearly erroneous, the appeal court can set aside the verdict. In the former situation, the appellate court might dismiss the charge(s). In the latter, the case will be remanded back to the trial court for a new trial. When this happens, both parties may decide to reach a plea agreement as the prospect of a new trial is not pleasing, or the case may be re-tried. The appellate court may also uphold the verdict of the trial judge.



5.0 Identifying Problems and Solutions —●

As described above, this report -- the second in the series -- deals with the prosecution segment of the DWI system. It seeks to identify problems that impact the efficient and effective prosecution of hard core drinking drivers, and solutions to these problems.

5.1 Literature Review

A comprehensive review of the related literature was undertaken, specifically to identify problems in the prosecution of hard core drinking drivers (the bibliography contains a list of the articles reviewed). Concern over the successful prosecution of drinking drivers, particularly repeat offenders, is not new. There is a reasonably extensive literature on the subject but, with only a few exceptions (Jones et al. 1998; Hedlund and McCartt 2001), it is fragmented, with most articles dealing with only one or two specific problems. As a result, the relative and contemporary importance of many of the problems is difficult to gauge. Nevertheless, our review of the literature did uncover a reasonably wide range of issues.

The problems identified in the literature were collated and expanded, based on our own knowledge of the system. This initial list was then synthesized and condensed to reduce redundancy and overlap. This process yielded a list of key problems that affect the prosecution of hard core drinking drivers -- problems such as evidentiary issues, test refusal, motions and continuances, and failure to appear.

Because the list of problems was generated from the research literature, some of which was neither contemporary nor national in scope, it was imperative to perform a “reality check” on the problem list. The first step in this process involved a series of workshops/focus groups with front-line prosecutors.



5.2 Prosecutor Workshops

The purpose of the workshops was to validate, expand and prioritize the list of problems generated from the existing research literature. Details on when, with whom, and how these workshops were held are provided below.

5.2.1 Site Selection

To achieve some degree of representativeness in the information obtained from the workshops, it was decided to hold them in a variety of states and to obtain participants from different jurisdictions within each state. The selection of states was determined by several factors, not the least of which was convenience. As well, we felt it would be useful to include some states that demonstrated a more progressive approach to dealing with hard core drinking drivers and some states that had made less progress in this area. States were rated using an informal composite based on their legislative record, drunk driving statistics and evaluations conducted by other groups, such as MADD's "Rating the States" (MADD 1999).

From the list of states created by this process, we selected those where we had a contact person – this was facilitated by James Catterson Jr., former District Attorney for Suffolk County, NY. An introductory information package and letter requesting participation in the project was sent to identified contacts in the targeted states. Follow-up discussions clarified the purpose of the workshop and what was expected from participants. We emphasized the need for participants with considerable contemporary experience in prosecuting repeat drinking drivers.

Workshops were organized and held during March, April, May and June 2000 in the following locations:

- Arizona (Tucson)
- California (Newport Beach)
- Connecticut (Farmington)
- Illinois (Springfield)
- Massachusetts (Newton)
- New York (Albany)



A total of 28 prosecutors representing 23 different jurisdictions participated in the workshops (their names and affiliations appear in Appendix B). These prosecutors were experienced, knowledgeable, dedicated and committed to making a difference in the problem of drunk driving.

5.2.2 Workshop Format

All workshops were conducted and facilitated by the authors of this report. Each workshop lasted approximately three hours and followed the same format:

- ◆ an introductory presentation provided background information about our organization and the purpose of the project;
- ◆ the problem list was distributed (see Appendix D) and participants were asked to independently rank order these problems in terms of their impact on the efficient and effective prosecution of hard core drinking drivers;
- ◆ discussion and clarification ensued as needed;
- ◆ the rank-ordered lists were collected and collated by the workshop facilitators -- during this process, participants were asked to independently identify important problems that were not on the list;
- ◆ each participant was, in turn, asked to describe a problem they felt should be added to the list -- open discussion sought to clarify the nature of the problem, to determine if it was considered an issue by the other prosecutors and, if so, to determine where it ranked in relation to those on the primary list; and
- ◆ finally, beginning with the problem that was ranked as the most serious, participants were asked, in round-table discussion format, to identify cost-effective, practical solutions to the problems.

Discussion in each workshop was lively and productive and consistently demonstrated the high level of commitment and passion the participants had for prosecuting DWI offenders. Prosecutors shared their concerns, views and opinions openly and freely. They had little difficulty understanding the problems contained on the list, or in rank-ordering them. Of some interest, many other problems were elicited during the open discussion but virtually all of them were variations of those on the primary list or were more specific instances of problems that were subtended by those on the primary list. This speaks to the validity and generality of the problems identified in the literature review.



Despite the differences in the states represented in the workshops and the differences across prosecutor offices, there was considerable consistency in the rankings as well as in the solutions suggested for overcoming or minimizing the effect of these problems. The results from the workshops are not discussed here but have been combined with the results from the survey (Section 5.3) and reported in a single, integrated section (6.0), that describes the overall findings and recommendations.

5.3 Survey of DWI Prosecutors

The workshops yielded a list of priority problems in the prosecution of hard core drinking drivers as well as suggested solutions to these problems. Despite the overall consistency of findings across the six workshops, it was deemed useful to enhance the generality or representativeness of these findings through a broader survey of prosecutors. Moreover, such a survey provided the opportunity to obtain other relevant information, such as the frequency with which various problems are encountered.

5.3.1 The Survey Instrument

Given the volume of information we wanted to obtain, two separate surveys were constructed – one focusing on issues related to problems; the other focusing on issues related to solutions. However, both surveys included a section that asked prosecutors to rank order the problem list that had been generated from the workshops. Copies of the surveys appear in Appendix E.

5.3.2 Obtaining Participation in the Survey

To facilitate a broad survey of prosecutors, we searched the Internet for the names of District Attorneys in the United States. A site for the Eaton County Prosecuting Attorney (<http://www.co.eaton.mi.us/ecpa/proslist.htm>) was discovered that contained the website addresses of many of the District Attorneys' Offices across the country. Each website was visited in order to gather the appropriate contact information for each of the identified offices and, subsequently, each office was contacted by phone to determine if repeat DWI offenses were prosecuted by the office, and if so, to identify the names of



two prosecutors in each office that had experience with DWI offenses, so a survey could be mailed to each of them. The number of prosecutors identified in each office varied depending on the size of the office.

5.3.3 Survey Distribution and Response

A survey package was mailed to each identified prosecutor. It contained a single survey, an explanation of the project, and a stamped, self-addressed return envelope. Problem and solution surveys were alternated for each name received to ensure that both problem and solution surveys were received in each jurisdiction.

Participation was outstanding – a total of 905 surveys were distributed in this manner and 390 were returned – a response rate of 43%, making this one of the larger surveys conducted of prosecutors' views on drunk driving issues. Table 1 shows the number of surveys returned by state. Of the 390 completed surveys, representing prosecutors in 35 states, 196 dealt with problems in the prosecution of hard core offenders, and 194 with solutions.

5.3.4 The Survey Respondents

Prosecutors participating in the survey varied considerably in their years of experience prosecuting DWI cases, ranging from 1 to 28 years. The mean number of years of experience as a prosecutor was 7.8 and the mean number of years prosecuting DWI cases was 7.2. One-quarter of those who participated in the survey had 11 or more years of experience prosecuting DWI cases. The distribution of years of experience was 55% had 1-5 years experience; 20% had 6-10 years experience; and 25% had 11+ years experience.

Respondents were asked if they worked mainly in limited or general jurisdiction courts and the approximate size of their jurisdiction. Approximately one-third of respondents indicated that they worked in limited jurisdiction courts, handling primarily misdemeanor DWI cases, and two-thirds worked in general jurisdiction courts handling both misdemeanor and felony DWI cases.



Table 1
Location of Survey Respondents

STATE	<u>Number of Surveys Returned</u>		Total
	Total	State	
Arkansas	3	Nebraska	3
Arizona	11	New Jersey	2
California	10	Nevada	6
Colorado	12	New Mexico	4
Florida	13	New York	14
Georgia	3	North Carolina	3
Iowa	11	North Dakota	7
Idaho	5	Ohio	34
Illinois	16	Oklahoma	31
Indiana	9	Oregon	6
Kansas	1	Pennsylvania	11
Kentucky	4	Tennessee	4
Louisiana	23	Texas	4
Maine	3	Utah	8
Maryland	11	Virginia	9
Michigan	57	Washington	23
Montana	7	Wisconsin	<u>15</u>
Missouri	7	Total	390

There was considerable variation in the size of the jurisdiction in which prosecutors worked, with 13% of respondents working in a jurisdiction with a population of less than 20,000; 26% working in a jurisdiction with a population of 20,000 to 50,000; 21% in a jurisdiction with a population of 50,000 to 100,000; 22% in a jurisdiction with a population of 100,000 to 250,000; 9% in jurisdictions with a population of 250,000 to 500,000; and 9% in jurisdictions exceeding 500,000.



6.0 Findings and Recommendations —●

This section integrates the findings and recommendations arising from the literature, workshops and the survey of front-line prosecutors from across the country. It describes problems encountered when prosecuting hard core drinking drivers and how these problems can be overcome.

Ten key problems that impede the efficient and effective prosecution of DWI offenders were identified. In order of priority, the problems are:

- evidentiary issues
- test refusal
- motions and continuances
- incomplete records
- inadequate penalties
- failure to appear
- legislative complexities
- expert witnesses
- plea agreements
- prosecutor training

In the sections that follow, for each problem, we present:

- ◆ a description of the problem itself and quantitative information on its extent -- i.e., what it is, and how big a problem it is;
- ◆ the consequences of the problem -- i.e., the ways it can impact the effective and efficient prosecution of hard core repeat offenders; and
- ◆ recommended solutions for addressing the problem.

For convenience, this rather extensive information is summarized in an introductory paragraph at the beginning of each problem.



6.1 Evidentiary Issues

♦ **The problem.** The effective prosecution of DWI cases depends heavily on the quality and quantity of evidence gathered by an officer during a DWI investigation, the precision with which such evidence is documented, and the accurate presentation of that evidence in court. When the evidence is compromised by errors or omissions during its collection, documentation or presentation, it diminishes the prosecutor's ability to obtain a conviction.

As detailed by Simpson and Robertson (2001), complex investigation and arrest procedures create opportunities for errors of omission and/or commission in the collection of evidence by police officers. What is collected, how it is collected, and how it is documented have profound implications for a potential conviction.

Prosecutors also expressed concern regarding the presentation of evidence in court. An officer's ability to recollect and testify effectively to the results of an investigation can impact how the evidence is interpreted by a judge or jury. The prosecutor may have strong evidence of impairment, however, the strength of this evidence may be lost or obscured if not supplemented effectively by an officer's testimony.

♦ **The consequences.** The consequences of evidentiary problems are straightforward and profound. First, it means that the appropriate and needed sanctions and/or treatment are not imposed because of potential dismissals, acquittals, or unsatisfactory plea agreements. Second, it means a conviction for an alcohol-related offense may be avoided by the defendant, which then prevents them from being identified as a repeat offender the next time around.

♦ **The solution.** Prosecutors recommend a number of solutions that can improve the quality of evidence collected, documented and presented in a DWI prosecution.

Prosecutors urge the consistent use of sobriety tests to facilitate the presentation of evidence in court. Moreover, they recommend the use of validated tests, in particular,



the SFST, which must be administered according to protocol, to improve the strength of the evidentiary test results.

The need for greater training in DWI investigations and arrest has already been acknowledged by police officers (Simpson and Robertson 2001) and prosecutors agree that this would improve the collection and documentation of evidence.

Prosecutors also believe that better communication is required between them and police officers. Each professional group has a unique perspective with regard to the collection, documentation and presentation of evidence and they need opportunities for dialogue to improve understanding of their respective issues and, thereby, the effectiveness and efficiency of the system.

97% of prosecutors support initiatives that will improve communication with police officers.

6.1.1 Problem Description and Scope

The effective prosecution of DWI cases depends heavily on the quality and quantity of evidence gathered by an officer during a DWI investigation, the precision with which such evidence is documented, and the accurate presentation of that evidence in court. When the evidence is compromised by errors or omissions during its collection, documentation or presentation, it diminishes the prosecutor's ability to obtain a conviction.

Collection of evidence. As detailed by Simpson and Robertson (2001), complex investigation and arrest procedures create opportunities for errors of omission and/or commission in the collection of evidence by police officers. The structure of a DWI stop, investigation and arrest involves a series of steps that require certain standards of proof be met at each step before continuing to the next. For example, before initiating a DWI stop, an officer must establish an "articulable suspicion" based on such things as weaving or straddling lanes, driving with the window open in cold weather, or making wide right-hand turns. This suspicion of DWI must be verified or validated during the roadside interview with the driver of the vehicle.



Probable cause must then be established before the investigation can proceed and the driver asked to perform field sobriety tests. Such probable cause can be established by the smell of alcohol on the driver's breath, a slurring of words, or an open container in the vehicle. Then, statutory warnings with regard to the chemical test must be issued. Following arrest, if the officer wishes to further question the suspect, the officer must "Mirandize" the suspect and provide them with a reasonable opportunity to speak to counsel.

The investigation and arrest process is so detailed and complex it can be a challenge for an officer to complete without error under ideal circumstances. Under the dynamic and variable conditions encountered at the roadside, it is even more difficult to follow procedure precisely and consistently. An officer must adapt to changing roadside conditions and circumstances, for example inclement weather, busy roadways, or uncooperative suspects, yet still remain vigilant with regard to personal safety and the safety of others.

Although no two DWI arrests are alike, they must be investigated uniformly, since any deviation from standard protocol in terms of how evidence is gathered can result in it subsequently being overlooked, suppressed, or challenged on technical grounds. This has profound implications for a potential conviction. Indeed, the suppression of evidence and evidentiary technicalities were identified by nearly half (47%) of prosecutors as the most significant factors contributing to a dismissal or acquittal.

Nearly ½ of prosecutors cited technicalities and suppression of evidence as the most significant factors contributing to a dismissal or acquittal.

Variability in the gathering of evidence is not solely attributable to the conditions surrounding the investigation and arrest. Evidence is often gathered using different techniques, due in part to the lack of standardization in DWI testing procedures across police agencies. These variations can often contribute to evidentiary problems. For example, there is considerable diversity between police departments as to what tests are included in the Standardized Field Sobriety Tests (SFST) – some departments do not consistently adhere to the guidelines for SFSTs established by the National Highway Traffic Safety Administration (NHTSA; Transportation Research Circular 1999). For the results of these tests to be useful evidence in court, they should be conducted in a specific manner, according to validated protocol. If the officer either omits or varies a



particular step, then the usefulness of these results for the prosecutor is diminished. Indeed, the results may even be deemed inadmissible. However, the complexity of these steps is very challenging under the best of circumstances, so it is not surprising that officers can make errors in the application of various testing procedures. Nonetheless, it is extremely important that these initial tests are properly administered because the prosecutor must often rely solely on this evidence when prosecuting repeat offenders because they are more likely to refuse chemical testing.

Moreover, in some cases the tests that officers use (e.g., the alphabet test, or counting test) have not been scientifically validated. Prosecutors and the courts have difficulty understanding the nature of such tests and how they relate to intoxication, which is what must be demonstrated. One prosecutor succinctly described the issue, stating that “uniform testing yields uniform prosecutions”. Prosecutors find it much more difficult to win a case when testing procedures are variable. Indeed, even SFST results may often be excluded as evidence if administered incorrectly. One-quarter of the prosecutors surveyed indicated that problems with the SFST administration are a key factor contributing to a dismissal or acquittal.

25% of prosecutors report that problems in the administration of the SFST are a key factor contributing to a dismissal or acquittal.

Hard core drinking drivers pose a special challenge for prosecutors. These individuals are more difficult to prosecute because of their familiarity with the system, their tolerance to the effects of alcohol, and because they often refuse to cooperate with SFSTs, preliminary breath tests (PBTs) and chemical testing. Officers may not recognize the need to take note of small behavioral details exhibited by uncooperative suspects, or how to obtain their cooperation. Officers may not know what key questions to ask that would assist the prosecutor in eliminating alternative defenses presented in court. For example, asking a suspect if they are able to blow up a balloon demonstrates their ability to provide a sufficient breath sample and allows the prosecutor to argue that the defendant’s refusal to cooperate with a chemical breath test was not related to their inability to provide a sufficient breath sample, thus refuting a common defense argument.

Detailed protocols also specify how physical evidence (e.g., breath, blood and urine specimens) must be gathered and handled following an arrest. Some prosecutors



raised concerns regarding the maintenance and calibration of the machines used to collect and analyze these specimens. Prosecutors must be able to demonstrate that the equipment used to perform the chemical test on a suspected impaired driver was in proper working order to show that the test results are valid. If the prosecutor is unable to confirm the accuracy of the test results, they may be deemed inadmissible and the prosecutor loses the most valuable piece of evidence needed to convict impaired drivers. Prosecutors estimate that 16% of DWI cases are lost as a result of defense arguments regarding the validity and accuracy of breath testing equipment. If the test results are successfully challenged and excluded, the defense may argue that observations of impairment made by the arresting officer are circumstantial and fail to prove intoxication beyond a reasonable doubt, ultimately resulting in an acquittal.

16% of DWI cases are lost due to defense challenges of the validity and accuracy of breath testing equipment.

Prosecutors must also be able to establish the chain of custody of any physical evidence collected pursuant to a DWI arrest, to preserve its value and reliability and to preclude defense arguments about its authenticity. For example, when blood is drawn from a suspect by a medical professional, the prosecutor must be able to verify that the blood taken from the suspect is the same blood that was analyzed, meaning that the test results presented in court are attributable to the defendant. In order to do this, the prosecution must be able to establish who collected the evidence, where it was collected, who handled the evidence, who logged the evidence at the police station, who tested the evidence, and what laboratory conducted the testing. Being able to establish all these elements eliminates the possibility that the evidence was tampered with or that the lab mixed up the specimens. If the prosecutor cannot establish all of these elements, the evidence may be excluded at trial and a guilty defendant may ultimately be acquitted.

Chain of custody concerns also apply to vehicles impounded as evidence in DWI crashes, especially those involving serious personal injury or death. Essentially, the vehicle is the weapon, so it needs to be preserved in the same way a gun would be preserved in a homicide case. The prosecutor must be able to establish that the vehicle was not tampered with or altered in any way. However, facilities available for vehicle storage are not always adequate and vehicles are often stored in unsecured areas. The prosecutor may be unable to confirm how many individuals had access to a storage area



and who had contact with the vehicle. This opens the door to arguments regarding the authenticity of the evidence. If the chain of custody and security of this evidence cannot be verified, the vehicle may not be admitted at trial and, if admitted, the prosecutor may be unable to adequately refute defense allegations regarding vehicle malfunction as a causal factor.

Documentation of evidence. Problems also arise in the documentation of collected evidence. The dynamic and unpredictable nature of the arrest environment, also described by Simpson and Robertson (2001), often contributes to errors and/or omissions in the documentation of evidence. Essentially, an officer must document a majority of the investigation and arrest scenario, including the physical appearance and demeanor of the suspect, the suspect's responses to questions, any impaired or unusual behavior exhibited by the suspect, any health problems that are indicated by the suspect, and the results of a variety of tests performed by the suspect. Additionally, the officer must note the date and exact time of the stop, the condition of the roads, the volume of traffic, and any adverse weather conditions.

The documentation required for a DWI arrest is so extensive and detailed that it may take several hours for an officer to complete (Simpson and Robertson 2001). Much of the documentation takes the form of arrest paperwork, statutory warnings, breath-testing protocols, and a variety of associated administrative paperwork. However, due to competing demands, officers rarely have sufficient time to record all of the particulars of the investigation and arrest. Officers can omit key details, leave forms incomplete, or make transcription errors when documenting the evidence collected during an investigation.

However, the documentation, or paperwork, provides the prosecutor with the bulk of evidence in a DWI case, so its completeness and accuracy are vital. If there is not enough detailed evidence documented, the case may be dismissed altogether before the trial even begins. If the quality of documented evidence is compromised, then the prosecutor may be unable to use some of it at trial, due to rulings on its admissibility. Consequently, the prosecutor may be left with scant evidence to present and may be unable to clearly establish all of the elements of the crime. In these instances, a guilty



defendant may have their case dismissed or be found not guilty because the documentation of the evidence was insufficient.

One of the causes of this problem is the structure and format of the paperwork itself. Many reports consist of check-box answers or filling in blanks and do not allow for the documentation of detail. For example, the officer may have checked a box indicating that the defendant was unsteady exiting the vehicle. However, this does not tell the prosecutor just how unsteady – e.g., did the suspect stumble, or actually fall down. Such evidence is open to interpretation in court and the defense may be able to successfully challenge the officer’s recollection of the degree of unsteadiness exhibited by the defendant.

Forms are created in a non-narrative fashion as a time-saving device for police, but they can cost in terms of successful prosecution. Indeed, 60% of prosecutors reported that the narrative form was necessary to secure a conviction, as it often provides the needed details and additional explanation. By contrast, only 6% of prosecutors reported that check-box forms are necessary evidence to secure a conviction. Discussions with prosecutors indicate that these check-box forms may in fact provide the defense with reasonable doubt because they lack detail and are based on a subjective evaluation by the officer with little or no supporting documentation.

60% of prosecutors believe detailed police narratives are the most critical evidence to secure convictions.

This concern may appear to be inconsistent with the number one problem forcing police officers – paperwork (Simpson and Robertson 2001). That is, the prosecutors appear to be calling for more paperwork, the police for less. These recommendations are, however, not incompatible. The paperwork demands faced by police vastly exceed the completion of the “narrative” form and paperwork can be streamlined and simplified in many areas. For the prosecutor, the most important evidence is the narrative and they would like to see more detail provided on this form.

