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A PUBLICATION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

The PROSECUTOR



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ABOUT THE COVER

The original Lehigh County Courthouse was constructed between 1814 and 1819. Additions were built in 1864, 1880-1881, and 1914-1916. It is currently having interior renovations performed. When those are completed, courtrooms again will be used as they have been since the building opened two hundred years ago. In addition, there will be a law library in the courthouse.

The courthouse is on the corner of 5th and Hamilton Streets in Allentown, PA. It is adjacent to the "new" courthouse, which opened in 1962. The original courthouse was added to the National Register of Historic Places on September 11, 1981.

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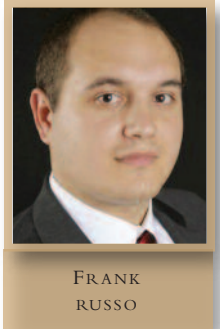
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VIEW

From the Hill

By Frank Russo
Director of Government
and Legislative Affairs



CAPITOL HILL IS GETTING BACK TO WORK during the lame-duck session as both parties prepare for the 116th Congress to begin in 2019. Prior to the midterm elections, Congress passed a landmark bipartisan bill to combat the ongoing opioid epidemic. The new law expands services and resources for all three aspects of the crisis: prevention, treatment, and recovery. Before the break, President Trump also signed the *Justice Served Act of 2018*, an original piece of legislation co-authored by NDAA alongside Senator John Cornyn (R-TX), Senator Amy Klobuchar (D-MN), and Representative John Carter (R-TX).

NDAA members are encouraged to contact Frank Russo, Director of Government and Legislative Affairs, on any policy or legislative issues that arise. He can be reached at frusso@ndaajustice.org or at 703-519-1655.

Below is a snapshot and update on recent issues:

FORENSIC SCIENCE

- President Donald J. Trump signed H.R. 4854, the *Justice Served Act of 2018*, into law. First passed by the House of Representatives in May by a vote of 377-1, the Justice Served Act cleared the Senate unanimously in October. The legislation authorizes a carve-out of 5 to 7 percent of funding from the Debbie Smith DNA Backlog Elimination Act to enhance the capacity of state and local prosecution offices to address the backlog of violent crime cases in which suspects have been identified through DNA evidence. Through the passage of this legislation, Congress acknowledges the importance of DNA evidence in modern

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criminal prosecutions and provides prosecutors with the necessary tools to obtain justice for victims of violent crimes and their families.

COMMUNITY SAFETY

- H.R. 6, *The SUPPORT for Patients and Communities Act*, was signed into law by the President. The bipartisan legislation was approved by a 98-1 vote in the Senate and passed the House 393-8. Included in the landmark opioid crisis legislation was the *Substance Abuse Prevention Act*. Supported by NDAA, this provision reauthorizes critical programs to reduce demand for narcotics such as the Office of National Drug Control Policy, Drug Courts, and Drug Abuse Prevention Programs.
- NDAA's Opioid Working Group, comprised of 33 prosecutors from 30 states, published its Opioid Epidemic White Paper in October. After eight months of collaboration, the final product reflects the diverse views of prosecutors representing unique jurisdictions across the country. Specifically, the paper focuses on the priorities in enforcement, prevention, treatment, and rehabilitation that can be implemented by law enforcement and policymakers nationwide. Dave Aronberg, chair of the working group, stated, "in response to this unprecedented epidemic, prosecutors from across the country have come together to recommend best practices

and policy changes to make our communities safer and save lives."

CRIMINAL JUSTICE & SENTENCING REFORM

- The White House has signaled to NDAA that it plans to address criminal justice reform during the lame-duck session of Congress following the midterm elections. As a reminder, the current proposal incorporates the *First Step Act*, which focuses primarily on reducing recidivism rates, alongside key provisions from the *Sentencing Reform and Corrections Act*, introduced by Senate Judiciary Chairman Grassley (R-IA) last year.