Presentation of evidence. Prosecutors also expressed concern regarding the presentation of evidence in court. Officers that testify frequently at trials are often very effective and present a formidable opponent for defense attorneys. However, most officers are rarely called to testify in DWI trials (Simpson and Robertson 2001) and,



when they are called, they are often unable to describe in sufficient detail the circumstances leading up to and surrounding the investigation and arrest as well as the evidence collected during this process. An officer's ability to recollect and testify effectively to the results of an investigation can impact how the evidence is interpreted by a judge or jury. The prosecutor may have strong evidence of impairment, however, the strength of this evidence may be lost or obscured if not supplemented effectively by an officer's testimony.

It is difficult to testify in DWI cases because much of the evidence is technical. It is very important for the officer to be able to specify the same details that are found in the paperwork. Officers may forget to include details in their testimony that were noted in reports or include details that were not noted in reports. In both of these instances, it is relatively easy for the defense to attack the credibility of the officer. Consequently, the evidence may be called into question and this may weaken the prosecution's case.

Also, the language some officers use when testifying can be problematic because a judge or jury may not clearly understand the contents of the officer's testimony, or have doubts regarding the officer's ability to recall this specific arrest. Officers may use technical terms or phrases ("police speak") that are confusing or unclear to the average citizen. For example, an officer will more commonly say "the suspect exited the vehicle" instead of "the driver got out of the car". The officer often appears to be talking about any DWI arrest, instead of the DWI arrest in question. The judge or jury may wonder if the officer even remembers the actual arrest in question because the testimony can appear distant, as though it has been recited in hundreds of cases. Prosecutors report that this kind of testimony is often ineffective and detracts from the strength of the evidence contained in arrest reports.

Admissibility of prior convictions. Although the key evidentiary concerns raised by prosecutors relate to the collection, documentation and presentation of evidence, an additional evidentiary issue was frequently raised – the inadmissibility of prior convictions. This issue is beyond the scope of this report but is mentioned here because it was raised with sufficient frequency by prosecutors. Prior convictions are often excluded as evidence at trial, most often due to their prejudicial nature. The



problem often lies with state procedures that prevent these priors from coming into evidence and, only in very specific instances, will this evidence be admitted.

The inadmissibility of prior convictions often detracts from the likelihood of a conviction, even when the prosecutor has considerable evidence. Drunk drivers are a special class of offenders because they may not present a stereotypical offender profile. It is this type of offender to whom jury members are most likely to relate. Many of these defendants appear to be regular citizens in that they most often have a job, a family, a house, and some formal education. Jury members are often more hesitant to convict these offenders because they appear to be upstanding members of the community. It is common for jury members to feel that “there but for the grace of God...” and to want to give “first-offenders” the benefit of the doubt. However, when polled by prosecutors following an acquittal, many jury members report that they would have convicted had they known about the suspect’s prior convictions.

6.1.2 Consequences of the Problem

The consequences of evidentiary problems are straightforward and profound. Evidentiary problems arising from the collection, documentation or presentation of evidence increase the likelihood that a DWI case will result in a dismissal or acquittal. Alternatively, prosecutors may be left with the possibility of an unsatisfactory plea agreement, believing it is better to see some punishment imposed than run the risk of an acquittal. Briefly, the plea agreement a prosecutor can negotiate is only as good as the evidence collected. Inadequate or inadmissible evidence allows a defense attorney to negotiate a reduced charge or minimal sentence for his/her client. This is important for two reasons. First, it means that the appropriate and needed sanctions and treatment are not imposed. Second, it means that the alcohol-related offense may be avoided by the defendant, which then prevents them from being identified as a repeat offender the next time around.



6.1.3 Recommended Solutions

Prosecutors recommend a number of solutions that can improve the quality of evidence collected, documented and presented in a DWI prosecution. These recommendations include the following:

♦ **Use of standardized DWI tests.** Despite the word “standardized” in its name, the SFST is not always administered in a consistent manner as approved by NHTSA. Strict adherence to the administration procedure is needed to improve the prosecution of DWI offenses. The three tests in the SFST battery (the walk and turn, the one leg stand, and the horizontal gaze nystagmus) have all been scientifically validated to demonstrate intoxication in excess of .08. However, some officers may not be familiar with these tests or may have had little opportunity to use them, depending on the shifts they work and competing demands for service. As a consequence, the tests may not be used at all or administered incorrectly or inconsistently. This opens the door for the defense to call the results into question.

In cases where an officer uses tests other than those included in the SFST, the evidentiary problems are exacerbated because the prosecutor must prove to a jury, beyond a reasonable doubt, that the results of those tests demonstrate intoxication. This is much more difficult to accomplish without scientific validation, which many of these other tests lack.

♦ **More opportunities for police training.** Prosecutors are the first to acknowledge that some officers do an excellent job collecting and documenting evidence in a DWI investigation. However, some officers do not receive enough training to be truly proficient. Officers have already acknowledged this (see Simpson and Robertson 2001) and have indicated they would make more arrests if they had more training. Officers need more opportunities to learn proper procedure and technique both at the academy and on-the-job.

This is especially important with regard to the investigation and arrest of repeat offenders, many of whom use tactics to impede an officer’s investigation. Officers need to be aware of the special characteristics of repeat offenders that make them more



difficult to identify and prosecute. Initial observations and responses to questions are often the only source of evidence that an officer can collect. Accordingly, they should be trained both to observe and record the smallest details so that they may be preserved and used as evidence at trial. Furthermore, officers need to learn how to document evidence so that each piece is strong enough to “stand on its own”, meaning that if one piece of evidence is excluded, there would still be sufficient evidence to obtain a conviction.

To illustrate how training can facilitate the collection, documentation and presentation of evidence, in Connecticut, all new recruits participate in a one-week course at the academy as part of their training before becoming a police officer. During the course, officers view a NHTSA training video of a typical DWI offense and are then required to write an appropriate police report and testify in a mock court as to the content of the report and the details of the arrest. The report and court testimony allow the instructor to evaluate the officer’s success. The course is also offered to officers in the field and runs approximately nine times a year. Instructors from various departments also take the course so they can return to their own department and instruct other officers. Unfortunately, not all departments have the resources to participate in these courses, so opportunities for training are not equally available.

In Champaign County, Illinois, efforts are made to assist officers in staying up-to-date on DWI case law with regard to evidentiary rulings. One prosecutor distributes informal memos to officers explaining a particular evidentiary issue that has arisen on more than one occasion. Included in the memo is an explanation as to why it is a problem and how it can be fixed. Another Illinois prosecutor reported that officers in their county attend a full-day seminar every year to go over some of the key issues associated with DWI cases and a majority of officers participate.

Officers also require more training to testify effectively at a DWI trial. Many officers testify infrequently (Simpson and Robertson 2001), so they gain little experience in the process. Prosecutors acknowledge that police officers experienced in providing testimony are a formidable opponent for a defense attorney, so the requisite skill is important. Prosecutors can help in this process by briefing officers prior to trial. Indeed, almost all prosecutors surveyed (95%) agreed that preparing

95% of prosecutors believe preparing officers to testify would result in more convictions.



police officers to testify at DWI trials would result in more convictions. For example, in Illinois, one prosecutor regularly invites officers to attend statutory summary suspension (SSS) hearings every Friday in order to learn by watching other officers testify.

♦ **Improved police/prosecutor communication.** Consistent with the preceding recommendation, prosecutors agree that more and better communication is required between police officers and prosecutors. Each professional group has a unique perspective with regard to the collection, documentation and presentation of evidence. In many instances officers may consider small details inconsequential because they are inexperienced with repeat offenders or unfamiliar with DWI prosecutions. Conversely, prosecutors may not understand the dynamic nature of the arrest environment or the overwhelming burden created by paperwork demands.

An exchange of ideas and information was supported by 97% of prosecutors in our survey. This is even higher than the 77% of police officers who also supported this initiative (Simpson and Robertson 2001). These results indicate a strong consensus, so agencies are encouraged to actively pursue this recommendation and explore various initiatives, such as workshops in their respective jurisdictions, that will facilitate communication. Workshops are already used in some parts of the country (e.g., FL, MA, MI, NY and NC) and anecdotal reports indicate that this has been a beneficial process for both parties.

97% of prosecutors support initiatives that will improve communication with police officers.

Some states have gone one step further and developed police-prosecutor teams that work together on cases involving vehicular homicide and other traffic-related crimes. This strategy was developed by Steven J. Janosko, an assistant prosecutor in Ocean County, New Jersey. These teams respond to a crash site and the prosecutor can survey the scene to identify potential evidence that may be necessary at trial or to respond to legal questions the officers may have. The presence of the prosecutor helps ensure that relevant evidence is gathered according to proper procedure and this greatly improves the prosecutor's ability to present evidence at trial by minimizing admissibility issues. This team strategy was highlighted by the National Traffic Law Center (NTLC) in their publication, "Between the Lines", Winter 2000 issue – further information on this strategy can be obtained by contacting NTLC.



♦ **Videotaped evidence.** Jurisdictions currently vary as to when videotape evidence is collected. Some police departments videotape roadside stops with in-vehicle cameras; others use booking videos in which the suspect is directed to perform field sobriety tests in a controlled environment at the station.

Currently, 41 states use in-vehicle videotaping to record DWI investigations (Century Council 1997). However, the extent to which this is done throughout each jurisdiction is inconsistent because many agencies lack the necessary resources and trained officers.

Many prosecutors believe that the collection of videotape evidence by trained officers is valuable in resolving any discrepancies or errors found in the documentation of the arrest or subsequent testimony by an officer. Many times, a judge or jury need to see for themselves the behavior of the defendant on the night in question, as the image of the defendant on that night is often quite different from the one the defendant presents in the courtroom. A videotape can be a powerful method of eliminating reasonable doubt. Overall, 34% of prosecutors reported that videotapes are necessary evidence to obtain a conviction.

However, there is a downside, especially with hard core repeat offenders. These individuals are often tolerant to the effects of alcohol and do not display easily detectable signs of impairment. Accordingly, the videotape in such circumstances may be more beneficial to the defendant.

♦ **Recognition of DWI officers.** Prosecutors feel that officers consistently making DWI arrests and collecting and documenting the evidence necessary to secure a conviction should be acknowledged for their abilities as a way to boost morale and motivate officers. Prosecutors are aware of how challenging it can be to collect sufficient evidence against an experienced repeat offender who is familiar with the loopholes in the system. These officers should be strongly encouraged to continue making arrests and to serve as models and mentors for new recruits. In some states these officers are recognized for their efforts by a variety of organizations. The New York State STOP DWI program recognizes the efforts of dedicated DWI officers, and in other states, such as Florida, MADD organizes special events to recognize law enforcement officers



contributing to the fight against DWI. Prosecutors would like to see similar efforts across the country.

♦ **Admissibility of prior convictions.** Obviously, to admit prior offenses in all DWI cases is prejudicial and involves significant constitutional issues. However, it is possible to get priors admitted in some instances. For example, some states allow priors for repeat offenses or in cases involving a murder charge. To achieve uniformity it is necessary for states to re-examine the procedures that currently preclude this kind of evidence. This is important evidence that would provide the jury with a more truthful image of the offender as opposed to the erroneous belief that the defendant is a first-offender who simply “made a mistake”.

6.2 Test Refusal

♦ **The problem.** Test refusal in the broadest sense encompasses a variety of activities, including refusal to cooperate with police questioning, refusal to submit to SFSTs, refusal to take a PBT and refusal to take a chemical BAC test at the station following an arrest for DWI. The latter is the most critical issue because of the importance of the BAC test result to a successful prosecution. Almost $\frac{3}{4}$ of the prosecutors surveyed (73%) reported that a BAC is the single most convincing piece of evidence that can be presented to a jury.

Unfortunately, as detailed in our enforcement report (Simpson and Robertson 2001), test refusal is by no means uncommon – officers experience some form of refusal in $\frac{1}{3}$ of their DWI investigations. Chemical test refusal rates vary substantially -- from 2% to 71% (Jones et al. 1991; Tashima and Helander 2000) but the average for the nation has been estimated at approximately 20% (Jones et al. 1991). Of considerable importance, 92% of prosecutors reported that test refusal is more common among repeat offenders.

The variability in refusal rates appears to be a function of the penalty structure associated with chemical test refusal. The consequences of test refusal are far less severe than those for taking the test and failing it.



♦ **The consequences.** Chemical test refusal impedes the prosecutor's ability to develop sufficient evidence to support the filing of charges. Without hard evidence, the success of the case relies heavily on the accuracy and detail found in reports completed by the officer and the strength of his/her observations, much of which is open to interpretation without actual test results (see the preceding section on evidentiary issues).

When the prosecutor cannot establish sufficient evidence of the DWI offense, charges may not be filed. If the prosecutor chooses to proceed in the hope that new evidence will be uncovered, the case may later have to be dismissed if this strategy fails. If the suspect has refused to cooperate with other aspects of the investigation as well, it can be exceedingly difficult for the prosecutor to demonstrate sufficient evidence of the alleged offense. At trial, the lack of BAC evidence also makes it more difficult for a prosecutor to refute alternative theories of the crime.

As a result, when a defendant is allowed to refuse testing, it is more likely that he/she will successfully avoid conviction on DWI charges altogether and/or avoid being identified as a repeat offender the next time they appear in court on another DWI charge.

Test refusal also has implications for the sentencing phase, assuming an offender is even convicted. Chemical test refusal significantly impacts what penalties a prosecutor can request, so a conviction without a BAC result means that the offender often faces lesser sanctions.

♦ **The solution.** Prosecutors have identified several solutions for dealing with the problem of test refusal.

They recommend making test refusal a criminal offense to ensure a criminal record is available so that subsequent DWIs are treated accordingly. Only 11 states have passed legislation making test refusal a criminal offense or sentencing enhancement.

Whether test refusal is an administrative or criminal offense, prosecutors recommend that the penalties be sufficient to remove the benefits of refusing. Nominal penalties for



refusal encourage this behavior, especially when compared to the substantial penalties faced upon conviction of DWI charges.

6.2.1 Problem Description and Scope

Test refusal in the broadest sense encompasses a variety of activities, including refusal to cooperate with police questioning, refusal to submit to SFSTs, refusal to take a PBT and refusal to take a chemical test at the station following an arrest for DWI. As described in our enforcement report (Simpson and Robertson 2001), protections engendered by the 4th and 5th Amendments of the Constitution do not permit states to address the lack of cooperation with police questioning and SFST testing procedures, so they are without resolution at this time. Further, refusal to submit to a PBT is also covered by the Constitution in most states and only a few states (NE, NY) have criminalized this offense to date.

Consequently, the main issue to be addressed in this section involves the refusal to take the chemical test. This is a critical issue because of the importance of the BAC test result to a successful prosecution. Almost $\frac{3}{4}$ of the prosecutors surveyed (73%) reported that a BAC result is the single most convincing piece of evidence that can be presented to a jury. And, more than $\frac{1}{4}$ (26%) of prosecutors surveyed reported that the lack of a BAC result is the evidentiary issue most often leading to a dismissal or acquittal.

Nearly $\frac{3}{4}$ of prosecutors say that a BAC test result is the single most convincing piece of evidence.

Unfortunately, as described in our enforcement report (Simpson and Robertson 2001), test refusal is by no means uncommon. Refusal rates vary considerably -- from 2% to 71% (Jones et al. 1991; Tashima and Helander 2000) but the average chemical test refusal rate for the nation has been estimated at approximately 20% (Jones et al. 1991) – i.e., in nearly $\frac{1}{5}$ of the DWI investigations, the suspect refuses to cooperate with chemical testing. Our survey of law enforcement officers (Simpson and Robertson 2001), which considered any and all elements of refusal, including refusal to answer questions, perform SFSTs or submit to a PBT, reported that, on average, officers experience some form of refusal in $\frac{1}{3}$ of DWI investigations.



Of considerable importance, 92% of prosecutors reported that test refusal is more common among repeat offenders, a figure that is entirely consistent with the one reported by police officers in our enforcement report – 95% of police officers said refusal is much more common among repeat offenders.

92% of prosecutors and 95% of police say test refusal is much more common among repeat offenders.

The variability in refusal rates appears to be a function of the penalty structure associated with chemical test refusal. A majority of states have administrative penalties for this offense that typically range from a brief license suspension of three months to a year suspension or revocation (NHTSA 2000). These penalties lack significant deterrent effect and a majority of motorists continue to drive with little fear of apprehension once their license has been suspended. It has been estimated that as many as 75% of suspended drivers continue to operate their vehicles (Nichols and Ross 1989).

Criminal penalties or sentencing enhancements for chemical test refusal apply in eleven states (AK, CA, FL, IN, MN, NE, NJ, OH, RI and VT). However, the magnitude of criminal penalties associated with this offense are not always substantial and, consequently, may have a minimal deterrent effect (NTLC 2001). To date, Alaska has one of the toughest criminal penalties for a first offense test refusal that includes a mandatory minimum of 72 consecutive hours in jail in addition to a mandatory minimum \$250.00 fine (NTLC 1999). Essentially, in very few states are the consequences of refusing the chemical test comparable to taking the test and failing. In light of this, it is most logical for suspects to refuse testing whenever possible.

The consequences of test refusal are far less severe than those for taking the test and failing.

A related issue associated with this problem is that evidence of refusal is still inadmissible in a few jurisdictions. This creates a serious disadvantage for the prosecutor in court. Private citizens are often not aware that refusal is inadmissible in court, so when this evidence is not presented, a jury often incorrectly assumes that the officer failed to offer the test to the defendant. This directly impacts the credibility of the officer testifying and the prosecutor has no way of correcting this impression. Fortunately, almost all states now allow test refusal to be entered as evidence.



A similar concern raised by prosecutors does not so much involve refusal as it does avoidance. Avoidance of the test typically occurs in relation to motor vehicle crashes involving drunk drivers. As documented in our enforcement report (Simpson and Robertson 2001), repeat offenders, who are more likely to be involved in collisions, also know how to evade testing by either leaving the scene of the collision or by going to a hospital. Indeed, there is evidence (Orsay et al. 1994) that 80% of impaired drivers admitted to hospital are not convicted. This fact has been further substantiated in many studies by both emergency room physicians and legal practitioners (Krause et al. 1998; Maull et al. 1983). The result is that BAC evidence is not obtained, which seriously affects the prosecutor's ability to obtain a conviction.

Some states (e.g., AZ, IL, MI, MN, NY) have attempted to address this issue by requiring mandatory blood testing of drivers involved in collisions. However, due to the chaotic nature of emergency rooms, the conditions under which blood is taken in a hospital setting usually makes it more difficult to get the blood test results admitted in court. Most of the difficulties are associated with determining which medical personnel took the blood, the standards of the laboratory conducting the test, the manner in which the test was conducted, or establishing the chain of custody of the evidence.

6.2.2 Consequences of the Problem

Chemical test refusal impedes the prosecutor's ability to bring charges for DWI. Without hard evidence, the success of the prosecutor's case relies heavily on the accuracy and detail found in reports completed by the officer and the strength of his/her observations, much of which is open to interpretation without actual test results. This problem is compounded by the fact that police officers do not receive equal opportunities to be trained in making DWI arrests and, consequently, other incriminating evidence needed to sustain charges is often not collected or noted by some officers.

When the prosecutor cannot establish sufficient evidence of the DWI offense, charges may not be filed. When the prosecutor chooses to proceed in the hope that new evidence will be uncovered, the case may later have to be dismissed if this strategy fails. If the suspect has refused to cooperate with other aspects of the investigation as well, it



can be exceedingly difficult for the prosecutor to demonstrate sufficient evidence of the alleged crime.

At trial, the lack of BAC evidence also makes it more difficult for a prosecutor to refute alternative theories of the crime, such as the suspect was not intoxicated but was, instead, having a diabetic reaction, or was on prescription medication, or had some physical condition that accounts for his/her behavior. Moreover, this problem is further compounded if the investigating officer was unable to conduct a follow-up investigation documenting where, when and how much the suspect drank prior to driving.

As a result, when a defendant is allowed to refuse testing, it is more likely that they will successfully avoid conviction on DWI charges altogether. Prosecutors participating in the survey estimated the conviction rate for suspects who refuse testing is 66%, compared to a conviction rates well in excess of 80% for cases where there is a BAC result. This underscores the importance of the chemical test result.

And, if the defendant avoids a conviction, the next time they appear in court on another DWI charge, they will still be treated as a first-offender, even though this may be the fourth or tenth time that the defendant has been charged with DWI but not convicted. Even if an offender is convicted of refusal, in some states this does not count as an alcohol-related charge, so again, a guilty offender is not subsequently identified as a repeat offender. The implication is that if and when test refusers, who are guilty of DWI, are finally convicted, they will be sentenced as first-offenders with minimal penalties, and may possibly be eligible for diversion or a plea agreement that would otherwise be excluded based on prior convictions.

Finally, test refusal also has implications for the sentencing phase, assuming an offender is even convicted. Chemical test refusal significantly impacts what penalties a prosecutor can request, so a conviction without a BAC means that the offender often faces lesser sanctions. For example, in 29 states enhanced penalties can be applied if the BAC at the time of arrest for the current offense exceeds a certain level. In three of these states the BAC can be specifically considered as an aggravating factor at sentencing (McCartt 2002). This BAC threshold typically ranges from .15 to .20 (NTLC 1999). Since the average BAC among arrested drivers is, in most states, in the range of .15 to .18, if



results are not available because repeat offenders refuse testing, this means that many suspects can face lesser penalties if convicted. There has even been some concern that high-BAC legislation may increase the number of test refusals, especially if the penalties for refusal are weak.

6.2.3 Recommended Solutions

Test refusal poses a number of problems that negatively impact the prosecution of hard core drinking drivers. Prosecutors have identified several solutions for dealing with this issue.

- ◆ **Make refusal a criminal offense.** In most jurisdictions the sanctions for chemical test refusal are administrative. Making test refusal a criminal offense will ensure that suspects who refuse are correctly identified as a repeat offender on a subsequent arrest, even if they are not convicted on the original DWI charge. As noted earlier only 11 states have passed legislation making it a criminal offense or sentencing enhancement to refuse a chemical test (AK, CA, FL, IN, MN, NE, NJ, NY, OH, RI and VT), so there is considerable room for improvement across the country.

- ◆ **Increase the penalties for refusal.** Whether test refusal is an administrative or criminal offense, prosecutors recommend that penalties be sufficient to remove the benefits of refusing. Nominal penalties for refusal encourage this behavior, especially when compared to the substantial penalties faced upon conviction of DWI charges. Suspects who know they are legally intoxicated would rather refuse the test and face a minor administrative suspension than take the test and be convicted for DWI, facing possible jail time and other sanctions.

- ◆ **Greater use of blood evidence.** Forty percent of prosecutors said they support greater use of blood evidence in DWI cases, especially in those involving serious injury or death. Some states statutorily permit forced blood draws in cases of test refusal. Blood evidence is more useful than breath evidence because the validity and reliability of the results are more difficult to challenge. Also, fewer procedural requirements are involved when drawing blood, meaning that challenges to admissibility are minimal. Blood testing also permits the defense to conduct independent tests at a



later time, as required by law, and prosecutors agree that this evidence is less confusing for jury members. To illustrate, in some areas of Arizona, blood evidence is used consistently and this has resulted in a very high conviction rate and fewer legal challenges.

In this context, blood draw procedures result in minimal intrusion for the suspect and the use of this procedure has been upheld by Federal Court rulings. Under *Schmerber v. California* (1966) 384 U.S. 757, an officer can obtain a warrant to collect blood evidence as long as it is not done in a manner that is likely “to shock the conscience” of the court. It is strongly believed that the use of blood draws is a reasonable limitation of the rights guaranteed under the Constitution.

♦ **Admit evidence of refusal.** As mentioned in the previous report (Simpson and Robertson 2001) this problem has all but been corrected. Only three states (MA, HI and RI) do not permit information regarding test refusal to be entered as evidence. In seven other states (e.g., MD, MI, VA) its admissibility is limited according to case law, usually meaning it can only be entered by the prosecution if the issue is raised during trial by the defense (NTLC 2001). However, it is still a problem for prosecutors, with 28% of those surveyed recommending this option as a solution for test refusal.

♦ **Other ideas.** Some prosecutors believe that test refusal should be a *rebuttable presumption*, meaning that when the defendant refuses to take the chemical test, the burden of proof or onus should shift to the defense to demonstrate that the defendant was not intoxicated at the time the test was refused, or more importantly, at the time of driving. Prosecutors raised this issue during workshop discussions, however, prosecutors acknowledged significant constitutional issues were involved. Currently, the prosecution has the burden of proof to demonstrate that the defendant was intoxicated at the time of driving. By creating a rebuttable presumption, the defendant will have to either provide evidence that they were not intoxicated or take the witness stand and explain why the test was refused. The Ohio Criminal Sentencing Commission has already recommended to the legislature that there be a presumption of drunk driving when a person refuses to take the chemical test (Century Council 1997).



6.3 Motions and Continuances

♦ **The problem.** Motions are written arguments initiated by either the prosecution or the defense regarding how a particular case should proceed. Governed by strict procedural rules, they are commonly initiated during pre-trial proceedings (but are not limited to this phase) and cover a broad range of issues including: discovery, the admissibility of evidence, limits placed on the use of particular kinds of evidence, and requests for continuances.

Although motions have a purpose and function in ensuring the fairness of the trial process, they can be overused or used in a “frivolous” manner in an effort to delay proceedings. Prosecutors often encounter difficulty, particularly when responding to evidentiary motions, since the availability of, and access to, legal research and reference materials may be lacking.

♦ **The consequences.** Excessive motions can both complicate and prolong the trial process, and when prosecutors are unable to respond adequately to motions filed, the defense is more likely to be successful in obtaining a dismissal or acquittal. Moreover, the lack of adequate legal resources needed to respond to technical motions may result in the exclusion of valuable evidence and greatly diminish a prosecutor’s ability to obtain a conviction.

♦ **The solution.** Prosecutors identified two principal ways to reduce the impact of frivolous motions and unreasonable requests for continuances.

Prosecutors would like better access to current materials that would assist them in promptly responding to some of the more complex motions filed by the defense. In addition, prosecutors would like to see more timely information – newsletters or journals – that keeps them abreast of new rulings, especially with regard to scientific evidence. Although some progress has been made in this area, it is evident that more needs to be done to improve the efficiency with which needed state-specific information is transmitted to, or can be accessed by, prosecutors.



To ensure that a case is processed in a reasonable timeframe almost half of the prosecutors in the survey (45%) want to see guidelines followed more closely. In this context, deterrence theory emphasizes the importance of the swiftness and certainty with which sanctions are imposed for a crime. Excessive continuances increase the time between the commission of the offense and the imposition of sanctions, and diminish the likelihood of a conviction, thereby eroding any deterrent effect.

6.3.1 Problem Description and Scope

Motions are written arguments initiated by either the prosecution or the defense regarding how a particular case should proceed. Motions, which are governed by strict procedural rules, are commonly initiated during pre-trial proceedings (but are not limited to this phase) and cover a broad range of issues including: discovery, the admissibility of evidence, limits placed on the use of particular kinds of evidence, and requests for continuances.

In most instances, motions consist of written technical arguments involving specific points of law that are supported by memoranda of law and other documents that reference relevant precedents involving similar facts and circumstances. Through the use of motions, attorneys may be able to improve their respective chances of obtaining the desired outcome -- either a conviction or an acquittal.

Motions are filed with the Court responsible for hearing the case and copies of these motions are also served on opposing counsel, essentially giving them notice that a motion has been filed. The filing and serving of motions must be completed by a specific deadline set out by the Court. Similarly, responses to motions by opposing counsel must also be filed within a specified time frame.

When a prosecutor or defense attorney receives a copy of a motion that has been filed by opposing counsel, they essentially have two options. Counsel can choose not to oppose the motion, which may be done if the contents of the motion serve their interests. For example, if defense counsel makes a motion for a continuance – a request to conduct pre-trial hearings at a later time – the prosecutor may decide not to oppose the motion in order to have additional time to prepare. However, if the prosecution is ready



to proceed with the hearings, they may decide to challenge the motion. In order to challenge the motion, the prosecution must file a similar written motion in response that argues technical points of law and cites specific cases supporting their reasons for objecting to the motion.

The judge plays a central role in determining what motions will be permitted and to what extent motions will be heard. A judge may decide to deny a motion entirely, or to permit written arguments only and counsel are then only permitted to submit a brief that argues their case. In other instances, a judge may also decide to hear oral arguments, meaning that both attorneys are permitted to argue their case before the judge in addition to producing a written motion. Following oral arguments, the judge will issue a decision as to whether the motion will be granted. In rare cases, the judge may also reserve judgment until a later time, allowing the case to proceed before a decision is issued.

Some of the most technical motions encountered involve the admissibility and use of evidence in court proceedings. There are two different kinds of motions that affect the evidence used at trial. First, there are motions made to suppress or exclude evidence based on constitutional or statutory violations. For example, in DWI cases, the defense may argue that the officer was not justified in stopping a vehicle, that the suspect was not “Mirandized”, or that the suspect was denied his/her right to counsel.

Secondly, there are motions *in limine*. These motions are mechanisms by which either the defense or prosecution may raise issues of the admissibility of evidence prior to trial. These motions allow the court to pre-judge the admissibility of evidence at trial. For example, the defense may want to present evidence of contributory negligence and introduce evidence that poor road conditions contributed to a loss of control of a vehicle by a driver implicated in a crash; the prosecution may object that the evidence is irrelevant to the case. A motion *in limine* will determine to what extent this evidence would be admitted, if at all.

To further illustrate the extent to which motions may be a complicating and time-consuming factor in the prosecution of repeat drinking drivers, listed below are motions which may be made during a routine DWI case. Prosecutors may either initiate and/or



be required to respond to these motions at some point during the pre-trial or trial process.

- motion to amend charges
- motion for bail
- motion for a Bill of Particulars
- motion for continuance
- motion for discovery
- motion for dismissal
- motion for extension of time to file pre-trial motions
- motion to admit expert testimony
- motion to include prior convictions
- motion for pre-trial detention
- motion to suppress evidence – physical evidence/ statements/ identifications
- “speedy trial” motion
- motion for a witness list or to amend witness list

Although each of these motions has a purpose and function in ensuring the fairness of the trial process, the overuse or “frivolous” use of motions can create an abuse of process, meaning that motions may be filed to burden opposing counsel with unnecessary paperwork and essentially delay the trial process. Frivolous motions in DWI cases can both complicate and prolong the trial and increase the potential for a dismissal on technical grounds. More specifically, motions in the form of continuances also serve to delay the adjudication process and increase the potential for evidence to be lost or for witnesses to be unavailable. The longer it takes a case to come to trial, the less likely the case will result in a conviction.

Prosecutors often encounter difficulty when responding to numerous complex, technical motions filed by defense attorneys in DWI cases. Evidentiary motions, which prosecutors must respond to within a very short time frame, often involve scientific evidence pertaining to BAC analysis and the use of breath-testing instruments. Unfortunately, many DWI prosecutors are new to the field and are typically unfamiliar with the legal issues involved in such things as retrograde extrapolation, partition ratios and the various methods of BAC analysis. Prosecutors also often lack access to both



the legal resources and support staff needed to research these issues and, consequently, may be unable to adequately respond to the motions filed within the specified period.

Prosecutors report that excessive continuances are problematic because they can ultimately result in a dismissal of the charges. Although there are instances when continuances are unavoidable, numerous requests for continuances can amount to an abuse of process. Some prosecutors routinely encounter defense attorneys who request continuances once it is clear that the investigating officer will be available to testify in court on a particular day. The defense usually does this in hopes that the officer will be unable to appear at a later time and, as a result, the case will be dismissed.

The Court typically has broad discretion in granting or denying motions for continuance and in re-scheduling the case. The only requirement is that the motion for continuance be “for sufficient cause”, for example, a witness may be unavailable. Some prosecutors feel that judges are more likely to grant a continuance in an effort to protect the rights of the accused and, these decisions, while commendable in principle, are not always appropriate and may conflict with acceptable case processing guidelines.

For example, anecdotal evidence indicates that, while most attorneys abide by Court Rules, some attorneys have developed a habit of abusing the continuance process by claiming conflicts that do not exist. It has been the experience of some prosecutors that a defense attorney will request a continuance, claiming that a scheduling conflict exists, when that conflict has already been resolved, or simply does not exist. In these instances, prosecutors have had to resort to contacting other courts to determine whether the defense has a legitimate conflict, only to discover that none exists. Moreover, some judges may fail to impose sanctions when this behavior is brought to their attention, potentially encouraging this behavior.

Other reports involve defense attorneys that appear in court unprepared for trial. In some instances, the attorney has gone so far as to inform their client that it is not necessary to appear in court prior to the continuance being either requested or granted. Again, in these instances, attorneys are not consistently sanctioned for failing to adhere



to Court Rules. Prosecutors believe that the continuance process should not be abused in such a fashion.

6.3.2 Consequences of the Problem

When prosecutors are unable to respond adequately to motions filed, the defense is more likely to be successful in obtaining a dismissal or acquittal. Prosecutors often encounter difficulty, particularly when responding to evidentiary motions, since the availability of, and access to, legal research and reference materials may be lacking.

Many offices do not have access to current reference materials or databases, so prosecutors cannot always research these motions to determine what recent rulings have been made on a particular issue and respond in a timely manner. Conversely, for some private defense attorneys, some of these motions are standard and are routinely filed and argued in most DWI cases, requiring little or no preparation. Without up-to-date reference materials, the prosecutor may be unaware of recent cases and rulings which would both validate and substantiate their responding motion or argument. The lack of adequate legal resources needed to respond to technical motions may result in the exclusion of valuable evidence and greatly diminish a prosecutor's ability to obtain a conviction.

This problem can be even more acute for newer less experienced prosecutors making them more hesitant to challenge motions filed by the defense if they are unable to research important issues. And, if unchallenged, these motions can result in valuable evidence being excluded and decrease the possibility that a defendant will be convicted. Moreover, these technical motions can also intimidate new or inexperienced prosecutors and lead to what would normally be considered an unsatisfactory plea agreement.

Protracted continuances result in a case becoming old, which makes it much more difficult to prosecute. This is because evidence is lost and/or police and other witnesses forget details or these participants can be difficult to locate. Judges do not always adhere to case processing guidelines as a result of numerous requests for continuances and some

Excessive motions, including those for continuances create excessive paperwork, complicate and prolong the trial process and increase the potential for dismissal.



cases can get to be 1-1½ years old. Typically, a case can and should be resolved in three to six months, depending on whether the case actually goes to trial or is resolved at some point with a plea agreement. Excessive continuances enhance the likelihood for dismissal or acquittal and allow the defendant to avoid both conviction and subsequent identification as a repeat offender. Additionally, continuances consume valuable resources by wasting the time, not only of the prosecutor, but also of the judge, the investigating officer, and any other witnesses whose appearance has been scheduled.

6.3.3 Recommended Solutions

Prosecutors identified two principal ways to reduce the impact of frivolous motions and unreasonable requests for continuances.

♦ **Better access to legal research and court rulings.** Prosecutors would like better access to current materials that would assist them in promptly responding to some of the more complex motions filed by the defense. There are a wide variety of reference materials available, the most notable of which is Westlaw (www.westlaw.com/about). Westlaw was introduced in 1975 and “enables legal professionals to retrieve cases, statutes, and other documents from West’s vast library of legal and business materials in a matter of seconds.”

Reference materials may come in two forms, either books and hard copies of legal reference materials or computerized databases. In terms of its content, Westlaw consists of both statutes and cases, administrative materials, law reviews and treatises, attorney profiles, news and business information, and forms. By accessing Westlaw, attorneys are able to search nearly 15,000 databases, more than 1 billion public records and over 700 law reviews among other items (www.westlaw.com). Access to this or other similar reference materials allows a prosecutor to quickly research and respond to motions filed by the defense and greatly expedites the case.

In addition to better access to Westlaw and other legal materials, prosecutors would like to see more timely information -- newsletters or journals -- that keeps them abreast of new rulings, especially with regard to scientific evidence.



Fortunately, there are some initiatives at the state and national level designed to do just that. In some states, such as New York, newsletters are produced that update prosecutors about current decisions and case law. For example, New York prosecutors can use the Defender's Digest and the New York State DWI Newsletter as reference materials. At the national level, NTLC maintains a brief bank that "contains motions, transcripts, and orders relating to various topics including drug recognition evaluations, horizontal gaze nystagmus, field sobriety tests, double jeopardy, breathalyzers and more" (NTLC 2001). Additional material pertaining to this bank is posted on the NTLC website at www.ndaa-apri/programs/traffic/brief_bank.html and further information can be obtained at trafficlaw@ndaa-apri.org.

However, in light of the fact that the issue of motions was given such a high priority on the list of problems encountered by prosecutors, it is evident that more needs to be done to improve the efficiency with which needed state-specific information is transmitted to, or can be accessed by, prosecutors.

♦ **Adherence to case processing guidelines.** Many states have developed case processing guidelines that dictate the maximum amount of time it should take to resolve a case in the court system. The guidelines that specify allowable time frames vary among states, typically ranging from three to six months, depending on the seriousness of the case. Indeed, almost half of the prosecutors in the survey (45%) want to see these guidelines followed more closely, so that the case is processed in a reasonable timeframe. In this context, deterrence theory emphasizes the importance of the swiftness and certainty with which sanctions are imposed for a crime. Excessive continuances increase the time between the commission of the offense and the imposition of sanctions and diminish the likelihood of a conviction, thereby eroding any deterrent effect.

45% of prosecutors believe case processing guidelines should be enforced to avoid delays in trying DWI cases.

6.4 Records

♦ **The problem.** Records containing data and information pertinent to the prosecution of DWI cases are maintained by a diversity of agencies. Such records vary



in terms of how up-to-date the information is, their contents (both in terms of the nature of the information and its scope), accuracy, completeness as well as ease and timeliness of access.

♦ **The consequences.** Inaccessible, incomplete or inaccurate records and associated documentation impede the proper identification of repeat offenders and result in ineffective or inappropriate sanctioning. The gravity of this problem was illustrated by the findings from a recent study conducted at Brown University on the accuracy of DWI charges filed by Rhode Island police agencies. Approximately 40% of DWI offenders were incorrectly charged as a first-offender instead of a repeat offender (Grunwald et al. 2001). Nationally, our survey results show that prosecutors estimate at least 15% of defendants are incorrectly charged as a first-offender. Those offenders that are not charged appropriately face lesser sanctions and are often able to negotiate diversion programs or minimal plea agreements.

♦ **The solution.** Prosecutors identified a number of solutions to the problem of incomplete and/or inaccessible records. Prosecutors would like to see all key agencies maintain appropriate records for the look-back period specified in DWI statutes. Prosecutors are often unable to locate the paper record of offenses that should be included in this period and, consequently, defendants are not consistently identified as repeat offenders and subject to the appropriate sanctions.

Prosecutors support standardized court reporting practices and the development of guidelines that establish the minimum necessary information that should be included in these reports. This would greatly facilitate the prosecution of repeat offenders.

Driver abstract forms should be standardized so that prior convictions can be clearly established. This will enhance charging and sentencing. Almost all (94%) prosecutors surveyed agree that standardized record-keeping practices and driver abstracts would improve the prosecution of out-of-jurisdiction or out-of-state drivers.

94% of prosecutors believe that standardized record-keeping practices would improve the prosecution of out-of-state and out-of-county drivers.

Prosecutors also believe that records of diversion programs should be maintained so that repeat offenders can be identified and prohibited from evading harsher sanctions.



6.4.1 Problem Description and Scope

Inaccessible and/or incomplete records and associated documentation from relevant agencies impede the proper identification of repeat offenders and result in ineffective or inappropriate sanctioning. Records relevant to a DWI prosecution are kept by a variety of agencies, many of whom maintain those records for varying periods. In addition, each agency's records contain different kinds of information, some of which may not be current or accurate, and depending on the jurisdiction and the agency responsible, these records may be either difficult to locate or access within acceptable time frames for use in court proceedings. As well, issues of admissibility are often raised due to variations in legislative standards and record-keeping methods.

Information relevant to a DWI case resides with a diversity of agencies. Some records are kept by federal agencies, such as the National Crime Information Center (NCIC) maintained by the Federal Bureau of Investigation (FBI) – NCIC consists of 17 separate databases, the one of most interest for DWI cases being criminal history. Other records are kept by state agencies, such as the Department of Motor Vehicles (DMV), or its equivalent, the Attorney General's Office, and the Administrative Office of the Courts. Still other records are kept by local agencies, such as law enforcement and probation/parole departments. Each maintains records for a different purpose so it is not uncommon to find that their contents, file structure, and methods of storage and retrieval differ. For example, the DMV maintains records regarding any administrative or criminal sanctions imposed that affect driver licensing; police agencies have records of arrests and charges filed; courts have records of court proceedings and convictions; and, probation/parole agencies maintain records regarding offenders under supervision and any conditions imposed. Prosecutors often need data held by a wide range of agencies, and in the absence of an efficient system for searching for relevant data from these diverse sources, important case information may not be readily accessible.

Moreover, many key agencies maintain records for different time periods – different from those specified in DWI legislation and from each other. In 30 states, DWI legislation specifies a particular period from which prior convictions are to be considered. This so-called “look-back” or “washout” period can range from three to twelve years, depending on the state, with the majority of states having either a five or ten year limit (NTLC 1999).



It is important that the look-back period for DWI cases is harmonious with the length of time related agencies retain records.

Not only do some agencies fail to maintain records for this specified period, but these agencies often do not to maintain records for periods similar to other agencies, meaning that some may keep records going back ten years, others only seven, and still others only five years. When a prosecutor requests a particular driver abstract from several different states, they encounter agencies that provide information for varying periods. To illustrate, Florida provides a complete driver history, Louisiana provides a driver history for the past 10 years and Nebraska provides a driver history for only the past five years.

Some records maintained by other agencies are either unavailable to prosecutors or not available in a form that is admissible in court. Often there are no available records maintained that document a defendant's past involvement in diversion and treatment programs. Currently, only a few states (e.g., Oregon) maintain diversion records for a 10-year period. These records are important because defendants are only eligible for diversion programs once. The prosecutor or the sentencing judge often have no way of verifying if a defendant has previously participated in diversion and must rely on whatever information the defendant chooses to disclose. And, treatment facilities may not know if an offender has been previously assessed and identified as having a particular problem, what types of treatment methods have been successful with the offender, or how many times the defendant has been charged with DWI (Shaver, Fallis 2000; Owens 2001). This requires the treatment facility to rely on information provided by the client and/or spend additional time and resources diagnosing them.

Another problem with records is that the information they contain is variable and may be neither accurate nor up-to-date. Each agency maintains records to serve their own purpose, however, some of that information may also be relevant to other agencies. For example, the DMV maintains records of convictions that affect driver licensing but do not contain information about all of the convictions a driver may have incurred. Further, this information may not be the most current, depending on the resources available within each agency. Courts may have records of convictions that have not yet been forwarded to the DMV for various reasons. It is important for prosecutors to access all of these



different records so as not to overlook pertinent information that results in an incorrect charge or sentencing recommendation.

Content and information concerns are especially relevant to out-of-state driver abstracts, which may often be incomplete. It is common for these records to contain information about charges or proceedings, however, it is sometimes impossible to determine the ultimate resolution of a case since in many instances the conviction is not noted on the driver abstract. Without a record of conviction, the prosecutor is unable to enter priors.

A secondary problem is that these abstracts can be exceedingly difficult to read. Each state has its own format for producing these abstracts, and prosecutors report that these abstracts are often difficult to decipher due to the lack of uniformity in reporting methods and the variable use of symbols and abbreviations for such things as charges, convictions, and the jurisdiction where they took place. For example, in Nevada the key (code) for the violation and the jurisdiction must be requested, whereas Florida does not code convictions, meaning they are written in plain language. In New Hampshire the violations are not coded but jurisdictions are and that code must be requested. In Illinois violations are coded and a phone number is provided to call for interpretation purposes (NTLC 2000).

Prosecutors acknowledge that there has been considerable improvement in these abstracts as well as other records in the last few years in some states, but some still encounter difficulty. However, considerable work is being done to increase the quality, uniformity and availability of traffic records. Participants in the International Forum on Traffic Records and Highway Information Systems have been working to consistently improve the quality of available records, to improve the access to these records, and to ensure that records contain the needed information.