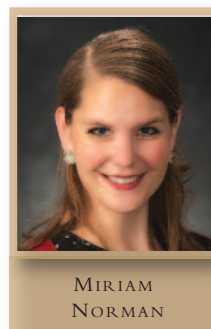
2019 NDAA CAPITAL CONFERENCE

- NDAA invites you to join us at our Annual Capital Conference in Washington, D.C. from January 29-30, 2019. As a member of NDAA, this event provides an opportunity for you to hear from Administration, agency and Capitol Hill speakers, as well as meet and engage with your individual members of Congress and state delegations. In addition to meeting other prosecutors and making important policy contacts, you will take away valuable information from this conference to share with your office colleagues, professional network and members of your community.

Register at: <https://ndaa.org/event/2019-ndaa-capital-conference/>

The Mellanby Effect

Why Impaired Individuals Should Not Be Allowed to Be Behind the Wheel



BY MIRIAM NORMAN

IN AN IMPAIRED DRIVING CASE, a prosecutor typically must prove a defendant was operating or driving a motor vehicle while impaired. Alternative to showing the defendant was driving, a prosecutor must prove he or she was in physical control of the vehicle. The usual facts of a “physical control” case include the police finding an individual “asleep” in the driver’s seat of a non-running car, either on the side of the road or in a parking lot. This type of case can present challenges for the prosecutor because jurors may agree with the defendant’s argument that he or she was being responsible by *not* driving and, therefore, find him or her not guilty. The Mellanby Effect explains why an impaired individual in physical control of a vehicle cannot be left to stay in the vehicle to just “sleep it off,” and the danger posed by such a situation.

It is well known that alcohol impairs judgment

and the ability of thought process; alcohol is a Central Nervous System Depressant.¹ “Alcohol in small doses may cause performance of driving-related skills to fall off; in moderation to high amounts, alcohol diminishes performance across the board with general impairment of nervous function.”² Several studies observed a marked decrease in the ability to divide one’s attention safely, ability to track, ability to react, ability to maintain lane position, ability to appropriately apply the brakes, and ability to control the steering of the vehicle.³ Alcohol’s ability to impair higher level cognitive processing, coupled with the Mellanby Effect, is exactly why it is dangerous to allow an impaired individual to be left behind the wheel: he or she will feel better, still be above the per se level, still be appreciably affected, and yet may still choose to drive.

¹ *Alcohol and the Driver*. Council on Scientific Affairs; JAMA. 1986 Jan 24-31; 255 (4): 522-7.

² *Id.*

³ *Id.*

Miriam Norman is a Traffic Safety Resource Prosecutor and works for the City of Seattle City Attorney’s Office in Seattle, Washington.

The Mellanby Effect is a scientific principle first discovered by Sir Edward Mellanby in 1919.⁴ Mellanby found that perceived behavioral impairment at a specific blood alcohol concentration was greater when the blood alcohol concentration (BAC) was rising than when it was falling.⁵ “Subjects feel less drunk during the descending

The individual decreases his or her speed to 45 mph, but now 45 mph feels painstakingly slow; it is practically crawling. This is the Mellanby Effect. In other words, the 45-mph felt fast before the individual drove faster.

When blood alcohol concentration is on the way up, a person will feel more impaired at a level of .08

Mellanby found that perceived behavioral impairment at a specific blood alcohol concentration (BAC) was greater when the blood alcohol concentration was rising than when it was falling.⁵

limb of the BAC-time curve than at the same concentration of alcohol on the ascending limb. However, objective measures of impairment...were generally worse during the descending limb for the same BAC.”⁶ In easier to understand terms, the Mellanby Effect can be likened to the “highway effect.”

For example, imagine an individual who drives on a feeder road to the freeway. The speed limit on that feeder road is 45 mph. While traveling on the feeder road, the individual feels like he or she is traveling at a good speed. Then he or she merges onto the freeway and drives at speeds from 65–70 mph for a period. When the individual reaches his or her exit, he or she exits back onto a feeder road.

g/mL than at the same level on the way back down.⁷ When a person is on the way back down, he or she will feel “better,” but will still be legally impaired. Because of this, in addition to the fact that alcohol affects all the processes that help a person make good choices, the person may choose to drive impaired. The Mellanby Effect highlights, therefore, why it is unsafe to allow impaired individuals to be left in a vehicle along with the keys to it. Although a person may feel less intoxicated, his or her impairment is not similarly improved.⁸ One study described the impairment on the descending BAC in this manner: “Objective measures of impairment, especially those involving skills necessary for safe driving and those measured on driving

⁴ Mellanby, E., Alcohol: Its Absorption Into and Disappearance from Blood Under Different Conditions. *British Medical Research Committee, Special Report Series*, No. 31. London: H.M.S.O., 1919.

⁵ *Id.*

⁶ Holland, MG; Ferner, RE; *A Systematic Review of the Evidence for Acute Tolerance to Alcohol — the “Mellanby Effect.”* *Clinical Toxicology* (Phila). 2017 Jul; 55(6): 545–556.

⁷ *Id.*; Mellanby, E., Alcohol: Its Absorption Into and Disappearance from Blood Under Different Conditions. *British Medical Research Committee, Special Report Series*, No. 31. London: H.M.S.O., 1919.

⁸ *Alcohol and the Driver.* Council on Scientific Affairs; JAMA. 1986 Jan 24–31; 255 (4): 522–7.

simulators, were generally worse during the descending limb for the same BAC. Slowed reaction times may recover somewhat during the descending limb, but accuracy falls. When these decrements are combined with a perceived improvement in ability to drive and a loss of inhibitory control, the likelihood of driving while impaired increases, and may explain the binge or

alcohol burn-off rate) of .02 g/mL BAC per hour rate of elimination.¹⁰ If this man went to sleep with a BAC of .16 g/mL, he would need to sleep for four hours for his BAC to reduce to .08 g/mL, a level that still represents legal impairment in every jurisdiction. This impaired man may wake up, however, at a .10 g/mL or .12 g/mL BAC, feel great because of the Mellanby Effect, and choose to

*The Mellanby Effect highlights, therefore, why it is unsafe to allow impaired individuals to be left in a vehicle along with the keys to it. Although a person may feel less intoxicated, his or her impairment is not similarly improved.*⁸

problem drinker's increased risks for motor vehicle crashes.”⁹ This study clearly explains that the Mellanby Effect will increase the likelihood that a driver will choose to drive while intoxicated.

This hypothetical example illustrates the Mellanby Effect. A 200-pound man is found “sleeping it off” behind the wheel of his vehicle. Imagine the best-case scenario of facts for him: (1) the nap was planned (*i.e.*, he did not just pass out), (2) he is in the elimination phase of alcohol metabolism (*i.e.*, post-absorption phase of all the alcohol he consumed), and (3) he has an elimination rate (*i.e.*,

drive, hence the danger of allowing him to sit behind the wheel with access to keys.¹¹

The Mellanby Effect is an interesting and enlightening scientific principle. To understand it helps to better understand the dangers posed by individuals in physical control cases and, therefore, the importance of holding these defendants accountable. Prosecutors in need of assistance with impaired driving cases—or any other traffic safety matter—may contact the National Traffic Law Center, a division of the National District Attorneys Association.

⁹ Holland, MG; Ferner, RE; *A Systematic Review of the Evidence for Acute Tolerance to Alcohol — the “Mellanby Effect.”* Clinical Toxicology (Phila). 2017 Jul; 55(6): 545-556.

¹⁰ BAC levels dropped 0.020% per hour for heavy drinkers and 0.017% per hour for moderate drinkers on the falling BAC test days. This difference is to be expected in terms of the increased metabolism rate for alcohol typically found in chronically tolerant heavy drinkers. Moskowitz, H; Daily, J; Henderson, R.; *The Mellanby Effect in Moderate and Heavy Drinkers*, Pages 184-170.

¹¹ Keep in mind that the American Medical Association (AMA) has supported a drop in the per se level to 0.05% for decades. In May 1982, the AMA issued to state and medical specialty societies a document titled, “Drunk Driving Laws,” urging state medical associations to consider supporting legislation

strengthening DUI laws in their respective states. Studies support this position; one study showed that “[i]mpairment of judgment by alcohol was demonstrated at BACs as low as 0.04% when skilled bus drivers misjudged their ability to drive a vehicle through space...” narrower than perceived. “Skills related to driving show that both information acquisition and information processing are rendered slower and less efficient, and the ability to carry out a divided-attention task that requires intellectual time sharing is impaired.” Everyone is affected by alcohol at very low levels and should not drive above a .05 g/mL. Alcohol and the Driver. Council on Scientific Affairs; JAMA. 1986 Jan 24-31; 255 (4): 522-7.