Another problem involves the prosecutor's ability to obtain either driver records or records of convictions from other jurisdictions, either within the state or out-of-state, in a timely manner. It is often difficult for prosecutors to obtain records from other jurisdictions or states in the allowable time frame (usually 10 days but this may vary according to local rules) when using formal request channels. For example, in Rhode Island it takes 28 days to obtain a driving record, in Colorado it takes 14 days, in D.C. it



may take 3-5 days and in Kentucky the information may take 1-2 days or can be faxed immediately on request (NTLC 2000). Prosecutors may also occasionally be required to provide certified copies of convictions that may be difficult to obtain within the required time period.

To overcome such difficulties, prosecutors will sometimes contact neighboring District Attorneys and request assistance in obtaining records directly from the police department responsible for the prior arrest as this produces more timely results. Furthermore, in some states (e.g., OK), DWI convictions are misdemeanors that are tried in municipal courts that are not necessarily a “court of record” (Fallis 1998). This means that there will be no record of the conviction with the courts or with any other agency – i.e., prosecutors cannot even count these convictions as priors.

Finally, the use of out-of-state records raises important admissibility issues as a result of variability in DWI legislation and record-keeping methods. Judges will often exclude prior out-of-state convictions if the wording of the DWI statute is different or a different standard of proof is required. Priors are also excluded if record-keeping procedures fail to meet a certain standard. Some court transcripts are very formal and specific, whereas others are very informal and lack detail. Prosecutors may be required to bring in justice officials from the other states to verify the identity of the defendant before priors are admitted and the resources to do this are not consistently available, especially for a misdemeanor conviction.

6.4.2 Consequences of the Problem

Records pertinent to the prosecution of DWI cases vary in their contents, accuracy, and ease of access. This hampers the ability of prosecutors to make appropriate decisions regarding charging, diversion, plea agreements and sentencing.

Prosecutors must clearly establish the number of convictions a defendant has accumulated in a specified period in order to increase a misdemeanor charge to a felony. Currently, 37 states have enacted DWI statutes that permit a felony charge if the driver has a specified number of prior DWI convictions. The number of convictions required to increase the charge ranges from two to five, with many states requiring three



or four convictions (NTLC 1999). When look-back periods are incompatible, it becomes necessary for the prosecution to locate a “paper trail” for the additional years for which electronic records are not available. This can be very difficult, as agencies may have moved and misplaced files, or old files may have been damaged.

The gravity of this problem was illustrated by the findings from a recent study conducted at Brown University on the accuracy of DWI charges filed by Rhode Island police agencies. Approximately 40% of DWI offenders were incorrectly charged as a first-offender (Grunwald et al. 2001). Nationally, our survey results show that prosecutors estimate at least 15% of defendants are incorrectly charged as a first-offender. Those offenders that are not charged appropriately face lesser sanctions and are often able to negotiate diversion programs or minimal plea agreements.

As many as 40% of DWI offenders are incorrectly charged as a first-offender.

In most states, the existence of diversion programs (e.g., alcohol education or treatment) allows a defendant to avoid an official conviction if they are a first-offender. When an offender participates in a diversion program, sentencing is deferred until completion of the program. Upon successful completion the DWI charge is removed from the record. Because records of diversion are not consistently recorded or noted, an offender may become eligible for this program several times as a first-offender. For example, in Connecticut, first-offenders are eligible for diversion on a misdemeanor DWI charge. If the defendant successfully completes the diversion program and incurs no other DWI charges in a 13-month period, any record of the charge is expunged. This means that if that same defendant incurs a new DWI charge 14 months after the first-offense, the defendant is then eligible for diversion again, thereby eliminating any possibility of being identified as a repeat offender, unless a new charge is incurred within the 13-month time frame.

The diversity and accuracy of records complicates the record search process considerably. Prosecutors must resort to searching the records of several agencies in order to determine the true criminal history of the defendant. The licensing agency may report two prior convictions but the courts may report three, requiring the prosecutor to determine which number is correct. To complicate this process, court records are not always maintained in one location. For example, in Illinois, traffic misdemeanors are



reported to the traffic court in a given jurisdiction and felonies are recorded with the Secretary of State, and there is little or no communication or record linkage between these agencies. This means that a prosecutor must contact the Court Clerk in several jurisdictions and the Office of the Secretary of State, and attempt to cross-reference names to uncover any prior convictions.

To make this even more difficult, the name of the defendant may vary depending on the use of a maiden name, middle initial, or an alias. Consequently, prior convictions may be impossible to locate or match to a defendant with any degree of accuracy, meaning that the defendant may be charged incorrectly and be able to negotiate a beneficial plea agreement as a result.

The main problem with incomplete records is that repeat offenders may not be consistently identified when brought before a court on a subsequent DWI charge. Without adequate access to complete and up-to-date records, the prosecutor is often unable to determine if the defendant is a repeat offender, if the charges filed are proper, if the plea agreement negotiated is equitable, or if sentencing recommendations are appropriate. A judge relies heavily on the information provided by the prosecutor when sentencing offenders, and if the information provided is incorrect, the offender may avoid mandatory minimum sentences required by law.

6.4.3 Recommended Solutions

Prosecutors identified a number of solutions to the problem of incomplete and/or inaccessible records:

- ◆ **Establish uniform look-back periods.** Prosecutors would like to see all key agencies maintain appropriate records for the period specified in the DWI statutes. Prosecutors are often unable to locate the paper record of offenses that should be included in the look-back period and, consequently, defendants are not consistently identified as repeat offenders and subject to the appropriate penalties. When agencies maintain current and accurate records with uniform time-frames it is more difficult for offenders to avoid being charged and sanctioned accordingly.



♦ **Standardized court reporting practices.** Prosecutors support standardized court reporting practices and the development of guidelines establishing the minimum necessary information that should be included in these reports. This would greatly facilitate the prosecution of repeat offenders. Uniform court reporting practices would facilitate the admissibility of court reports of prior convictions from different jurisdictions. The development of these guidelines could be further studied by an agency such as the National Center for State Courts (NCSC) under guidance from the Conference of State Court Administrators (COSCA) or the Executive Office of Public Safety Programs Division, also known as the Committee on Criminal Justice (CCJ). In this context, one of the sessions scheduled at the 2002 Traffic Records Forum involves court automation of traffic records. The move towards automation should greatly assist the standardization of court reporting practices and facilitate the prosecution of offenders.

♦ **Establish uniform driver abstracts.** Driver abstract forms should be standardized so that information of prior convictions can be clearly established. This will enhance charging and sentencing. Almost all (94%) of prosecutors surveyed agree that standardized record-keeping practices and driver abstracts would improve the prosecution of out-of-jurisdiction or out-of-state drivers. In this context, the American

94% of prosecutors believe that standardized record-keeping practices would improve the prosecution of out-of-state and out-of-county drivers.

Prosecutors Research Institute (APRI) has recently produced a 3-volume series entitled "Prior Convictions in DUI Prosecutions: A Prosecutor's Guide to Prove Out-of-State DUI/DWI Convictions", (www.ndaa-apri.org) that details the procedure for requesting driver abstracts in each state, shows an example of the driver abstract from each state, and provides a summary of the most recent DWI statutes. The intent of this series is to assist prosecutors in locating and entering evidence of out-of-state convictions. This series provides a valuable resource for prosecutors due to the current lack of uniformity and standardization that exists among driver records.

♦ **Maintain diversion records for consistent periods.** Prosecutors believe that records of diversion programs should be maintained so that repeat offenders can be identified and prohibited from evading appropriate sanctions. These diversion records would also be useful in assisting criminal justice professionals in determining if diversion programs demonstrate any deterrent value, an issue that was raised in our workshops by both prosecutors and judges. In this context a review of diversion programs by the



National Transportation Safety Board (NTSB) concluded that diversion programs do not reduce DWI recidivism (Hedlund and McCartt 2001).

6.5 Inadequate or Inconsistent Penalties

♦ **The problem.** Prosecutors believe that the penalty structure available to judges and/or the sanctions imposed in many DWI cases are inadequate or applied inconsistently. DWI statutes in some states do not include significant tiered penalties for repeat DWI offenses. Tiered penalties refer to increasing penalties for each subsequent offense, regardless of whether or not there is a corresponding increase in the severity of the offense.

However, even in states that do have tiered sanctions for repeat offenses, these elevated penalties are not consistently imposed and/or may not be severe enough to deter repeat offenses. This can be a result of inadequate resources for sanctioning offenders, the outcome of plea agreements, judicial discretion and/or the cultural atmosphere of some jurisdictions, and a lack of opportunities for judicial training. Even in cases where mandatory minimum sanctions are specified by statute, they may not be consistently imposed for the same reasons.

♦ **The consequences.** The consequence of inadequate or inconsistently applied penalties is that offenders are not sanctioned effectively for their crime, thereby diminishing the specific and general deterrent effects. It is especially important to impose effective sanctions for repeat offenses to deal with the persistence of the behavior. Because repeat offenders often avoid detection and apprehension, and can also avoid conviction even when apprehended, it is essential that effective sanctions are imposed in those cases where offenders are convicted.

♦ **The solution.** Prosecutors support the continued development of tiered penalties for repeat drinking drivers. They also believe that penalty structures should be carefully examined to ensure they will effectively deter future offenses. Those states that do not currently rely on tiered penalties for DWI offenses are strongly encouraged to



examine this option. Those states that do have tiered penalties are urged to review the penalties in place and determine if they need to be enhanced.

Prosecutors believe that tiered strategies should include the development of stricter sentencing guidelines for repeat offenses to ensure that the sanctions specified in the legislation are imposed. Although it is important for judges to be able to adjust sentences according to case specifics, the sentencing guidelines should be the rule, rather than the exception. Three-quarters of the prosecutors surveyed (75%) strongly supported stricter sentencing guidelines that mandate harsher sanctions for repeat offenses.

Prosecutors feel that the development of more dedicated DWI courts and judges would improve the effectiveness of the criminal justice system's response to hard core drinking drivers because prosecutors and judges will work exclusively on DWI cases and thereby become more proficient and consistent.

The inadequate and/or inconsistent imposition of sanctions can arise indirectly from a lack of familiarity with technical issues pertaining to DWI, or more directly from a lack of confidence in the effectiveness of the penalties. These problems can be addressed in part by education and training. Almost all prosecutors (91%) surveyed believe that more DWI educational opportunities, such as workshops and conferences involving all criminal justice professionals, would be beneficial.

6.5.1 Problem Description and Scope

Prosecutors believe that the penalty structure and/or sanctions imposed in many cases are inadequate – they either do not “fit the crime” or are insufficient to serve as a deterrent, or are applied inconsistently. This may occur for a variety of reasons, ranging from loopholes and inconsistencies in legislation, to a lack of opportunities for judicial education, to judicial discretion.

DWI statutes in some states do not include significant tiered penalties for repeat DWI offenses. Tiered penalties refer to increasing penalties for each subsequent offense, regardless of whether or not there is a corresponding increase in the severity of the



offense. This means that the sanctions imposed for each offense gradually increases with each repeat offense. Some states have gone one step further and legislated mandatory minimum penalties that must be imposed with each subsequent offense, whereas others have not. Consequently, the penalties for DWI offenses may vary substantially between jurisdictions and states.

Prosecutors are generally supportive of a tiered penalty structure because, in its absence, many repeat offenders are punished as first-offenders, meaning that a typical DWI offender may receive the same sanction, regardless of whether it is a first-offense or a fifth-offense. This contradicts a fundamental principle of the justice system; that repeat offenses should be punished more harshly than first-offenses. This is why convictions for prior offenses are typically an aggravating factor at sentencing as long as they are subject to the 'washout' period.

However, even in states that do have tiered sanctions for repeat offenses, these elevated penalties are not consistently imposed and/or may not be severe enough to deter repeat offenses. This can be a result of inadequate resources for sanctioning offenders, the outcome of plea agreements, judicial discretion and/or the cultural atmosphere of some jurisdictions, and a lack of opportunities for judicial training. Even in cases where mandatory minimum sanctions are specified by statute, they may not be consistently imposed for the same reasons.

Inadequate resources is a common problem that plagues the justice system in many jurisdictions. As mentioned previously, several jurisdictions are facing the issue of jail overcrowding (Cunniff 2002). Judges may often sentence offenders to imprisonment for several days, however, upon reporting to the jail, the offender is often released because there are no beds available. In these instances, penalties are inadequate due to constrained resources. Also mentioned previously, plea agreements often include reduced sentences in exchange for a guilty plea, especially when the prosecutor's evidence is weak, so again, in many instances the penalties for the offense are inadequate.

In all criminal cases, judges are granted considerable discretion with regards to sentencing. This allows the judge to sentence an offender based on the circumstances



of the case and ensures fairness in sentencing. Broad judicial discretion in DWI cases, as with other criminal cases, often leads to “judge-shopping”, meaning that a defendant will attempt to have their case heard in front of a judge known to impose lesser sanctions. A study conducted on judicial sentencing of DWI offenders by the Foundation for Constructive Change in New Mexico clearly illustrates this point. This study found that some judges consistently impose jail sentences in more than 75% of their cases, whereas other judges impose jail sentences in less than 10% of their cases (Foundation for Constructive Change 1998).

The point is that a lack of relatively uniform sentencing structures and penalties undermines the effectiveness of the sanctioning process. Offenders are permitted to essentially circumvent the sanctioning process by appearing before a particular judge.

Additionally, in some jurisdictions, drunk driving offenses are not viewed as seriously as they are in other jurisdictions. In these instances, it may be almost impossible for judges to impose harsh sentences, even if they are mandated by law. In response to this, in individual judicial districts, judges may agree on set levels or tiers of penalties to impose that differ sometimes from the legislature directives. This is usually done to make the judges uniform in their sentencing and to avoid criticism and “judge shopping”.

Prosecutors also suggest that inadequate penalties can be imposed because of inconsistent familiarity with the benefits and effectiveness of sanctions across the judiciary. For example, the effectiveness of alcohol ignition interlocks has been scientifically demonstrated and documented (Beck et al. 1999; Voas et al. 1999). Despite this, it is also well established that they are not routinely imposed by judges as a sanction, even in jurisdictions where they are mandated (Tashima and Helander 2000). It has been determined that many judges were reluctant to impose interlocks as a sanction because they did not believe they were effective – i.e., they were unaware of the contemporary and substantial literature demonstrating the beneficial impact of ignition interlocks. As evidence of this, during the judicial phase of our study, we received several requests for information on the effectiveness of various sanctions discussed in the workshops.



Inadequate penalties may also be imposed as a result of the lack of opportunities for judicial training. Some judges, especially those who most often hear cases in very rural areas, may lack opportunities for judicial training and, as a result, can be unaware of the value of various sanctions. Moreover, a lack of access to training can have much broader implications since DWI trials can be very complex. In some jurisdictions municipal or lower court magistrates or justices of the peace can hear DWI cases, however, they are not necessarily required to be members of the bar. DWI cases often involve very complex legal, technical, and scientific aspects that can be challenging even for the most experienced and well-trained court officers. These cases can present significant problems for those with less training and experience.

6.5.2 Consequences of the Problem

The consequence of inadequate or inconsistently applied penalties is that offenders are not sanctioned effectively for their crime. This means that the specific and general deterrent effects traditionally associated with sanctions are greatly diminished. It is especially important to impose effective sanctions for repeat offenses to deal with persistence of the engage in the behavior. Because repeat offenders often avoid detection and apprehension, and because they often avoid conviction even when apprehended, it is essential that effective sanctions are imposed in those cases where they are convicted.

6.5.3 Recommended Solutions

There are a number of solutions to this problem that have been identified by prosecutors nationwide:

- ◆ **Tiered penalties for repeat offenses.** Prosecutors support the continued development of tiered penalties for repeat drinking drivers. They also believe these penalties should effectively deter future offenses. Those states that do not currently rely on tiered penalties for DWI offenses are strongly encouraged to examine this option. Those states that do have tiered penalties are urged to review the penalties in place and determine if they need to be enhanced. In either case, there needs to be assurance that



the needed resources are available and that these penalties will be imposed by the judiciary. In an effort to ensure that adequate penalties are imposed, many states are now implementing *mandatory minimum* sentences and plea bargaining restrictions prohibiting repeat offenders from pleading guilty to a first-offense. Repeat offenders should be subject to sanctions that will enhance the deterrent effect and prevent further repeat offenses.

♦ **Stronger sentencing guidelines.** Prosecutors believe that tiered strategies should include the development of stricter sentencing guidelines for repeat offenses to ensure that the sanctions specified in the legislation are imposed. Although it is important for judges to be able to adjust sentences according to case specifics, sentencing guidelines should be the rule, rather than the exception. Three-quarters of the prosecutors surveyed (75%) strongly supported stricter sentencing guidelines that mandate harsher penalties for repeat offenses.

¾ of the prosecutors support stricter sentencing guidelines mandating enhanced penalties for repeat offenders.

♦ **Dedicated DWI courts.** Prosecutors feel that the development of more dedicated DWI courts and judges would improve the effectiveness of the criminal justice system's response to hard core drinking drivers because prosecutors and judges will work exclusively on DWI cases and thereby become more proficient and consistent. "Special DWI courts allow judges and prosecutors to specialize in drunk driving cases, meaning that hardcore drunk drivers are less likely to slip through the court system unidentified, unpunished, untreated" (The Century Council 1997). Almost half (45%) of prosecutors surveyed support this recommendation. Currently, DWI/Drug courts exist in several jurisdictions (e.g., AZ, CA, IN, NC, NM, OK, VA). There is an impetus among treatment professionals to develop a National DUI/Drug Court Strategy and use these special courts in more jurisdictions to deal with drunk drivers (NDCI 1999). And, there is limited evidence that DWI courts involving close monitoring and alcohol treatment can reduce DWI recidivism (NDCI 1999; Jones and Lacey 2000).

♦ **Continuing education.** The inadequate and/or inconsistent imposition of sanctions can arise indirectly from a lack of familiarity with technical issues pertaining to DWI, or more directly from a lack of confidence in the effectiveness of the penalties. Many judges are responsible for adjudicating a broad spectrum of criminal cases and,



consequently, may hear DWI cases infrequently. This means that judges may be unfamiliar with the effectiveness of various DWI sanctions. This can be addressed in part by education and training. Almost all prosecutors (91%) surveyed believe that more DWI educational opportunities, such as workshops and conferences involving all criminal justice professionals, would be beneficial.

6.6 Failure to Appear

♦ **The problem.** To avoid prosecution and/or conviction, offenders will sometimes simply fail to appear for arraignment or trial. When a defendant fails to appear, a bench warrant ordering the arrest of the defendant is issued by the presiding judge. However, as documented in our previous report on enforcement (Simpson and Robertson 2001), there are substantial problems associated with executing warrants. Accordingly, those who fail to appear are not likely to be apprehended or sanctioned. Warrants that are not executed for failure to appear relating to DWI offenses translate into defendants that are never prosecuted.

According to prosecutors in our survey approximately 22% of defendants fail to appear at some point in a typical DWI case. However, hard core drinking drivers are more familiar with the loopholes in the justice system and are more likely to fail to appear for either arraignment or trial because they are aware of the low risk of apprehension – indeed, 65% of prosecutors say that this behavior is more common among repeat offenders.

♦ **The consequences.** By failing to appear on DWI charges, the defendant, if guilty, can often evade prosecution and conviction, most often because the police are unable to locate them. Limited resources impact the number of warrants that officers are able to execute, meaning that few offenders are returned to custody to face charges.

♦ **The solution.** Prosecutors identified three ways that the problem of failure to appear can be addressed. Defendants that have failed to appear on one or more occasions should be held in custody until trial. Another approach is to impose significant bail to ensure appearance when it is not practical to hold the defendant in custody.



As well, penalties for failure to appear need to be increased to reflect the severity of the crime, especially those committed by repeat offenders. In this context, efforts must also be made to ensure that the increased penalties can be imposed. Their mere presence will do little to deter offenders if they cannot be enforced.

6.6.1 Problem Description and Scope

To avoid prosecution and/or conviction, offenders will sometimes simply fail to appear for arraignment or trial. When a defendant fails to appear, a bench warrant ordering the arrest of the defendant is issued by the presiding judge. However, as documented in our previous report on enforcement (Simpson and Robertson 2001), there are substantial problems associated with executing warrants. And, the longer it takes to execute a warrant, the less likely the defendant will be successfully prosecuted for the original charges, and the more likely the warrant will be purged from the system. Warrants that are not executed for failure to appear relating to DWI offenses translate into defendants that are never prosecuted.

The magnitude of the problem is very difficult to estimate because it is not routinely recorded and many states purge their files every few years, so accurate statistics are often unavailable (Nalder 1997). States that have many borders with other states, or borders with either Canada or Mexico, identify this as being more of a problem, with estimates ranging from 10% to 30% of offenders failing to appear. The Century Council has reported “there is evidence that offenders who fail to appear at trial are an increasing problem that is further burdening the justice system and leaving a number of cases unresolved” (Century Council 1997). More recently, a NHTSA report on the issue of outstanding DWI warrants makes clear that it is extremely difficult to accurately quantify the extent of the failure to appear problem because of poor record-keeping systems (Wiliszowski et al. 2001). According to prosecutors in our survey, approximately 22% of defendants fail to appear at some point in a typical DWI case.

Prosecutors say that about 22% of defendants fail to appear at some point in a typical DWI case; 65% say this behavior is more common among repeat offenders.

However, hard core drinking drivers are more familiar with the loopholes in the justice system and are more likely to fail to appear for either arraignment or trial because they



are aware of the low risk of apprehension – indeed, 65% of prosecutors say that this behavior is more common among repeat offenders. This means that prosecutors must contend with numerous unresolved cases that become more difficult to prosecute as time passes.

When a defendant appears for arraignment on the charges, the judge has an opportunity to impose bail requiring that money or other assets belonging to the defendant are to be held by the court as collateral, guaranteeing that the defendant will appear for trial.