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The PROSECUTOR

Breaking the Cycle: St. Joseph County's Implementation of the DA-LE to Better Respond to Intimate Partner Violence



KYLIE M.
CONNELL

BY KYLIE M. CONNELL

*"I thought he was going to kill me."
"I never thought this could happen to her."
"I'm afraid to go home."
"Daddy hit mommy."
"I couldn't breathe."
"I just want this to be over."*

THESE ARE THE PHRASES we hear every day in the Special Victim's Unit of the St. Joseph County Prosecutor's Office of Indiana. As we investigate cases, make charging decisions, extend plea offers, and go to trial, those are the phrases that sit in our minds. Those phrases were one reason that drove St. Joseph County of Indiana to reassess the community's response to intimate partner violence and make changes.

A year ago, St. Joseph County implemented a new intimate partner violence protocol. This protocol included the use of the Danger Assessment-Law Enforcement (DA-LE) and the creation of a Domestic

Violence High Risk Team (DVHRT).¹ The Jeanne Geiger Crisis Center selected St. Joseph County to receive technical training and policy development for the DA-LE and DVHRT. At the time, St. Joseph County was only the third community to use the DA-LE. The goal of the protocol is to reduce harm to victim, increase offender accountability, and improve the county's response to intimate partner violence.

The biggest component of the protocol is the DA-LE. The DA-LE is a shortened version of the Danger Assessment (DA). The DA is a tool often administered by victim advocates.² The DA is twenty questions long and covers a 12 month period of history to aid the victim in recalling severity and frequency of violence. Based on the responses, the victim is categorized as variable danger, increased danger, severe danger, and extreme danger. The DA-LE consists of only eleven yes or no questions. Seven or more "yes" responses indicate there is a high risk of danger to the victim. The

¹ The DA-LE is based on the Danger Assessment and research of Dr. Jacquelyn C. Campbell, PhD, RN, FAAN of Johns Hopkins University School of Nursing and Dr. Jill Theresa Messing, MSW, PhD, Arizona State University School of Social Work and developed with the Jeanne Geiger Crisis Center. The contents of the DA-LE may not be reproduced, changed, or

duplicated in any manner without express written permission of Jeanne Geiger Crisis Center, Inc. <https://www.jgccdale.org>.

² Jill Theresa Messing and Jacquelyn Campbell (2016), Informing Collaborative Interventions: Intimate Partner Violence Risk Assessment for Front Line Police Officers, *Policing: A Journal of Policy and Practice* 10(4), 328-340.

Kylie M. Connell is a St. Joseph County Deputy Prosecuting Attorney (Indiana) in the Special Victims Unit.

DA-LE questions include: Has the physical violence increased in severity or frequency over the past year?; Have you left him/her after living together in the past year?; Does he/she control most or all of your daily activities?; Has he/she tried to kill you?; Has he/she ever threatened to kill you?; Has he/she used a weapon against you or threatened you with a lethal weapon?; Has he/she ever tried to choke (strangle) you?; Has he/she ever choked (strangled) you multiple times?; Do you believe he/she is capable of killing you?; Does he/she own a gun?; Has he/she ever threatened or tried to commit suicide?³

The use of the DA-LE is best summarized from the

still on-scene with the officer. Later the YWCA again follows up with the victim to provide referrals for services and check to see how to best help the victim. The officer forwards a copy of the DA-LE to the YWCA, DVHRT, and the prosecutor's office. The prosecutor's office then uses the DA-LE to request particular terms of bond when charging a crime. DVHRT reviews high risk cases and uses community partners to track high risk cases and respond to the cases.