When defendants fail to appear, bail is forfeit. Typically, bail decisions are made with consideration of the public's security and the risk of flight, meaning that the offender may harm others or flee the jurisdiction and not appear for trial. Consequently, some offenses are designated "bailable" and other, more serious or violent offenses, are "non-bailable". To set high bail in circumstances that do not meet these criteria violates the 8th Amendment of the U.S. Bill of Rights, which states "excessive bail shall not be required". This clause prevents judges from unreasonably holding defendants accused of bailable offenses by setting bail that is too high for the defendant to meet.

Consequently, judges must set reasonable bail, which can be as little as a few dollars. If a defendant does fail to appear, the bail is forfeit and the judge issues a bench warrant for the defendant's arrest.

Even in cases involving felony DWI with serious injury or death, bail rarely exceeds \$5,000.00. Low bail amounts do little to discourage failure to appear. Many defendants are able to afford minimal bail amounts and defendants would often rather fail to appear and forfeit bail than go to court and risk being convicted of DWI. Further, once released from custody, there is no incentive for the defendant to resolve the case through a plea agreement. And, if it is discovered that the charges should be amended to a felony offense, judges will rarely increase bail once the defendant has already been released from custody.

Once the bench warrant is issued, a considerable amount of time (ranging from a few days to a few years) may pass before the offender is located, apprehended and returned to court for the DWI charges and new failure to appear charges. As discussed previously, older cases are more difficult to prosecute because evidence can be lost or



misplaced, witnesses are difficult to locate, and memories fade. Accordingly, the prosecutor may be left with little evidence to prosecute a defendant.

This problem is further compounded when the defense files a “speedy trial” motion, forcing the prosecutor to bring the case to trial quickly. This may leave the prosecutor scant opportunity to locate and review relevant evidence or contact the necessary witnesses. Constitutional safeguards also entitle the defendant to due process in a reasonable amount of time. When the defense raises this issue, the onus is on the prosecutor to demonstrate “due diligence”, meaning that police vigorously pursued this case. This is typically difficult to demonstrate as few police agencies possess sufficient resources to devote officers to the sole task of locating one defendant in a multitude of thousands. As a result, these cases are often dismissed because pursuing prosecution would be considered a violation of the defendant’s rights.

6.6.2 Consequences of the Problem

By failing to appear on DWI charges, the defendant, if guilty, can often evade prosecution and conviction, most often because the police are unable to locate them. Limited resources impact the number of warrants that officers are able to execute, meaning that few offenders are returned to custody to face charges. In addition to the lack of police resources to execute warrants, it is also not uncommon for some offenders to be transients, residing in high-density areas, meaning that they are rarely found at the address listed on the warrant. Additionally, these warrants are rarely entered into the appropriate database in a timely manner, which further limits the ability of officers to apprehend these individuals.

Out-of-state defendants are not deterred from crossing state lines to commit criminal behavior. Essentially, out-of-state offenders can avoid prosecution by returning to their home state because warrants are so difficult to enforce. In some jurisdictions, judges will not honor misdemeanor warrants issued by judges in other jurisdictions, or out-of-state, most often for fiscal reasons. When these warrants are enforced, it is difficult to arrange satisfactory transport of the suspect as neither jurisdiction may have the resources to hold the suspect in custody or provide transport.



Most offenders who successfully avoid detection long enough are able to evade prosecution altogether. In many jurisdictions, warrants are purged from the system after a certain period of time because attempts to pursue or prosecute the case will most likely be futile. Furthermore, because these records are not maintained, prosecutors cannot use evidence of this behavior to have the defendant held in custody when apprehended on a subsequent DWI charge. This means that when a defendant can fail to appear without subsequent detection or apprehension, the charges are essentially erased. The offender is not punished for failing to appear or DWI, so there is no disincentive to prevent this behavior.

Even if apprehended, offenders are rarely punished, or face only nominal penalties, for failing to appear. Typically, failing to appear for a misdemeanor crime warrants a \$1,000.00 fine or six months in jail at most. Defendants are aware that any jail time will be served concurrently with any jail time they receive if convicted of the DWI offense. The imposition of a fine is of little consequence for offenders who have already demonstrated they are willing to forfeit bail posted for their release. Consequently, there is often no meaningful penalty for this behavior. It is more logical for defendants to fail to appear and risk apprehension, than to appear in court. By doing this they can significantly delay the imposition of penalties and suffer little or no additional punishment for engaging in this behavior.

Additionally, prosecutors are more likely to lose the original DWI case because they are unable to demonstrate due diligence. Not only does the defendant avoid sanctioning, but more importantly, will not be identified as a repeat offender the next time around.

Finally, defendants who fail to appear waste valuable court time and resources, in addition to the time of any police officers or witnesses who have been scheduled to appear.

6.6.3 Recommended Solutions

Prosecutors identified three ways that the problem of failure to appear can be addressed:



◆ **Hold defendants who have previously failed to appear in custody.**

Defendants that have failed to appear on one or more occasions should be held in custody until trial. Currently only one state permits a “hold for court” provision as an enhanced penalty, but this is in association with high-BAC offenders, not offenders who have previously failed to appear (McCartt 2002). It is recognized that overcrowding in jail facilities often makes this problematic but considering that these defendants are not likely to appear, as demonstrated by past behavior, every effort should be made to retain them.

In this context, there are ways to address the problem of jail overcrowding as described in a recent study entitled, “Jail Overcrowding: Understanding Jail Population Dynamics”, authored by Mark A. Cunniff of the National Association of Criminal Justice Planners, and can be found at the National Institute of Corrections’ (NIC) website www.nicic.org. Among other things, the study identifies how the problem of overcrowding can be managed and rationalized through a systemic review of who is in the jail, how these offenders get into the jail, how they leave the jail and what is their average length of stay. The study recommends that the jail be analyzed from a systems perspective in order to determine the causes of overcrowding and how the problem can best be addressed.

◆ **Increase bail.** In instances where a defendant has previously failed to appear, and where it is not practical to hold them in custody, another option is to impose significant bail to ensure appearance. The higher the amount, the less likely the defendant will be willing to forfeit that money. These increased amounts would also be defensible or justified due to the defendant’s past history of failing to appear.

◆ **Increase penalties.** The current penalties for failure to appear are ineffective in most jurisdictions and do not discourage this behavior. Penalties need to be increased to reflect the severity of the crime, especially those committed by repeat offenders. In this context, efforts must also be made to ensure that the increased penalties can be imposed. The mere presence of increased penalties will do little to deter offenders if the penalties cannot be enforced.



6.7 Legislative Complexities

♦ **The problem.** The remarkable growth in DWI legislation over the past two decades is unparalleled. This has strengthened DWI laws but has also served to complicate an already complex system.

♦ **The consequences.** The complexities in legislation at various levels have produced incompatibilities and inconsistencies within the system. In turn, this has created loopholes that provide opportunities for repeat offenders, in particular, to avoid identification and prosecution.

♦ **The solution.** Prosecutors have recommended a comprehensive legislative review to identify and correct inconsistencies and loopholes. Participation and cooperation from a broad range of sectors is needed to ensure the review is comprehensive and effective. Important stakeholders in this process include criminal justice professionals – police, prosecutors, judges, probation and parole officers – as well as representatives from the DMV and other agencies charged with maintaining key records, individuals from Traffic Safety Commissions who are often in a key position to implement and coordinate strategies between various groups, legislators and their representatives from the state and local levels who have an active role in this issue, and members of interest groups.

6.7.1 Problem Description and Scope

As mentioned previously, the statutes associated with DWI offenses are some of the most complex criminal statutes in existence. Even homicide statutes are considerably shorter than DWI statutes. This is because there has been a remarkable growth in the number of DWI laws introduced in recent years. In 1998 alone, legislators in 42 states considered more than 275 bills that specifically target hard core drunk drivers (Blakey 1999). Further, the Century Council reports that, “in the 2000 legislative session, 42 states introduced nearly 300 pieces of legislation... focusing on the hard core drunk driver” (The National Hard Core Drunk Driver Project 2001).



While these changes are obviously intended to strengthen DWI laws, an unintended byproduct has been to further complicate an already complex system. Not surprisingly, inconsistencies and incompatibilities have arisen – elements of the system do not mesh smoothly or seamlessly, creating loopholes, which provide opportunities for repeat offenders, in particular, to avoid identification and sanctioning.

The complexity associated with DWI legislation makes the prosecution of these cases extremely difficult. For example, when presented with a DWI case, the prosecutor must review the relevant statutes and determine what charge(s) to file. Based on the evidence, it may be possible for the prosecutor to file a misdemeanor, a gross misdemeanor or a felony charge. Although the DWI evidence may warrant only a misdemeanor charge, it may still be possible for the prosecutor to file a felony charge if other legislation permits it – for example, when a defendant has a certain number of priors, or has a BAC in excess of a specified level.

Laws also contain a significant number of exceptions. For instance, a state may permit the introduction of prior convictions as evidence at trial, but only in limited circumstances (e.g., vehicular homicide). As another example, a state may permit evidence of prior convictions, but only if there are three or more in a 10-year period. This means that if the defendant has only two prior convictions, or three convictions in eleven years, the evidence may be excluded. The same kinds of exceptions hold true with regard to the admissibility of test refusal. For example, prosecutors in Maryland, Michigan and Virginia can only introduce evidence of test refusal if the issue is raised by the defense.

There are also instances of loopholes within state statutes that benefit the defendant and impede a prosecutor's ability to obtain a conviction. For example, in Virginia, the DWI statute requires that the certificate of the breath analysis and results must be filed with the court seven days before trial in order to be admissible as evidence. If the certificate is not filed in the specified time frame, then the breath results are deemed hearsay (because there is no official record or authentication of the evidence) and are inadmissible in court.

The Virginia DWI statute also requires that the breath certificate be served on the defense attorney when a written request is made by the defense. If the breath certificate



is not served on the defense within seven days of trial, after a written request has been made, then the breath results are not admissible. This is true, even if the defense attorney already obtained a copy of the certificate from either the court or his/her client. Consequently, almost every defense attorney routinely makes a written request for a copy of the breath certificate. However, it is unlikely that any one of them ever hopes to actually receive it. When the request is not honored, the potential for a dismissal increases because the breath results are excluded as evidence at trial and the prosecutor loses a valuable piece of evidence. Efforts have been in progress for quite some time to get this loophole closed, however, prosecutors have yet to be successful.

Legislation specifying penalties is also relevant to a prosecutor's case because harsher penalties are greater leverage when negotiating a plea agreement. For example, in Massachusetts, although there are laws specifying penalties for repeat offenders, there is also a law that allows repeat offenders to receive a first-offender disposition in certain circumstances. So, even if it appears likely that a prosecutor will be successful in prosecuting and convicting a repeat drunk driver, there may be difficulties in having the repeat offender penalties applied in some circumstances, meaning prosecutors may have nothing to leverage when negotiating an agreement and repeat offenders may be permitted to escape harsher penalties (NCSL 2001).

In many states, the laws pertaining to penalties often overlap. Laws pertaining to the criminal suspension/revocation of a defendant's drivers' license may conflict with ignition interlock laws. License sanctions may often be circumvented with laws permitting judicial driving permits or "hardship" licenses. Although penalties have been elevated to increase their deterrent effect, this may not be the end result. Legislation targeting repeat offenders, although initiated with good intent, may result in more harm than good if it is not well-planned with consideration of existing statutes.

In addition to the complexities associated with statewide DWI legislation, prosecutors may encounter still further difficulty when prosecuting an out-of-state defendant. DWI statutes can vary considerably in content from state-to-state in terms of the elements of the crime and the standard of proof that has to be met to obtain a conviction. In most states, if the defendant fails a chemical test administered within two hours of driving, it may be presumed that the defendant was DWI. However, in Connecticut, prosecutors



have to prove intoxication or impairment *at the time of driving*. In order to do this, an expert toxicologist must conduct a retrograde extrapolation to relate the BAC at the time of testing back to the time of driving. Because this element of the crime is different, a conviction from another state may not necessarily be counted as a prior conviction in Connecticut.

When judges make determinations regarding the admissibility of out-of-state prior convictions, they must carefully consider any differences between DWI legislation in their respective states and DWI legislation in other states where the defendant has been previously convicted. This means that convictions from some states may not be counted as priors in other states because the elements of the crime that have to be proven are different. It is important for prosecutors to be able to admit evidence of prior convictions, including those from other states, to ensure that offenders are charged appropriately as a felony as opposed to a misdemeanor, when the circumstances warrant.

The burden of proof necessary to obtain a conviction also varies depending on state statutes. Most states have a *per se* law. This means that evidence of a BAC in excess of the legal limit is often sufficient to prove intoxication with only minimal additional evidence. This enables prosecutors to obtain convictions without having to introduce considerable additional evidence of impairment. However, Massachusetts does not have a *per se* law and this makes it more difficult to obtain convictions because the prosecutor has to introduce considerable evidence of impairment or intoxication, and much of this evidence is based on the subjective interpretation of the investigating officer.

Judges must take these legislative differences into consideration when making a determination as to the admissibility of prior convictions. If the burden of proof to obtain a conviction is considerably lower in the out-of-state jurisdiction, then judges may be more inclined to exclude other priors. Although a majority of states allow for the filing of a felony charge (as opposed to a misdemeanor) with a certain number of priors, prosecutors are not always able to count all of the priors due to the inconsistencies in the state legislation and differences in the burden of proof that has to be met to obtain a conviction. This may mean that prosecutors are unable to lay felony charges in certain circumstances due to the inadmissibility of priors.



A final concern relates to the incompatibility between federal and state laws regarding DWI. As a consequence, DWI cases may be considerably more difficult to prosecute in some states than in others. For example, Federal case law (*Schmerber*) permits forced blood draws in instances of test refusal as long as they are conducted in a manner that does not “shock the conscience” of the court. In some states, such as California, this Federal Court ruling has been recognized and is applied in the appropriate circumstances. This means that officers can routinely obtain BAC evidence, even in instances of test refusal. As mentioned previously, the BAC is the most valuable piece of evidence in a DWI case and prosecutors are much more likely to obtain a conviction in cases where this evidence is available. However, in the Commonwealth of Massachusetts, the *Schmerber* ruling is not recognized because it is deemed to be inconsistent with protections embedded in the Massachusetts Declaration of Rights. This means that prosecutors are much less likely to obtain a conviction because BAC evidence is often unavailable in cases where the defendant refuses testing.

6.7.2 Consequences of the Problem

The loopholes and complexities found in DWI legislation in individual states, between states, and between the state and federal levels make the prosecution of DWI cases both problematic and unpredictable. The complexities in legislation at various levels can significantly impede the prosecutor’s ability to successfully prosecute and convict those defendants that are guilty of DWI or related charges by creating unintended loopholes that benefit defendants. Prosecutors in some states are better able to introduce important evidence, such as blood test results, or HGN results and, as a result, are more successful in convicting repeat offenders.

Out-of-state repeat defendants are more likely to benefit from their “out-of-state” status and avoid a DWI conviction when legislation is inconsistent or incompatible. Prosecutors may be unable to introduce evidence of priors and elevate a misdemeanor charge and, consequently, repeat offenders may avoid identification and the appropriate sanctions. Additionally, defendants also increase their opportunity for a dismissal or acquittal due to existing loopholes.



6.7.3 Recommended Solutions

Prosecutors have recommended one major solution to the problem of legislative complexities.

♦ **Comprehensive legislative review.** Prosecutors believe that states should undertake a comprehensive legislative review to identify and correct inconsistencies and loopholes. This has already been completed in Minnesota and anecdotal reports indicate that members of the criminal justice system believe this has been a positive change and the system is much more streamlined and effective, with many difficulties being resolved. Reports suggest that Colorado and Virginia will also be initiating such a review in the near future.

States are strongly encouraged to review their current DWI legislation and resolve any inconsistencies. Participation and cooperation from a broad range of sectors is needed to ensure the review is comprehensive and effective. Important stakeholders in this process include those criminal justice professionals involved in the DWI system – i.e., police, prosecutors, judges, and probation and parole officers. Additionally, the review should involve representatives from the DMV and other agencies charged with maintaining key records, individuals from Traffic Safety Commissions who are often in the best position to implement and coordinate strategies between various groups, representatives from the National Association of Governors Highway Safety Representatives (NAGHSR), legislators from the state and local levels who have an active role in this issue, and representatives of interest groups.

6.8 Expert Witnesses

♦ **The problem.** Scientific and technical evidence from expert witnesses is often needed by prosecutors to support their case. Indeed, prosecutors estimate that they require some form of expert testimony in 56% of cases, especially those involving breath and blood analysis, retrograde extrapolation, or HGN. Such testimony may be unavailable due to a lack of funding, scheduling problems, or judicial decisions to exclude expert testimony.



♦ **The consequences.** When expert witnesses are either unavailable or not permitted to testify at DWI trials, the prosecutor loses valuable evidence that may have resulted in the conviction of a guilty defendant. Further, without an expert witness to qualify the evidence or explain results, technical evidence may be incorrectly interpreted, or attributed greater or lesser weight than it should have, resulting in an inappropriate verdict. This may result in guilty defendants being acquitted instead of being sanctioned and, by avoiding conviction, they also avoid being identified as a repeat offender if apprehended again.

♦ **The solution.** To facilitate the prosecutor's decision about the potential need for expert testimony and to facilitate the identification and contact of experts in the event testimony is deemed necessary, it was recommended that a databank be created containing a record of expert testimony on various technical issues as well as the witnesses who provided it. Additionally, some prosecutors feel that the State should hire a small number of expert witnesses on a permanent basis who can be called upon to testify at DWI trials on a priority basis.

Currently, in order to admit some newer scientific testimony, the prosecutor may be required to request a hearing, pursuant to *Frye v. U.S. (1923) 293 Fed 1013*. The *Frye* rule requires a demonstration to the court of the reliability and general scientific acceptance of the evidence prior to it being introduced in court. It is often difficult to have this evidence admitted because caseload demands and time constraints often prohibit these hearings. Prosecutors believe that once a Court of appropriate jurisdiction has recognized the admissibility of the evidence, the hearing requirement in each DWI trial to get this evidence admitted should be eliminated.

6.8.1 Problem Description and Scope

Scientific and technical evidence from expert witnesses is often needed by prosecutors to support their case. Indeed, prosecutors estimate that they require some form of expert testimony in 56% of cases. Expert testimony may be necessary on a variety of issues: to prove intoxication, especially with repeat offenders who are often alcohol tolerant and do not display obvious signs of

Prosecutors estimate that they require some form of expert testimony in 56% of cases.

intoxication; to give evidence on blood/breath testing or HGN testing; or, on various medical conditions raised by the defense. Such testimony may be unavailable due to a lack of funding, scheduling problems, or judicial decisions to exclude expert testimony.

All courts hear evidence on breath and blood results, however the need for and availability of experts to testify on such issues varies between states. With regard to breath evidence, 77% of prosecutors report needing an expert for their DWI cases often or sometimes (46% said sometimes and 31% said often). With regard to blood evidence, 90% of prosecutors said they need expert testimony often or sometimes (30% said it is needed often; 60% say this is only necessary sometimes). Experts (toxicologists) are often needed to conduct retrograde extrapolations that allow the prosecution to accurately verify the defendant's BAC at the time of driving.

1/3 of the prosecutors said they often need an expert to testify on breath or blood evidence.

Other evidence that sometimes needs the support of expert witnesses involves HGN, Passive Alcohol Sensor (PAS) results and courts vary regarding the extent to which such evidence is permitted. Expert testimony might be required at either a pre-trial hearing and/or at trial. For example, slightly more than half (55%) of prosecutors report that an expert HGN witness is either sometimes or often required to determine the admissibility of the evidence by demonstrating the scientific validity and reliability of the test. There is, however, an added complexity because courts vary to the extent they will admit HGN and PAS results. In states where such evidence can be admitted (e.g., AK, AZ, OR), hearings may not be consistently held as a result of time constraints and caseload issues. Other states will not even hear evidence pertaining to HGN results (e.g., AL, MA, NE) and, consequently, expert testimony is not required. Moreover, prosecutors vary as to whether they find HGN testimony to be of value in a DWI trial. Some prosecutors claim it is effective with juries and is very easy to understand, whereas other prosecutors find that it tends to complicate the trial and confuse the jury.

In the event that such evidence is admissible, it is not always easy for prosecutors to find an expert who is qualified, available and willing to come to court, and can testify effectively. Depending on the expert witness, prior arrangements usually have to be made in advance of a case coming to trial if the witness has a heavy schedule. When a prosecutor does not "flag" a case as requiring an expert witness in advance, they may



be unable to locate an expert witness to review evidence and possibly testify in court on short notice. Due to heavy caseloads and competing demands, a prosecutor may not have sufficient opportunity to review each case they will be required to prosecute well in advance of the case coming to trial. In these instances, it can be difficult for a prosecutor to engage an expert witness to review the case and/or testify at trial. Without this expert testimony, a prosecutor may lose a case that would otherwise have resulted in a guilty verdict.

As noted earlier, there is a related issue -- getting expert testimony admitted. In the case of HGN evidence, certain standards of evidence or proof must be met before test results can be admitted (see, e.g., *Frye v. U.S.* *supra*, *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, or FRE 702) and these hearings are often quite lengthy and tedious. In some instances, judges are not able to set aside the necessary time required for a *Frye* hearing, and will exclude this evidence even when expert witnesses are available. PAS results are currently not as large an issue because there have been few test cases to create case law that establishes the admissibility of results. Few courts currently admit this evidence, and this is likely to remain the case until more rulings in favor of this evidence are made.

Other elements of this problem raised by prosecutors refer to their ability to secure experts for cases involving motor vehicle collisions or cases where specific medical conditions are raised as part of an affirmative defense. Experts are required in the area of collision reconstruction to do such things as make accurate speed estimations. Qualified mechanics can also be required to testify that a crash was not a result of mechanical failure. Experts, in the form of physicians, may be required to refute medical defenses raised, such as the defendant was suffering from a diabetic reaction as opposed to being impaired.