Implementing the intimate partner protocol was a ten month process which required collaboration among the Special Victims Unit of St. Joseph County, all local law enforcement agencies, the St. Joseph

Each time an officer responds to intimate partner violence, the officer asks the victim the DA-LE questions. If the victim answers seven or more questions affirmatively, then the victim is considered to be at a high risk of danger.

officer's perspective. Each time an officer responds to intimate partner violence, the officer asks the victim the DA-LE questions. If the victim answers seven or more questions affirmatively, then the victim is considered to be at a high risk of danger. When a victim is a high risk, this is referred to as "screening in." The officer also has the ability to override the questions and screen in a victim regardless of the victim's responses to the questions. Once a victim screens in, the officer immediately contacts the local YWCA. The victim is given the opportunity to talk with the YWCA while

County Prosecutor's Office, the YWCA, Family Justice Center, the local civil protection order court, Adult Probation Department, and Center for Positive Change. Each community partner first created a policy of how to respond to intimate partner violence and screen for high risk victims with the DA-LE. Then training began on the use of the DA-LE for law enforcement and all community partner victim advocates. In addition to the use of the DA-LE, local law enforcement was trained on strangulation, evidence collection, report writing, primary aggressor determi-

³ These questions have been included with the permission of Jeanne Geiger Crisis Center, Inc. and may not be reproduced, changed, or duplicated in any manner without express written permission of Jeanne Geiger Crisis Center, Inc. Communities interested in implementing the DA-LE within

their law enforcement agency(ies) must contract with the Jeanne Geiger Crisis Center to receive technical assistance and training before receiving authorization to begin administering the DA-LE.
<https://www.jgccdale.org>.

nation, and domestic violence. At the same time, DVHRT was creating a structure and policy for identifying and intervening in the high risk cases. By October 2017, the DA-LE was in use by all local law

enforced with services immediately at the time of report and community partners follow up later with victim to offer additional services. Victims are receiving emergency shelter, counseling, assistance in obtaining pro-

Based on the DA-LE, the prosecutor's office is able to ask the court for GPS monitoring of the defendant as a term of bond as well as a higher than standard bond and no contact orders to protect the victim.

enforcement and all community partners, and DVHRT began reviewing cases.

A year later, over 812 DA-LE screens have been completed with close to a third screening in as high risk.⁴ The protocol has provided a framework for our community to better respond to the high risk victims. With the use of the DA-LE, victims are being con-

tective orders, along with support during the criminal court process. The civil protective order court uses the DA-LE to respond to victims who never report violence to law enforcement. DVHRT has been able to coordinate with community partners to intervene and reach out to victims in instances of multiple reports of intimate partner violence. Based on the DA-LE, the prosecutor's office is able to ask the court for GPS monitoring⁵ of the defendant as a term of bond as well as a higher than standard bond and no contact orders to protect the victim. From the training victim advocates have received, the prosecutor's office can use the victim advocates as strangulation and domestic violence experts for trial. While the success of the recent intimate partner violence protocol is still yet to be fully appreciated, our community is doing its part to break the cycle of violence. Our community will not stand idly by and wait for intimate partner homicides. As a team we have the power to reduce harm to victims and we are taking the responsibility to better respond to intimate partner violence. "With great power there must also come great responsibility."⁶



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⁴ St. Joseph County DVHRT Data, October 2017–June 2018.

⁵ GPS as of term of bond monitors a zone, typically the victim's home and/or place of employment. If the defendant enters the zone, an alert is sent to the defendant and the monitoring agency. Entering the zone can result in bond revocations and new criminal charges.

⁶ S. Lee and S. Ditko, *Amazing Fantasy No. 15*: "Spider-Man," p. 13 (1962).



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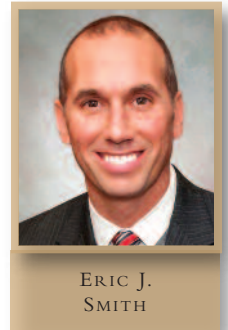
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The PROSECUTOR

Crime Victims get Free Ride to Court at Criminals' Expense with Macomb County Prosecutor's New Technology



BY ERIC J. SMITH

IN SEPTEMBER, Macomb County Prosecutor Eric J. Smith announced what is likely the nation's first program to use new technology called "Uber Central" to provide free rides from home to court and back for crime victims and witnesses. Under Smith's plan, crime victims get personal chauffeurs to court as he seeks to reduce delays and dismissals that can occur when crime victims or witnesses lack transportation to get to court. Thanks to new technology from Uber, witnesses do not even need to own a smartphone. Smith said his office plans to seek reimbursement as part of court-ordered restitution costs paid by convicted defendants.