6.8.2 Consequences of the Problem

When expert witnesses are either unavailable or not permitted to testify at DWI trials, the prosecutor loses valuable evidence that may have resulted in the conviction of a guilty defendant. Further, without an expert witness to qualify the evidence or explain results, technical evidence may be incorrectly interpreted, or attributed greater or lesser weight



than it should have, resulting in an inappropriate verdict. This may result in guilty defendants being acquitted instead of being sanctioned and, by avoiding conviction, guilty defendants also avoid being identified as a repeat offender if apprehended again.

6.8.3 Recommended Solutions

Prosecutors identified three solutions to the problems associated with expert testimony:

- ◆ **Expert witness databank.** To facilitate the prosecutor's decision about the potential need for expert testimony and to facilitate the identification and contact of experts in the event testimony is deemed necessary, it was recommended that a databank be created. It would contain a record of expert testimony on various technical issues as well as the witnesses who provided it. An example of such a databank can be found in Connecticut, where the Office of the Chief State Attorney tracks all expert witness testimony given in the state and maintains a record of that testimony. Prosecutors in the state can contact the Office of the Chief State Attorney to access this databank. When prosecutors identify a particular issue with regards to a technical aspect of a DWI case, they can review the expert witness testimony provided in the databank and determine the value of any evidence and whether an expert witness will be required to testify.

- ◆ **State-hired expert witnesses.** Some prosecutors feel that the State should hire a small number of expert witnesses on a permanent basis who can be called upon to testify at DWI trials on a priority basis. For example, in Connecticut a toxicologist is retained to testify to retrograde extrapolations in DWI trials. This would provide prosecutors across the State with regular access to expert witnesses to provide valuable knowledge when required, which can enhance the strength of the case and the likelihood of a conviction.

- ◆ **Reduce/eliminate hearing requirements.** Currently, in order to admit HGN testimony, the prosecutor must request a hearing (e.g., *Frye*) prior to the evidence being introduced in court. As mentioned above, it is often difficult to have this evidence admitted because caseload demands and time constraints often prohibit them. Prosecutors believe that once a particular kind of evidence has been recognized by



higher courts within the State, the necessity or requirement of having a hearing prior to each DWI case to get the evidence admitted is unnecessary and a waste of valuable resources. Once a Court of appropriate jurisdiction has recognized the admissibility of the evidence (e.g., HGN), the hearing requirement in each DWI trial to get this evidence admitted should be eliminated.

6.9 Plea Agreements

♦ **The problem.** Despite the efficiency merits of plea agreements – negotiated settlements that can result in reductions of the charge and/or the sentence – it is commonly argued that the use of plea agreements “undermines the integrity of the justice system” and the deterrent effect of criminal sanctions by allowing offenders to avoid mandated penalties. This may be especially true in the case of repeat drinking drivers. Anecdotal reports and survey results from some prosecutors indicate that up to 75% of DWI cases are resolved with some form of a plea agreement.

♦ **The consequences.** The plea process can significantly reduce the penalties associated with a DWI offense and, thereby, both its specific and general deterrent effect. In addition, pleas to lesser charges prevent prosecutors from elevating charges from misdemeanors to felonies because prior convictions involving pleas may not be counted. Finally, this process detracts from the ability of the criminal justice system to identify repeat offenders, especially those that are allowed to plead to a non-alcohol offense.

♦ **The solution.** Prosecutors generally tend to be satisfied with the frequency of plea agreements and, on balance, believe that the negative consequences of reduced penalties are tolerable, relative to the benefits associated with plea agreements – namely, an efficient processing of cases. If caseloads were reduced substantially, plea agreements would be needed less. For this reason, only 18% of prosecutors surveyed would like to see the frequency of plea negotiations reduced.

However, prosecutors would like to see the contents of plea arrangements restricted – i.e., remove the opportunity for pleas to non-alcohol offenses and pleas in high-BAC



cases, and they support the requirement for prosecutors to state the reasons for plea agreements on the court record if pleas are used in these instances.

6.9.1 Problem Description and Scope

Plea agreements or plea “bargains” – negotiated settlements that result in reductions in the nature of the charge itself and/or the sentence – have been an established part of the justice system since the 1920s and are considered “a natural outgrowth of a progressively adversarial criminal justice system” (Guidorizzi). The bargaining process provides considerable benefit for the efficiency and effectiveness of the justice system by allowing attorneys greater flexibility in resolving criminal cases. In many jurisdictions, up to 90% of criminal cases are resolved with a guilty plea by the defendant, and a significant portion of these guilty pleas may be a result of a negotiated plea agreement involving a reduced charge or sentence. Although not all of these guilty pleas involve a negotiated agreement, it provides insight into the extent to which plea agreements have become a fundamental and necessary element of the justice system. If it were not for their ability to negotiate agreements, prosecutors would be unable to manage heavy caseloads.

Despite their merits, many believe that the use of plea agreements “undermines the integrity of the justice system” and the deterrent effect of criminal sanctions by allowing offenders to avoid mandated penalties (Guidorizzi). This may be especially true in the case of repeat drinking drivers. Anecdotal reports and survey results from some prosecutors indicate that up to 75% of DWI cases are resolved with some form of a plea agreement. This is further substantiated by the fact that 78% of police officers participating in the survey contained in our enforcement report (Simpson and Robertson 2001) said that they rarely or only occasionally testify in court because very few cases actually go to trial.

The two most common types of plea agreements involve charge bargaining and sentence bargaining. Charge bargaining involves a reduction of the charges in return for a guilty plea. In five states (CA, FL, MI, OR, PA) a reduction of the charges is prohibited or restricted in cases involving either serious injury or death and/or cases involving a BAC in excess of a specified amount. In eleven other states plea agreements involving



DWI charge reductions are also prohibited or restricted (AZ, AR, CO, KS, KY, ME, MS, NM, NY, WY) but, of those, some will permit a defendant to plea to a lesser degree of a DWI charge (e.g., a first-offense instead of a repeat offense) whereas others will not. The majority of other states do not have any anti-plea bargaining legislation in place with regard to DWI offenses (NTSB 2001). However, despite the lack of anti-plea bargaining legislation in many states, fewer and fewer jurisdictions will permit the reduction of a DWI charge to a non-alcohol related offense, such as reckless driving, which is a lesser charge than DWI. These policies vary from state-to-state and are governed by statute, or the particular policy of the District Attorney.

Sentence bargaining involves an agreement to plead guilty to a particular charge in exchange for a reduced sentence. Agreements that include a negotiated sentence must be approved by the judge. A judge may reject the sentence agreement if he/she feels that the sentence is not appropriate to the severity of the offense. If this occurs, the offender is not bound by the sentence agreement and further negotiations will be required.

Prosecutors estimate that, on average, 44% of DWI defendants plead guilty, and of these, 67% do so with a negotiated plea agreement. Only 33% plead guilty without a plea agreement in place. Of those defendants who plead with a negotiated agreement, estimates indicate that approximately 8% are permitted to plead to a non-alcohol related offense, such as reckless driving, meaning that upon a subsequent arrest, the defendant will not be identified as a repeat offender. Further, 77% of prosecutors report that they are not required to state the reasons for plea agreements on the court record.

These results may be reflective of the increasing penalties associated with DWI offenses and greater restrictions being placed on the plea agreement process. As penalties increase, and plea agreements are further restricted, it appears that more defendants, especially repeat offenders, are hiring private defense attorneys and opting to contest the charges.



6.9.2 Consequences of the Problem

There are several negative implications associated with plea agreements. Primarily, the plea process significantly reduces the penalties associated with a DWI offense and thereby, both its specific and general deterrent effect. In addition, pleas to lesser charges prevent prosecutors from elevating charges from a misdemeanor to a felony because prior convictions involving pleas may not be counted. Finally, this process detracts from the ability of the criminal justice system to identify repeat offenders, especially those that are allowed to plead to a non-alcohol offense.

6.9.3 Recommended Solutions

Prosecutors generally tend to be satisfied with the frequency of plea agreements. The negative consequences of reduced penalties are tolerable, relative to the benefits associated with plea agreements – namely, an efficient processing of cases. If caseloads were reduced substantially, plea agreements would be needed less. For this reason, only 18% of prosecutors surveyed would like to see the frequency of plea negotiations reduced. More than two-thirds (68%) believe plea negotiations should remain at the current level.

Only 18% of prosecutors would like to see a reduction in the frequency of plea agreements.

However, prosecutors would like to see the contents of plea arrangements restricted – i.e., remove the opportunity for pleas to non-alcohol offenses and pleas in high-BAC cases. And, there is evidence that the use of plea bargaining restrictions in conjunction with other policies result in crash and injury reductions (Wagenaar et al. 2000).

Moreover, if pleas are to be offered to non-alcohol offenses or in high-BAC cases, prosecutors support the requirement that the reasons be stated on the court record. Currently, a majority of states do not require the prosecutor to state reasons for pleas on the record in any instances.

♦ **Elimination of pleas to lesser, non-alcohol related offenses.** In some states defendants are permitted to plead to a variety of non-alcohol related offenses, such as reckless driving, as opposed to a DWI, as part of the agreement. In the case of



reckless driving charges, attorneys refer to these pleas as a “wet reckless”. Prosecutors believe that DWI defendants should be unable to plead to a lesser charge so as to ensure the proper subsequent identification of these offenders. Offenders already receive an opportunity to evade identification through participation in diversion programs. Permitting pleas to lesser offenses provides offenders with an opportunity to avoid identification a second time.

♦ **Elimination of pleas in cases involving elevated BACs.** Prosecutors feel that defendants having a BAC in excess of an agreed-upon level (e.g., .15) should not be able to negotiate a plea to either a first-offense (if they are a repeat offender) or to negotiate reduced penalties. In New York, few prosecutors will agree to a plea when the BAC of the defendant surpasses a specified level because this group of offenders have been identified as posing a more significant threat on the roadways. This particular group of offenders should not be able to benefit from a plea agreement and avoid subsequent identification because they pose a much greater risk. Many states currently have a tiered system of charges relating to BAC level and offenders should not be able to circumvent this system using plea negotiations.

6.10 Prosecutor Training

♦ **The problem.** DWI cases have been referred to as a training ground for prosecutors, as they are often handled by those new to the job. This is unfortunate given the complexities of DWI laws and the specialized defense attorneys that new prosecutors face. Almost half (48%) of the prosecutors in our survey reported that they did not receive adequate training or preparation in the prosecution of DWI cases before assuming their position. As well, some prosecutors indicate that it is difficult to hire and retain good prosecutors in this area – relatively high turnover rates exist in many offices. Although some prosecutors find working on DWI cases extremely challenging and rewarding, others are disappointed with the lack of recognition or reward involved.

♦ **The consequences.** Newer, less experienced prosecutors are more likely to hesitate to proceed to trial and may be more likely to negotiate an unsatisfactory plea. And, if a prosecutor is unsure about handling a misdemeanor DWI case, they are even



less likely to feel confident about pursuing a felony DWI. Consequently, many offenders are not being sanctioned appropriately or are not being sanctioned at all.

♦ **The solution.** Almost all prosecutors (94%) would like to receive more training in the area of DWI prosecution and feel this would be a benefit – they would be better able to win convictions of guilty offenders.

Prosecutors would also welcome the opportunity to meet with other DWI prosecutors from surrounding jurisdictions and/or states in order to discuss common problems encountered in DWI prosecution, new case law, and new tactics for approaching these cases. Prosecutors would also like greater access to educational and reference materials.

Prosecutors also support the development of specialized training courts that would allow them to practice and learn in mock trial situations. Some attorneys also recommend the use of “turn-over” binders, which contain relevant notes and explanations with respect to specific issues involved in DWI cases. When the attorney moves on to another department, he/she would turn over the binder of relevant information to the next DWI prosecutor.

Prosecutors believe that the introduction of vertical prosecution – one prosecutor handling the case from start to finish – would improve the efficiency and consistency with which DWI cases are processed. Currently, in some states, more than one prosecutor may be involved in a DWI case, depending on availability, caseload, and experience. This problem is compounded when the case changes from a misdemeanor to a felony. This may create inconsistencies in prosecution as each prosecutor has their own style when handling a case.

Finally, prosecutors also believe, that in some instances, more recognition should be given to those who successfully and consistently prosecute DWI cases.



6.10.1 Problem Description and Scope

According to prosecutors across the country, it is not uncommon for DWI cases to be assigned to new prosecutors – for this reason, some have called DWI prosecution a training ground. Unfortunately, as discussed in a previous section, the DWI statutes are among the most complex in criminal law as are the associated technical and scientific issues. As a consequence, some prosecutors in the DWI field feel they are ill-equipped to successfully challenge specialized private defense attorneys and win convictions. Moreover, as prosecutors become competent with DWI cases, it is often difficult to retain them due to the low priority emphasis on DWI crimes and the associated low job reward value.

DWI cases are often technical, involving a significant amount of scientific evidence and expert testimony. DWI law has been described as “a body of law unto itself”. DWI statutes are often longer and more detailed than almost any other criminal statute. In light of these facts, it is clear that prosecutors require greater experience and expertise to prosecute these cases successfully. However, this is often not the case. Indeed, almost half (48%) of the prosecutors in our survey reported that they did not receive adequate training or preparation in the prosecution of DWI cases before assuming their position.

Nearly half of prosecutors said they did not receive adequate training in the prosecution of DWI cases before assuming their position.

Unfortunately, the field of DWI crimes has traditionally been, as one prosecutor stated, a “teeth-cutting field with an exceptionally steep learning curve”. Therefore, prosecutors are often expected to learn through experience even though they often face sophisticated private defense attorneys.

This is not so much a problem in district or superior courts because prosecutors at this level often possess greater experience. However, it is a problem in the lower courts (e.g., municipal or magistrate courts). Occasionally there are efforts to alleviate this problem by providing some additional training for more serious offenses, such as vehicular homicide, but these opportunities are infrequent and limited.

The problem is more commonly encountered in rural areas because new prosecutors have fewer opportunities to “shadow” those with more experience. This is usually a result of the heavy caseloads often found in smaller offices. Furthermore, in these



jurisdictions most prosecutors try a wide variety of cases and DWI trials may not occur during their initial on-the-job experience. Additionally, due to the short-staffed nature of many prosecutor offices, new staff are often left to answer phones and complete paperwork while experienced prosecutors go to trial. Many new prosecutors never have the opportunity to observe a DWI trial before having to try one themselves. Additionally, in some jurisdictions there may be a lower priority associated with DWI crime.

Obviously, if these crimes are not considered a priority within the department, more experienced prosecutors are not going to be assigned to these cases.

A second concern involves a lack of technical resources available to prosecutors in this field because fewer resources are directed at prosecuting DWI offenses than other crimes. In reality, DWI crimes are much harder to prosecute because of the involvement of scientific evidence and analysis, investigative techniques, stringent testing procedures and expert testimony. In this respect, prosecutors consider DWI offenses comparable to homicides or sex crimes in terms of technicalities.

Without significant training and a clear understanding of the issues, it is very difficult for less experienced prosecutors to win convictions when they are facing private defense attorneys who focus almost exclusively on DWI cases. It is very challenging and intimidating for a “green” prosecutor to face an experienced defense attorney that specializes in this field. Private defense attorneys are often better prepared because they have a greater ability to research these cases as they are often less constrained by a bureaucracy. Consequently, a defense attorney may file a technical motion arguing the scientific aspects of blood partition ratios, or a particular medical condition that may have been researched by several paralegals or law students, and the prosecutor may be unable to respond adequately, especially if the prosecutor carries a large caseload and has limited resources. Additionally, as discussed previously, many offices do not have updated computer technology, or access to legal resource materials, such as Westlaw, and have limited staff to carry out this research.

A final issue relates to the low reward value associated with prosecuting DWI cases. Some prosecutors indicate that it is difficult to attract competent attorneys to DWI law because of the low priority often associated with DWI cases. DWIs are not as “glamorous” as homicides or drugs, and DWIs are not always considered “real” crimes. DWI is, therefore, viewed by some as a training ground or “stepping-stone” to bigger



crimes and cases. Consequently, it is difficult to hire and retain good prosecutors in this area – relatively high turnover rates exist in many offices. Although some prosecutors find working on DWI cases extremely challenging and rewarding, other attorneys are disappointed with the lack of recognition or reward involved in prosecuting them.

6.10.2 Consequences of the Problem

Newer, less experienced prosecutors are more likely to hesitate to proceed to trial and may be more likely to negotiate a plea. And, if a prosecutor is unsure about handling a misdemeanor DWI case, they are even less likely to feel confident about pursuing a felony DWI case. In this regard, research clearly demonstrates that repeat offenders are more likely to refuse testing, essentially robbing the prosecutor of the most valuable piece of evidence, and are also more likely to plead not guilty and go to trial with a private defense attorney. Prosecutors that are unfamiliar with the issues and are unable to adequately research case law and various defenses are hard-pressed to win a conviction. Consequently, many offenders are being sanctioned inappropriately or not at all, thereby failing to deter them from persisting in their behavior.

6.10.3 Recommended Solutions

Prosecutors identified a number of ways to resolve this issue:

◆ **Training.** Almost all prosecutors (94%) would like to receive more training in the area of DWI prosecution and feel they would benefit from increased training – they would be better able to win convictions of guilty offenders. Approximately 36% of prosecutors support the development of statewide DWI conferences, and 25% support local day courses. Currently, there are several national and statewide conferences on impaired driving. For example, the Northwestern University Traffic Institute hosts the Vehicular Homicide/DUI Conference and the Washington Traffic Safety Commission hosts an Annual Conference on Impaired Driving. Many of these conferences are open to all criminal justice professionals and focus on a variety of subjects, including prosecution. However,

94% of prosecutors would like more training and believe this would improve conviction rates.



prosecutors generally favor smaller forums with the opportunity for in-depth discussions, which are less feasible at larger more generic meetings.

Prosecutors would also welcome the opportunity to meet with other DWI prosecutors from surrounding jurisdictions and/or states in order to discuss common problems encountered in DWI prosecution, new case law, and new tactics for approaching these cases.

Almost one-fifth (17%) of prosecutors would also like greater access to educational and reference materials. In this context, NTLC has developed several excellent references to assist newer prosecutors. “Prosecution of Driving While Under the Influence” is a comprehensive guide that was written by prosecutors for prosecutors. The manual contains an overview of all aspects of a DWI trial and provides explanations of many different kinds of scientific evidence and guidance on how to refute some of the standard defenses presented in court. This document also contains many references to scientific studies and summaries of case decisions in several states. Other manuals focus on HGN, the prosecution of vehicular fatalities, and the use of prior convictions as evidence. “Between the Lines” is a quarterly report, also produced by NTLC, which references current issues, cases and new resources that are available. All of these reports can be obtained by contacting NTLC or visiting their website at www.ndaa-apri.org.

Relevant information and training may also be accessed at the state level in some states. In California, the California District Attorneys Association (CDA) publishes a comprehensive manual entitled “DUI Prosecution”. In Michigan, the Prosecuting Attorneys Coordinating Council provides a Traffic Safety Training Program. Its role is to provide attorneys with updates on legislative and case law changes and provide a bi-monthly newsletter (“The Green Light News”) containing updates and additional references to other legal materials. Further information on this resource can be found at <http://www.michiganprosecutor.com/>. In New York, prosecutors have found that the Defender’s Digest is a good publication to review for information.

♦ **Training courts.** Prosecutors would like to see specialized training courts developed that would allow them to practice and learn in mock trial situations. Many DWI cases do not go to court and prosecutors may try these cases infrequently, so they



would like an opportunity to engage in “refresher” courses and learn new techniques. As a second option, the office responsible for training in each state could have special prosecutors visit different jurisdictions to provide a day of more specialized training to DWI prosecutors, using mock trials and other techniques. For example, in Illinois, the Appellate Prosecutor’s Office is responsible for training, and suggestions have been made that such offices should consider conducting DWI workshops or training courts throughout the State in order to assist newer prosecutors. If this is not feasible, perhaps “mentors” (a more experienced prosecutor) could be assigned to 2nd chair in serious DWI cases when the lead prosecutor is new, in order to give guidance and make suggestions to improve the quality of prosecution.

◆ **A ‘turnover’ binder.** Some attorneys maintain a binder of relevant notes and explanations with respect to specific issues involved in DWI cases. Key issues that arise in DWI trials are explained in greater detail, and “helpful hints” are usually included in terms of how the prosecutor approached the issue, and possibly what could have been done differently. When the attorney moves on to another department, he/she would turn over the binder of relevant information to the next DWI prosecutor. The suggestion is that the binder contain practical information and explanations cultivated by previous attorneys.

◆ **Vertical prosecution.** In vertical prosecution, one prosecutor handles a case from start to finish. Currently, in some states, more than one prosecutor may be involved in a DWI case, depending on availability, caseload, and experience. This problem is compounded when the case changes from a misdemeanor to a felony. This may create inconsistencies in prosecution as each prosecutor has their own style when handling a case. Some prosecutors are more willing to negotiate a plea; others are more likely to go to trial. When a case is handled by different prosecutors it also becomes difficult to determine at what point a case is, and what the next step should be, or where discussions with the defense left off. Accordingly, prosecutors believe that the introduction of vertical prosecution would improve the efficiency and consistency with which DWI cases are processed. This has recently been introduced in New York and anecdotal reports indicate that it has been a positive change.



♦ **Recognition.** Prosecutors also believe, that in some instances, more recognition should be given to those who successfully and consistently prosecute DWI cases. Often the prosecution of DWI cases suffers from high turnover rates because there is little reward or recognition for prosecuting these crimes, compared to other higher-profile cases. Recognition of police officers has been a practice in several states and appears to have a positive impact on morale. A similar program should be considered for prosecutors.



7.0 Summary —●

It should be evident from reading this report that the prosecution of a DWI case involves highly technical evidence, complex and often overlapping legal issues and relies heavily on work completed by other agencies. The unprecedented growth in DWI legislation in the past decade has made an already complicated system even more complex. Indeed, it has become so complex and technical that it is often frustrating, discouraging and even intimidating to some prosecutors. There is a need to streamline and simplify the prosecutorial process to improve its effectiveness and efficiency. This is a primary concern to prosecutors and a linchpin to successfully improving the DWI system.

In addition to this general recommendation a variety of specific changes to the DWI system can improve the prosecution of hard core drinking drivers. These improvements are organized below in terms of the general method by which this can be achieved.

7.1 Training and Education

Prosecutors identified several areas in which training can improve the prosecution of hard core drinking drivers:

- ◆ enhanced on-the-job training of new prosecutors in the complexities of DWI evidentiary issues, trial proceedings, and legislation in general;
- ◆ specialized training courts that would allow prosecutors to learn to prosecute using technical, scientific evidence, to cross-examine witnesses with regard to scientific evidence and refresh their trial skills periodically;
- ◆ enhanced training of police officers at the academy in conjunction with more on-the-job experience in the collection of evidence to improve its quality and quantity; this is particularly important in the prosecution of alcohol tolerant repeat offender; and



- ◆ continuing education for the judiciary to provide contemporary information on the effectiveness of alternative sanctions.

7.2 Communication and Cooperation

Prosecutors believe that improved communication and cooperation with other professionals involved in the DWI system will facilitate the prosecution of hard core drinking drivers. They support:

- ◆ workshops with police officers, that would highlight evidentiary requirements for obtaining a conviction, keep officers informed about new case law, and allow police the opportunity to share with prosecutors the complexity, dynamics and realities of the arrest environment;
- ◆ the mentoring of newer prosecutors by those who have more experience;
- ◆ facilitating the use of blood evidence based on its greater reliability and validity;
- ◆ the use of a 'turnover' binder which contains learning notes on key issues and procedures in DWI cases. This binder would provide a source document for new or replacement prosecutors;
- ◆ the development of vertical prosecution that would allow one prosecutor to handle a DWI case from start to finish and eliminate confusion and unnecessary delays; and
- ◆ dialogue with legislators, criminal justice professionals and other stakeholders external to the justice system to undertake a comprehensive review of current DWI legislation and practices in order to improve the effectiveness and efficiency of the system.

7.3 Record Linkages, Availability and Access

Records containing data and information pertinent to the prosecution of DWI cases are maintained by a diversity of agencies. Such records vary in terms of how up-to-date the



information is, their contents (both in terms of the nature of the information and its scope), accuracy, completeness as well as the ease and timeliness of access. Prosecutors require timely access to accurate, contemporary and comprehensive records to facilitate the filing of DWI charges and the subsequent prosecution of offenses. The importance of this has been underscored by numerous agencies, and remains a critical need to improve the prosecution of hard core drinking drivers. Prosecutors support the following changes to record systems:

- ◆ uniform driver abstracts;
- ◆ uniform look-back periods for driver and associated records that are consistent with look-back periods specified in criminal legislation;
- ◆ consistent and uniform records on offenders participating in diversion programs; and
- ◆ standardized court reporting practices.

7.4 Technology

Prosecutors believe that greater use of technology can improve the efficiency and effectiveness with which they prosecute hard core drinking drivers:

- ◆ consistent, computerized access to Westlaw and related legal web sites as well as greater access to legal research materials and court rulings such as the Brief Bank maintained by NTLC; and
- ◆ development of an expert witness databank that tracks testimony and expert opinion on various kinds of evidence as is currently done in Connecticut.

7.5 Legislation and Regulation

Prosecutors also identified a number of legislative changes that would improve the prosecution of hard core drinking drivers:



- ◆ increase bail amounts for defendants who have previously failed to appear, or require that these defendants be held for arraignment with higher bail amounts as a condition of release;
- ◆ reduce or eliminate hearing requirements once a court of competent jurisdiction has ruled as to the admissibility of certain kinds of evidence (e.g., HGN results);
- ◆ criminalize test refusal and allow evidence of refusal to be admitted in court or make refusal a rebuttal presumption of fact;
- ◆ increase penalties for test refusal and for failure to appear;
- ◆ greater use of tiered penalty systems that specify increased sanctions for repeat offenders; and
- ◆ stricter adherence to case processing guidelines to minimize unnecessary continuances or delays.



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Appendix A

District Attorneys Who Assisted in Organizing the Workshops



District Attorneys Who Assisted in Organizing the Workshops

Arizona

1. Barbara LaWall – County Attorney, Pima County
2. Robert Carter Olson – County Attorney, Pinal County

California

1. Tony Rackaukas – District Attorney, Orange County
2. Grover C. Trask – District Attorney, Riverside County
3. Paul J. Pfingst – District Attorney, San Diego County

Connecticut

1. Mr. John M. Bailey – Chief State's Attorney
2. Mr. Jack Cronan – Office of the Chief State's Attorney
3. Ms. Mary Galvin - State's Attorney, Ansonia-Milford District

Illinois

1. Mr. Don Hays – Senior Staff Council, Illinois State's Attorneys Appellate Prosecutors Office
2. Mr. Scott Manuel – Illinois State's Attorneys Appellate Prosecutors Office

Massachusetts

1. Ms. Geline Williams – Massachusetts District Attorneys Association

New York

1. Hon. James M. Catterson, Jr., District Attorney, Suffolk County
2. Hon. Sol Greenberg – District Attorney, Albany County
3. Hon. William V. Grady – District Attorney, Dutchess County
4. Hon. Polly A. Hoyer – District Attorney, Fulton County
5. Hon. Kenneth R. Bruno – District Attorney, Rensselaer County
6. Sean M. Byrne, Executive Director NYPTI
7. Caran Curry, NYPTI



Appendix B

Prosecutor Workshop Participants



Workshop Participants

Albany, New York

1. Jennifer Gill – Albany County
2. George Hazel – Dutchess County
3. Karina Hojraj – Albany County
4. David Rynkowski – Rensselaer County
5. Louise Sira – Fulton County

Tucson, Arizona

1. Janet Altschiler – Pima County
2. Bruce Chalk – Pima County
3. Jan-Georg Roesch – Pinal County
4. John Woodring – Pinal County

Newport Beach, California

1. Blaine Bowman – San Diego County
2. Janice Chieffo – Orange County
3. Creg Datig – Riverside County
4. Jim Pippin – San Diego County

Boston, Massachusetts

1. William Melkonian – Essex County
2. Gerald Stewart – Suffolk County
3. Patrick Bomberg – Plymouth County
4. Michael Leary – Middlesex County
5. Richard Locke – Berkshire County
6. Brian O'Neill – Norfolk County

Rocky Hill, Connecticut

1. John Malone
2. Christopher Godialis
3. Angela Macchiarulo
4. Anne Holley

Springfield, Illinois

1. Jon Hurst – Morgan County
2. Dick Koritz – Dewitt County
3. Kelly Griffith – Champaign County
4. Terry Costello – Montgomery County
5. Pete Cavanagh – Sangamon County

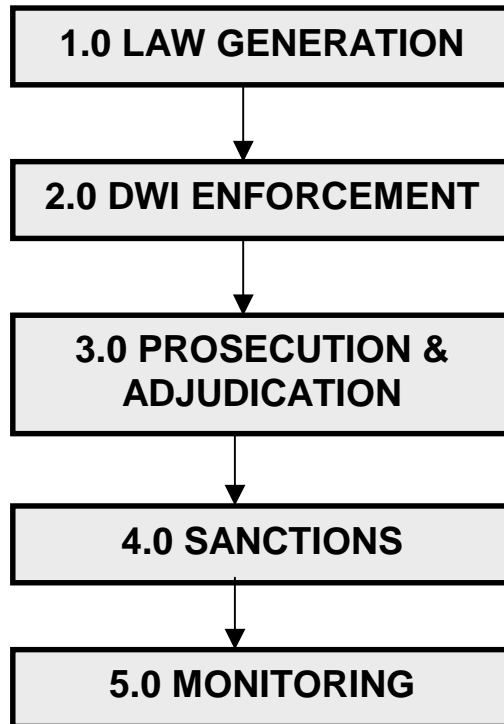


Appendix C

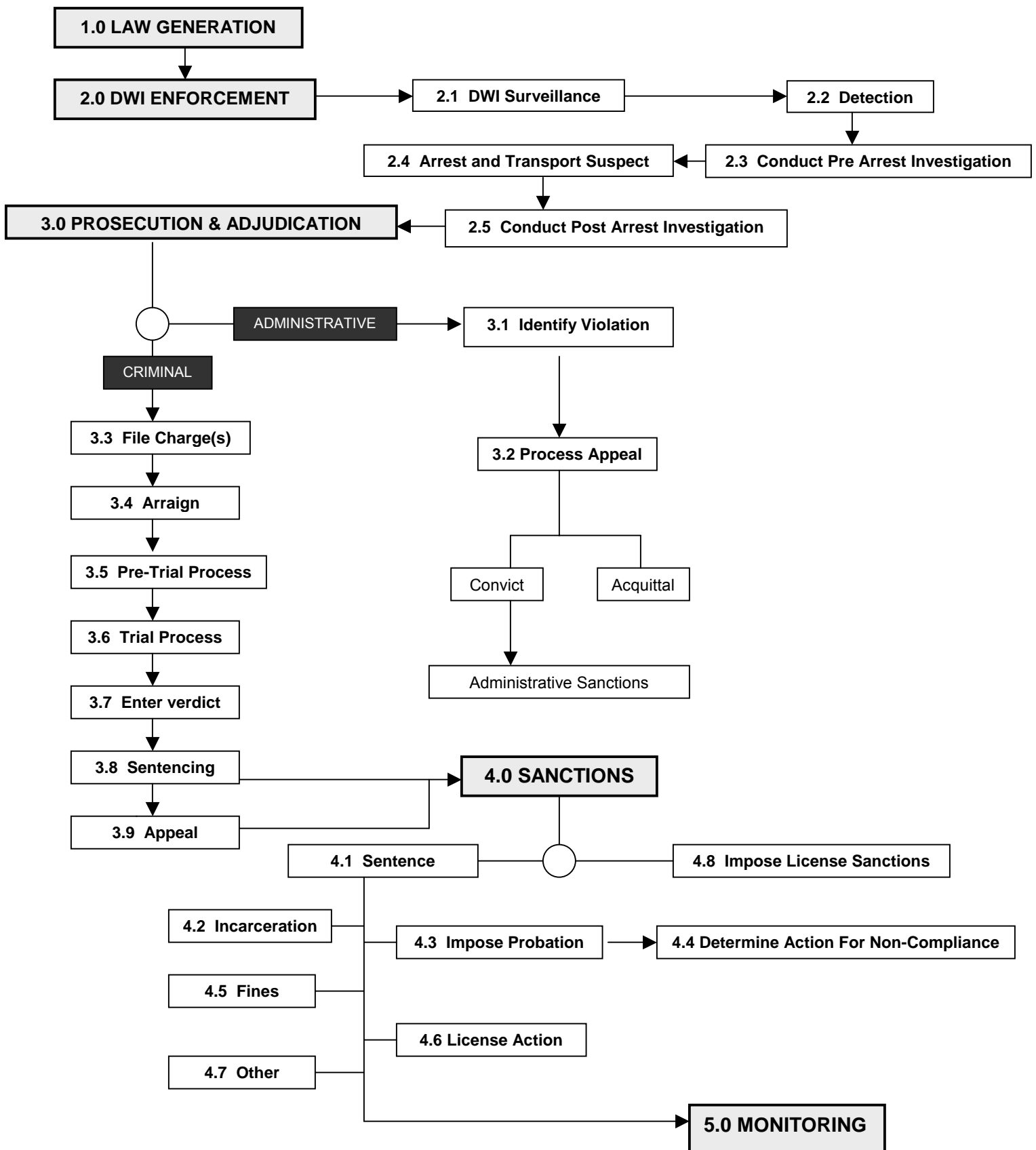
Schematic Representation of the DWI System

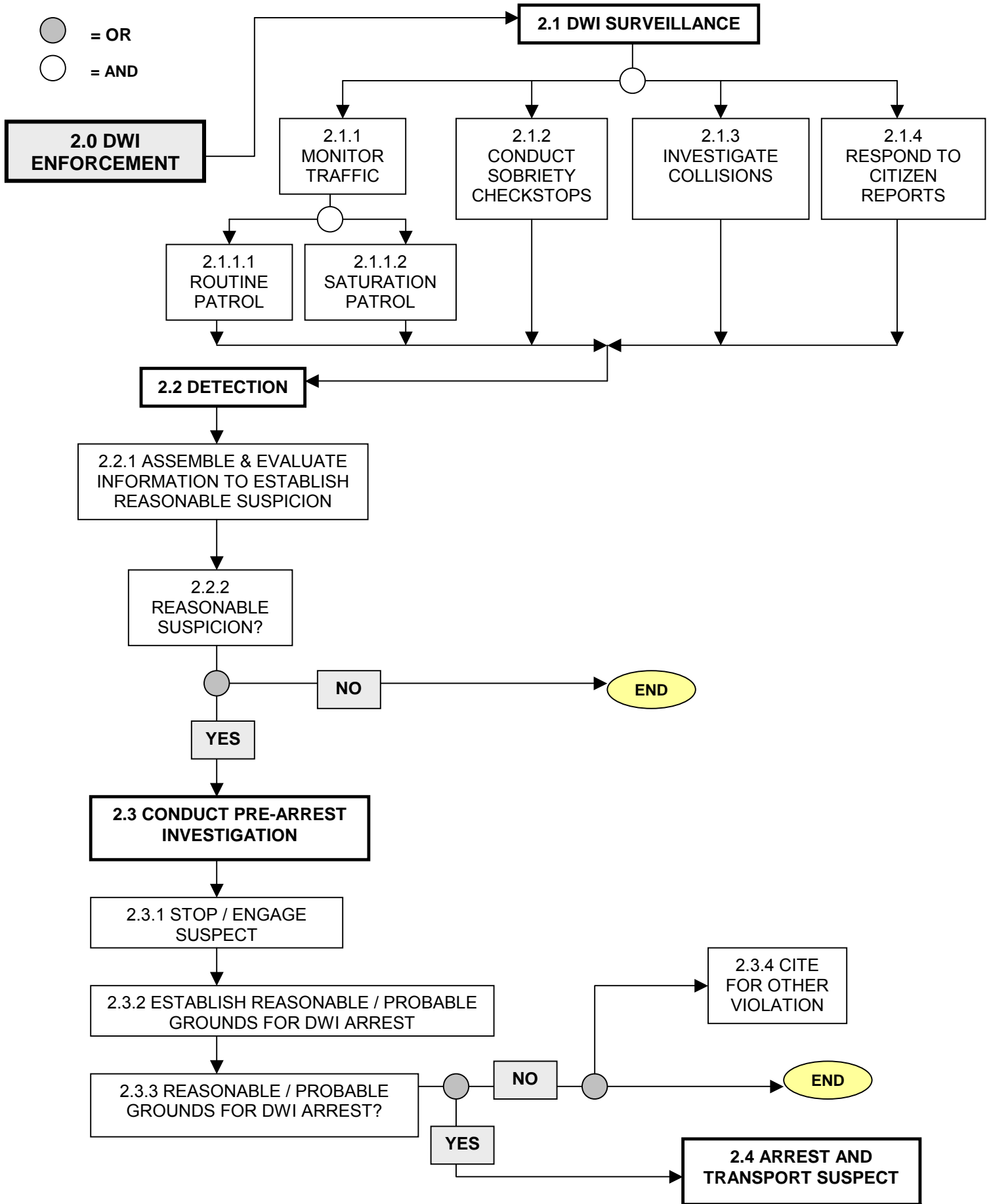


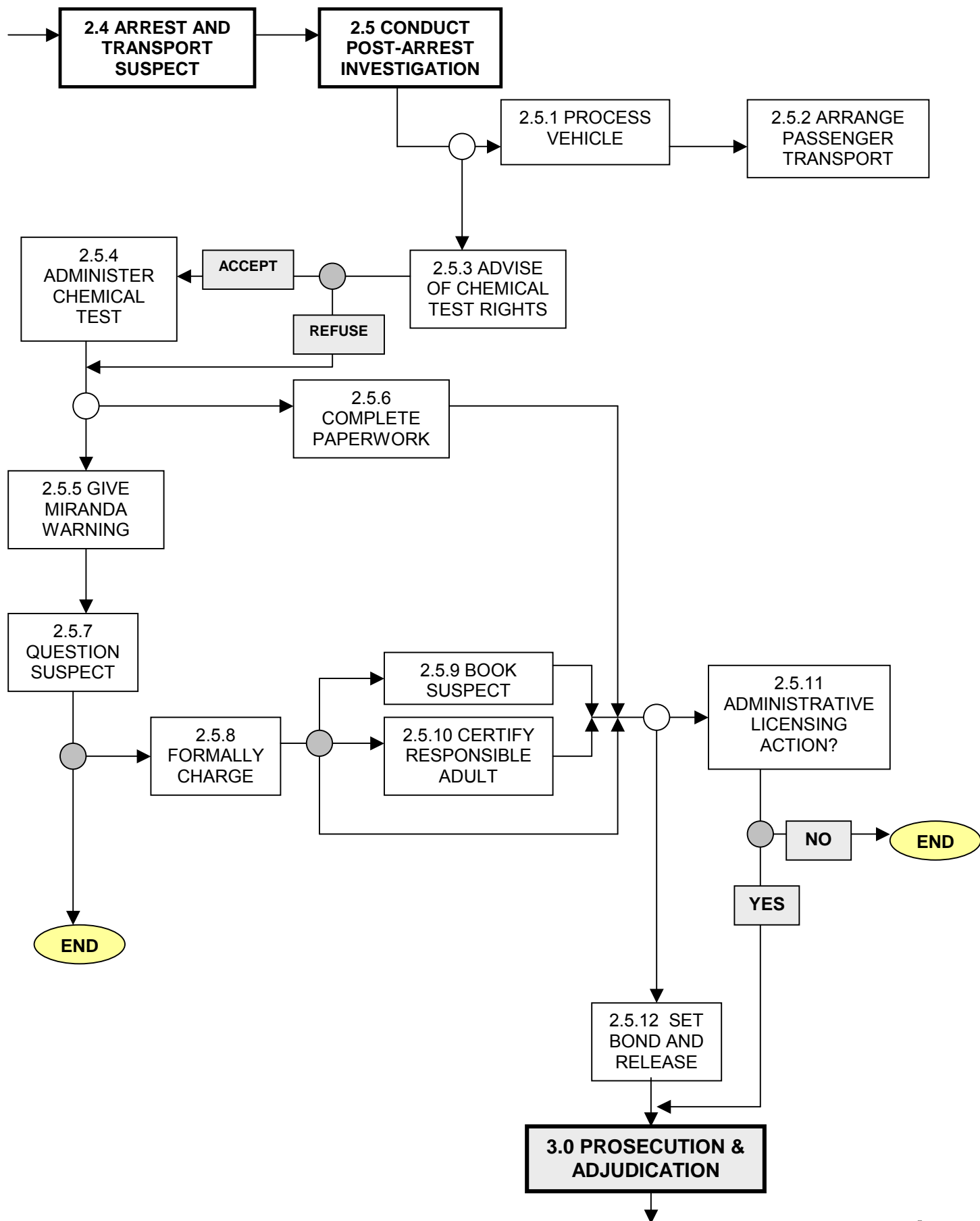
Overview

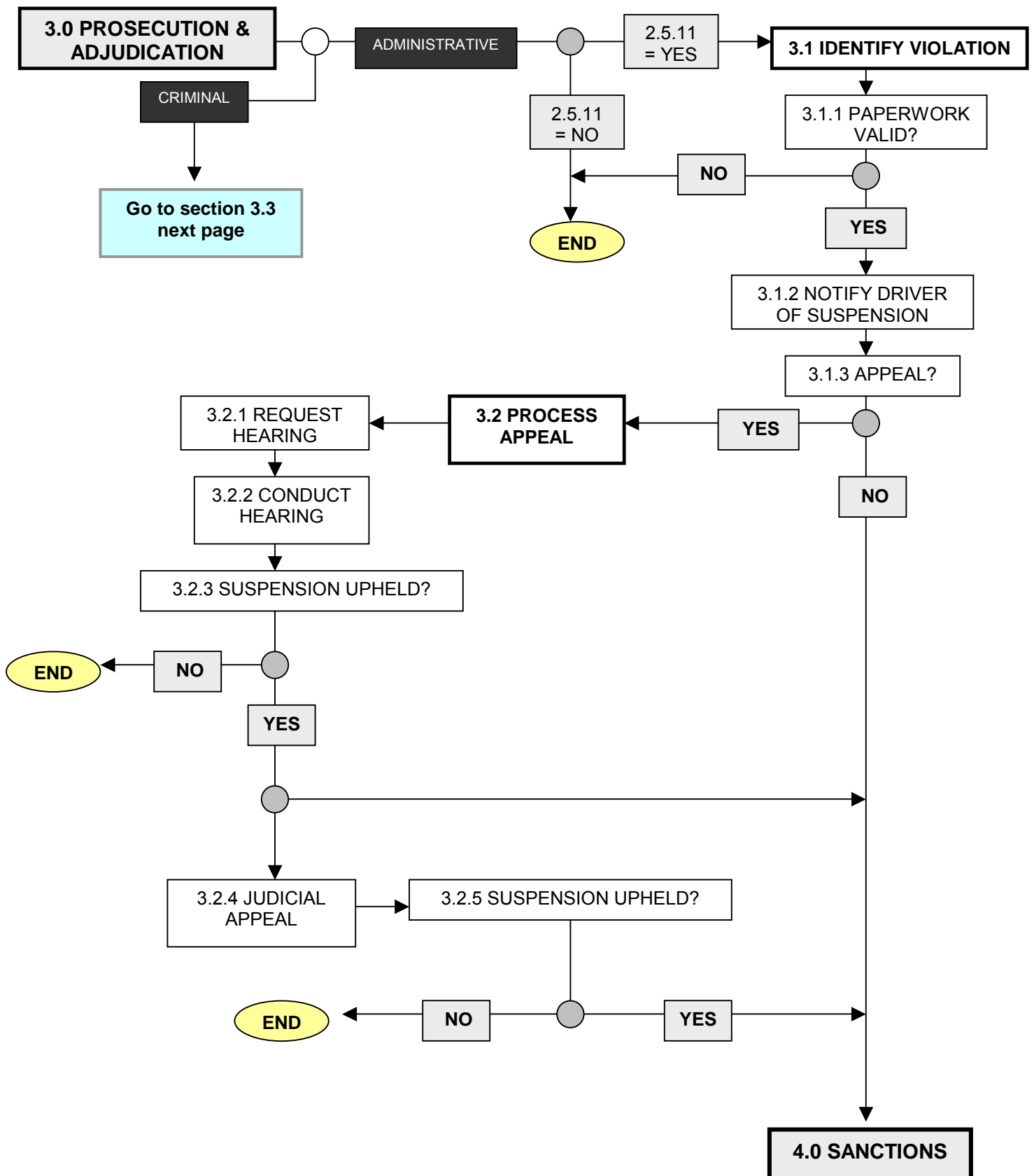


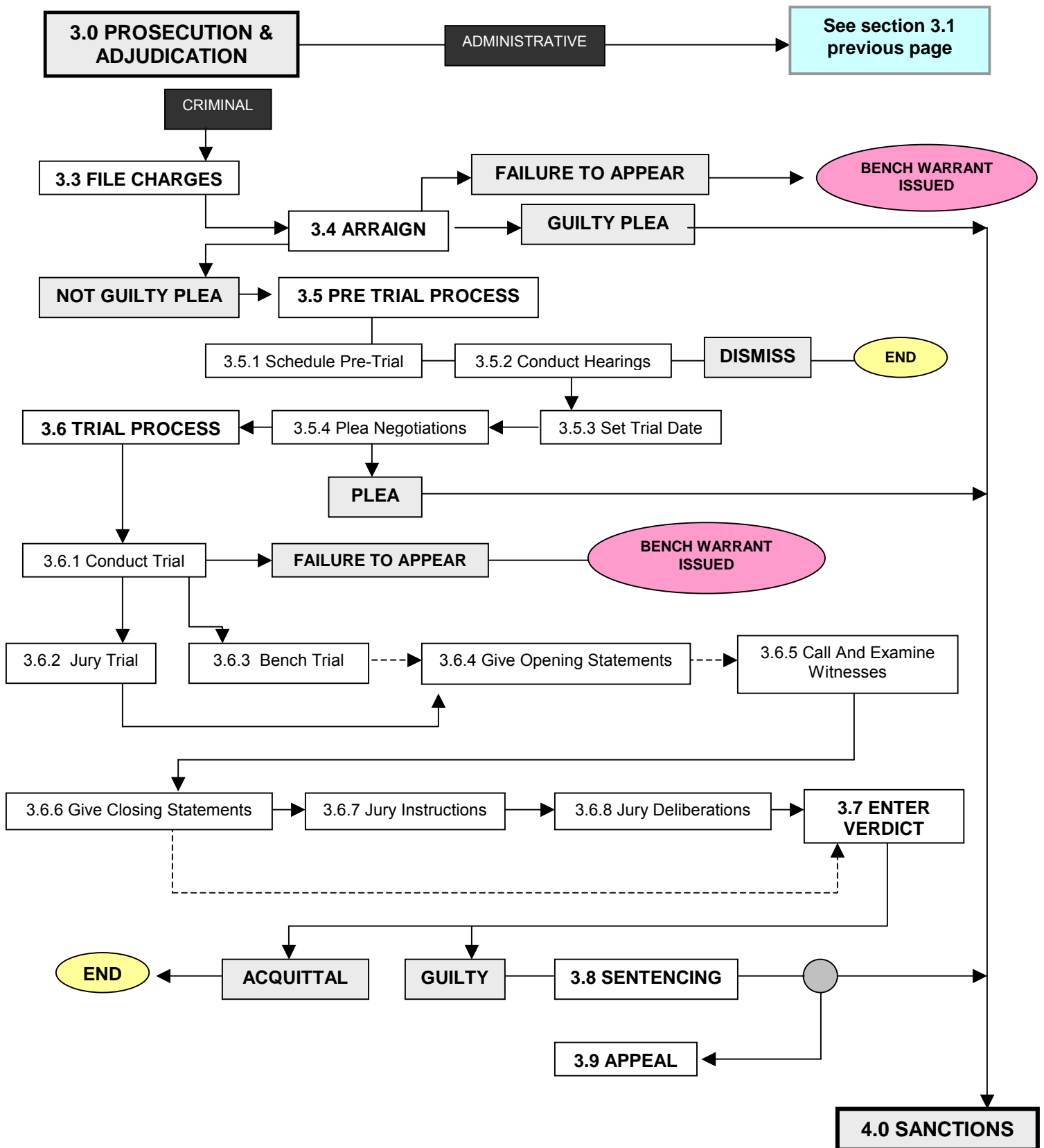
Overview

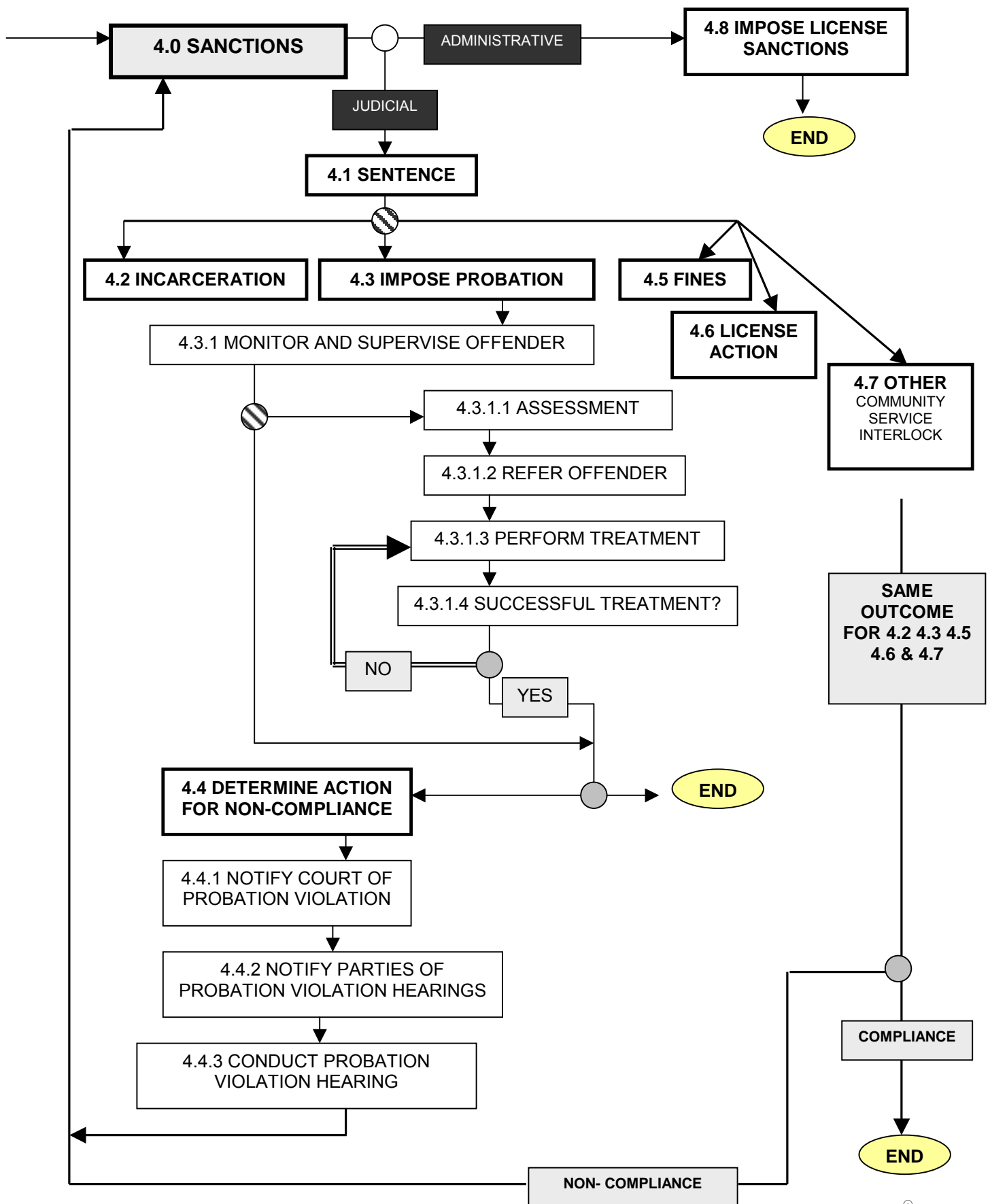












Appendix D

Problem List Distributed at Prosecutor Workshops



PROBLEMS IN PROSECUTING HARD CORE DRUNK DRIVERS

RANK*

- ◆ **CASELOAD:** The repeat offender typically pushes the case into the trial phase and contributes to heavy caseloads, which makes it difficult to prepare a case sufficiently. _____
- ◆ **FAILURE TO APPEAR:** Repeat offenders often fail to appear during the pre-trial and trial phases. _____
- ◆ **LACK OF ADEQUATE EVIDENCE:** Police officers or witnesses are unable to provide (for various reasons) sufficient quantity or quality of evidence to obtain a conviction against repeat offenders. _____
- ◆ **INADMISSIBLE EVIDENCE:** As a result of police error, consensus on test standards or judicial decisions, relevant and necessary evidence is deemed inadmissible, thereby precluding conviction of the repeat offender. _____
- ◆ **RECORDS:** Records and associated documentation from sources such as the DMV are unavailable, inaccessible or incomplete making the identification of repeat offenders for the purpose of sanctioning unlikely. _____
- ◆ **PLEA BARGAINING:** This pervasive practice reduces the severity of penalties imposed and makes subsequent identification of repeat offenders difficult. _____
- ◆ **MOTIONS / CONTINUANCES:** The number of motions and continuances filed by repeat offenders prolong the court process and increase the likelihood of case dismissal. _____
- ◆ **LACK OF EXPERIENCE:** Inexperienced prosecutors have difficulty successfully prosecuting repeat offenders as a result of complex legislation and sophisticated opposition from specialized defense attorneys. _____
- ◆ **LEGISLATIVE INCONSISTENCIES:** Increasingly complex, extensive and inconsistent DWI legislation enhances opportunities for dismissal/acquittal of repeat offenders on technicalities. _____
- ◆ **INADEQUATE PENALTIES:** The lack of adequate penalties for repeat offenders in DWI legislation seriously undermines the deterrent effect of the sanctions imposed. _____

*Note: Highest priority problem rank #1, Lowest priority problem rank #10



Appendix E

Prosecutor Surveys



PROSECUTING HARD CORE REPEAT DUI OFFENDERS

A National Survey of Prosecutors

©Traffic Injury Research Foundation
www.trafficinjuryresearch.com

May 2001



PURPOSE

The purpose of this survey is to obtain your views about key problems associated with the prosecution of **hard core DUI offenders**¹.

PRIVACY

To ensure the anonymity of individual respondents, you are not being asked to provide personal information that could lead to your identification. Only aggregate results will be published.

GENERAL INFORMATION

1. How many years have you worked as a prosecutor? _____years
2. How many years have you prosecuted DUI cases? _____years
3. In which state are you currently a prosecutor? _____
4. Are the majority of your DUI cases in (check the appropriate box):

☐ courts of limited jurisdiction
☐ courts of general jurisdiction
5. What is the estimated population size of your jurisdiction?

☐ 0-20,000 ☐ 20,000-50,000 ☐ 50,000-100,000
☐ 100,000-250,000 ☐ 250,000-500,000 ☐ 500,000+

Footnotes

¹ Hard core drunk drivers are repeat offenders who frequently drink and drive, usually with high BACs.

For convenience, the abbreviation DUI is used throughout the survey, although the specific term used in state statutes may vary (e.g., DWI – driving while impaired, OUI – operating under the influence of alcohol, etc.).



1. The eleven problems listed below impede the prosecution of hard core repeat drunk drivers in many areas of the country. Rank order these problems in terms of how important they are to you. Give a rank of 1 to what you believe is the most serious problem affecting your ability to prosecute hard core drunk drivers, a rank of 2 to the next most serious problem, and so on.

Rank

Unavailability of Complete Offender Records _____

Unavailability of Expert Witnesses _____

Evidentiary Issues _____

Legislative Inconsistencies _____

Plea Negotiations _____

Lack of Prosecutor Training _____

Inadequate Penalties Imposed _____

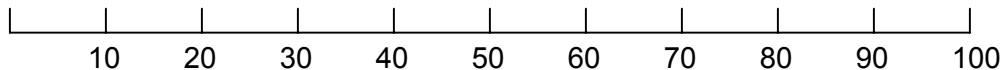
Failure to Appear _____

Offenders Pleading Not Guilty _____

Test Refusal (SFSTs, chemical) _____

Delays resulting from Motions/Continuances _____

2. In your office, what percent of cases involve repeat DUI offenders that are incorrectly charged as first offenders, due to incomplete or inaccessible records? (Please circle the approximate percentage on the scale below.)



3. How often do you require expert witnesses to present the following types of evidence in a DUI trial?

a) blood test evidence:

☐ Never ☐ Sometimes ☐ Often

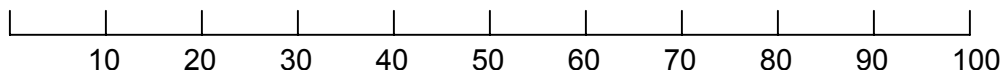
b) breath test evidence:

☐ Never ☐ Sometimes ☐ Often

c) HGN evidence:

☐ Never ☐ Sometimes ☐ Often

4. How often are experts available to review evidence and testify in court for your DUI cases? (Please circle the approximate percentage on the scale below.)



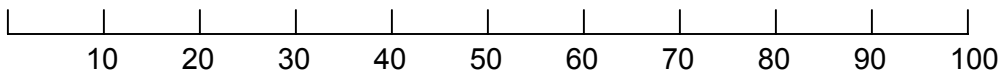
5. Which of the following evidentiary problems most often lead to a dismissal/acquittal? (Place an **X** beside the **two** most common problems.)

- No BAC result..... _____
- SFST results do not sufficiently relate to/demonstrate intoxication..... _____
- Technicalities..... _____
- Breath test instruments not properly calibrated/certified..... _____
- Key evidence suppressed..... _____

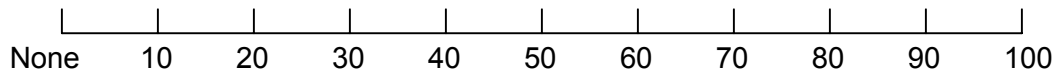
6. Which form of evidence do you believe carries the most weight, or is most convincing, to jury members? (Place an X beside the one most convincing form of evidence.)

- BAC result..... _____
- Expert testimony/scientific evidence..... _____
- Police testimony..... _____
- Eye witness testimony..... _____

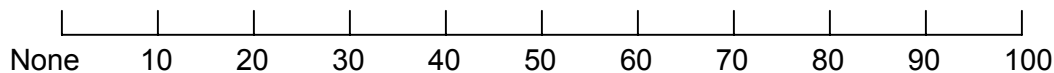
7. In your experience, what percentage of cases are lost as a result of defense arguments concerning the validity and reliability of breath test equipment and/or results? (Please circle the approximate percentage on the scale below.)



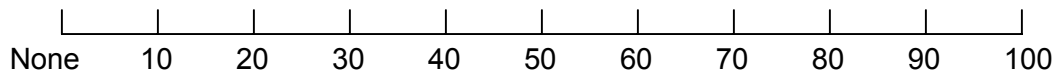
8. In your office, what percent of DUI cases involve offenders that plead guilty **without** benefit of a plea agreement? (Please circle the approximate percentage on the scale below.)



9. In your office, what percentage of DUI cases would you estimate are concluded with plea agreements? (Please circle the approximate percentage on the scale below.)



10. In your office, what percent of cases are plead down from a DUI offense to a non-alcohol related offense?



11. In your office, are prosecutors required to state on the record the reasons for plea agreements in DUI cases?

☐ Yes ☐ No



12. In your office, what percentage of repeat drunk driving defendants do you estimate plead not guilty? (Please circle the approximate percentage on the scale below.)

None 10 20 30 40 50 60 70 80 90 100

13. Do you feel that you received adequate training and preparation in the prosecution of DUI offenders when you were first assigned to this position?

☐ Yes

☐ No

14. In your office, what percentage of DUI defendants do you estimate fail to appear during either arraignment, pre-trial proceedings, or trial? (Please circle the approximate percentage on the scale below.)

None 10 20 30 40 50 60 70 80 90 100

15. Would you agree that failure to appear is more of a problem among repeat offenders than among first offenders?

☐ Yes

☐ No

16. What would you estimate is the criminal conviction rate for test refusal (SFSTs and/or chemical) cases in your office? (Please circle the approximate percentage on the scale below.)

None 10 20 30 40 50 60 70 80 90 100

17. Is it your experience that test refusals are more common among repeat offenders than among first offenders?

☐ Yes

☐ No

18. If you could change one thing to improve the prosecution of repeat offenders, what would it be?

PLEASE MAIL THE COMPLETED SURVEY IN THE ENCLOSED
SELF- ADDRESSED STAMPED ENVELOPE AT YOUR
EARLIEST CONVENIENCE. THANK YOU.



PROSECUTING HARD CORE REPEAT DUI OFFENDERS

A National Survey of
Prosecutors

©Traffic Injury Research Foundation
www.trafficinjuryresearch.com

May 2001



PURPOSE

The purpose of this survey is to obtain your views about key problems associated with the prosecution of **hard core DUI offenders**¹ and how these problems can best be resolved.

PRIVACY

To ensure the anonymity of individual respondents, you are not being asked to provide personal information that could lead to your identification. Only aggregate results will be published.

GENERAL INFORMATION

1. How many years have you worked as a prosecutor? _____ years
2. How many years have you prosecuted DUI cases? _____ years
3. In which state are you currently a prosecutor? _____
4. Are the majority of your DUI cases in (check the appropriate box):
 - ☐ courts of limited jurisdiction
 - ☐ courts of general jurisdiction
5. What is the estimated population size of your jurisdiction?

<input type="checkbox"/> 0-20,000	<input type="checkbox"/> 20,000-50,000	<input type="checkbox"/> 50,000-100,000
<input type="checkbox"/> 100,000-250,000	<input type="checkbox"/> 250,000-500,000	<input type="checkbox"/> 500,000+

Footnotes

¹ Hard core drunk drivers are repeat offenders who frequently drink and drive, usually with high BACs.

For convenience, the abbreviation DUI is used throughout the survey, although the specific term used in state statutes may vary (e.g., DWI – driving while impaired, OUI – operating under the influence of alcohol, etc.).



1. The eleven problems listed below impede the prosecution of repeat drunk drivers in many areas of the country. Rank order these problems in terms of how important they are to you. Give a rank of 1 to what you believe is the most serious problem affecting your ability to prosecute hard core repeat offenders, a rank of 2 to the next most serious problem, and so on.

Rank

Unavailability of Complete Offender Records _____

Unavailability of Expert Witnesses _____

Evidentiary Issues _____

Legislative Inconsistencies _____

Plea Negotiations..... _____

Lack of Prosecutor Experience _____

Inadequate Penalties Imposed _____

Failure to Appear _____

Offenders Pleading Not Guilty _____

Test Refusal (SFSTs, chemical) _____

Delays resulting from Motions/Continuances _____

2. Do you believe that standardized record keeping practices and driver abstracts for all criminal courts across the country would improve the prosecution of out-of-state offenders?

☐ Yes ☐ No

3. Which type of documentation is most significant/necessary to secure a conviction?

- Check box arrest forms..... _____
- Narrative arrest forms..... _____
- Videotapes..... _____

4. Would you support planned workshops involving both prosecutors and police officers to allow for the exchange of information and ideas regarding evidence collection?

☐ Yes ☐ No

5. Do you think preparing police officers prior to their providing testimony in court would result in a higher conviction rate for repeat offenders?

☐ Yes ☐ No



6. Do you feel that prosecutors would benefit from increased training in the area of DUI offenses?

☐ Yes (go to item 7) ☐ No (go to item 8)

7. Which forms of education/training do you think would be most beneficial to prosecutors? (Place an X beside the **two** methods you think would be **most** beneficial.)

____ national conferences
____ statewide conferences
____ local day courses
____ greater access to manuals and other reference materials
____ prosecutor networking
____ other _____ (please specify)

8. Would you like to see the frequency of plea negotiations in DUI cases:

☐ increased ☐ reduced ☐ eliminated ☐ remain same

9. Would you support the development of dedicated DUI courts and DUI judges in your jurisdiction?

☐ Yes ☐ No ☐ Already have them

10. Do you feel that the presence of victims/court monitors in the courtroom increases the likelihood of conviction?

☐ Yes ☐ No ☐ Not Applicable

11. Would you support the development of stricter sentencing guidelines with regard to repeat DUI offenders?

☐ Yes ☐ No

12. On average, what level of priority do you think that DUI cases generally receive within the court system?

- High priority consistently..... _____
- High priority when warranted..... _____
- Medium priority..... _____
- Low priority..... _____



13. In light of the technical laws and forms of evidence introduced at DUI trials, do you feel that all professionals involved in the court process would benefit from local or state-wide workshops designed to address the technical issues pertaining to DUI offenses?

☐ Yes

☐ No

14. What do you think is the most effective method for dealing with defendants who fail to appear for court proceedings? (Place an X beside the **one** method that you feel is **most** effective.)

- ___ holding defendants in custody
- ___ setting higher bail amounts
- ___ increased penalties for failure to appear
- ___ other _____ (please specify)

15. What do you think is the most effective/practical method for dealing with test refusals? (Place an X beside the **one** method you think would be **most** effective.)

- ___ making refusal admissible in court
- ___ increasing penalties for refusal
- ___ allowing forced blood draws
- ___ other _____ (please specify)

16. Would you like to see the number of motions and continuances in a DUI trial limited in order to adhere to case processing guidelines?

☐ Yes

☐ No

☐ Not a problem

17. If you could change one thing to improve the prosecution of repeat offenders, what would it be?

PLEASE MAIL COMPLETED SURVEY IN THE
ENCLOSED SELF-ADDRESSED STAMPED ENVELOPE
AT YOUR EARLIEST CONVENIENCE.

THANK YOU.