"We are literally going the extra mile to fight crime," said Smith. "Using new technology, my office is helping crime victims get a ride to court. We can monitor their ride progress, and even greet our witnesses when they get dropped off at court. Crime victims deserve respect, and helping them get to court is one way we show that respect."

Smith said a court case can be delayed or even dismissed when a crime victim or witness fails to appear and testify in court, which may happen if a crime victim has no transportation.

Alisha Steward of Macomb Township, the victim in an assault case, said, "I felt safe getting a ride because I was worried that if I used my car, someone who knows my car could have followed me home from court." She benefited from Smith's crime victim service by receiving a ride home from the Mount Clemens Circuit Court last December.

"It was very helpful because I cannot drive due to injuries I suffered as the victim of a crime," said a crime victim whose name is being withheld at his request, and who used the service in April to get to the Clinton Township District Court. "The service was excellent. It worked like it was supposed to work." He is a stabbing victim. If he had not appeared in court prepared to testify, it's possible the felony case could have been dismissed and his alleged attacker could have been released. He and his brother used Smith's crime victim service to get from home to court in Clinton Township.

When a crime victim does not have a ride to court, Smith's Crime Victim Advocate team may now use new technology called Uber Central to request a ride on the crime victim's behalf. No smartphone, no problem. The Uber Central service automatically calls

Eric J. Smith is the elected Prosecutor for Macomb County, Michigan.

crime victims on their home phone when their ride is coming, and lets the prosecutor's office know witnesses are on the way to court on time.

Sometimes a police department will give a crime victim or witness a ride to court to testify. Smith's new service is helping police spend more time keeping our community safe, by reducing the need for police to spend time transporting witnesses to court. Some witnesses do not want neighbors seeing a police car coming to their house to take them to court, and Smith's service helps crime victims with that concern.

Smith said his office started testing the new Uber Central service in April of last year. For court hearings on days when Smith's crime victim ride service was used, none of the cases involved were adjourned or dismissed due to a crime victim failing to appear in court. Since April 2017, crime victims and witnesses have used the service to make 110 trips to or from their homes and the various district courts in Macomb County, and the circuit court, at a cost of \$2,516.13, which includes some trips where witnesses were picked up from Detroit Metropolitan Airport to testify. Criminals pay the costs. For future cases, Smith said his office will seek reimbursement as part of court-ordered restitution costs paid by convicted defendants. On cases where a defendant cannot pay, trips will be paid for from forfeiture funds seized from criminal activity. Smith said it's a small cost for a big benefit in the fight against crime.

"It worked great!" said Gary Laight of Warren, MI. He did not have transportation, and last year used the new service to get to court with his son, who was the victim of a robbery and suffered a fractured leg. "We got a text a message when ride was on the way. We were picked up at home and dropped off on time at the courthouse. It was convenient and helpful." Had his son been unable to appear in court, it's possible the case, alleging unarmed robbery, a 15-year felony, might have been dismissed.

Uber launched Uber Central in 2016 as a new way for businesses to connect with their customers. Businesses can use the service to request, manage, and pay for multiple Uber rides on behalf of their customers. Smith has adapted this business technology for government service in the fight against crime.

For further questions, please contact Macomb County Prosecutor Eric J. Smith at 586.469.7282

Additional Resources

- Macomb Co. introducing 'Uber Central' to provide crime victims free rides to court

<https://www.wxyz.com/news/macomb-co-introducing-uber-central-to-provide-crime-victims-free-rides-to-court>

- Prosecutor uses Uber to get victims and witnesses to court, bills suspects

<http://www.mlive.com/news/detroit/index.ssf/2018/09/suspects-to-pay-for-uber-rides.html>

- Prosecutor uses Uber for witness, victim rides to court

<http://www.fox2detroit.com/news/local-news/prosecutor-uses-uber-for-witness-victim-rides-to-court>

- Macomb County Prosecutor's Press Release:

<http://prosecutorsmith.com/crime-victims-get-free-ride-to-court-at-criminals-expense-using-prosecutors-new-technology/>

The story about Michigan Uber innovation even ran in Phoenix, Arizona:

- Prosecutor uses Uber for witness, victim rides to court

<http://www.fox10phoenix.com/news/us-world-news/prosecutor-uses-uber-for-witness-victim-rides-to-court>

Effectively Presenting Crash Reconstruction and EDR Evidence at Trial

BY WILLIAM J. MELKONIAN AND JONATHAN W. BLODGETT

YOU ARE FULLY ENGAGED in your first trial involving a car crash resulting in death or serious injury. The evidence includes the testimony of a crash reconstructionist and interpretation of the data from an event data recorder (EDR). You fret over the pretrial motions to allow the crash expert's testimony and the EDR evidence to go to the jury. The motion hearings are brutal. In law school, they did not teach you about chord middle ordinates ... or pedestrian throw formulas ... or Newton's Laws ... or data sampling, but, here you are, presenting all this information to a judge, doing your best to sound as though you understand the subject matter. You did not sign on for this.

Ultimately, though, you prevail. The Court admits the reconstructionist's testimony and the EDR evidence. Your duties as a prosecutor now are to: (1) present the evidence so that the laypeople of the jury understand it and (2) persuade them that your theory of the case is the correct one — tasks which might be more difficult than anything you encountered in the pretrial motions.

Unfortunately, not many resources are available to help you effectively present your motor vehicle case. Through trial (literally) and error, We have developed the following tips. We hope you find them to be helpful.

1. Remember the True Purpose of Expert Testimony

This tip forms the basis for the rest. The classic definition of expert testimony is that which helps the jurors understand a topic outside the common knowledge of a layperson. The Federal Rules of Evidence (702), as well as state rules of evidence, essentially repeat this definition. When you are preparing for your reconstructionist's direct examination, keep in mind that the jurors will be hearing this technical evidence for the first time. You have to educate them. Discuss the evidence you seek to admit with your colleagues. If they understand the evidence as you have explained it, you are on the right track. Let this "mooting" of the evidence form the outline of your reconstructionist's direct examination.

William J. Melkonian is an Assistant District Attorney in the Essex County District Attorney's Office in Salem, Massachusetts, and is the Supervisor of Motor Vehicle Offense Prosecutions and Director of Training. The Essex District Attorney is Jonathan W. Blodgett, NDAA's current President.

2. Use Layperson Language and Everyday Examples/Analogies

Lay as basic a foundation as possible without allowing the evidence to become too technical. Reconstructionists should avoid detailing formulas or performing calculations in front of the jury. The better practice is to identify the key measurements they subsequently used in a formula — itself, generally accepted and based on principles of physics — to reach their conclusions.

Where EDR evidence is present, your goal is the

on a home computer. The EDR's flash memory also is in digital cameras. Accelerometers, used by the ACM to detect the severity of a crash, are in place in any device having a rotating display, such as a cell phone.

Try to allay jurors' fears that the EDR is an instrument of "Big Brother" and enhance their comfort level with the technology and the prosecution's access to it. Elicit testimony that the reconstructionist had to obtain a search warrant or consent to perform the download.¹ Make sure the jurors understand that EDRs do not record personal, identifying information, such as audio

Where EDR evidence is present, your goal is the same: Keep things simple.

same: Keep things simple. The EDR is the recording component of a car's airbag computer, known as the airbag control module (ACM). The function of the ACM is to monitor the severity of a crash and determine whether to deploy the airbags. When the ACM encounters a situation in which it has to make this determination, certain pre-crash and post-crash data of the car's operation are saved in the EDR. These parameters can include speed, brake application, throttle percentage, deceleration values, and seat belt usage, but typically include many more. Using the Crash Data Retrieval (CDR) tool, a reconstructionist can access the data stored in the EDR. The CDR tool interprets the raw data from the EDR and generates a report, involving text, charts, and tables.

Almost every component of an airbag control module has another use with which jurors more readily can identify. The port into which the reconstructionist plugs the CDR tool, for instance, is the same an automotive technician uses when servicing a car. The CDR connection hardware includes a modem, similar to that found

or video from a car's passenger compartment, GPS location, or, even, the date and time of a crash. Stress that these devices do not employ untested technology, as they have been in use for years, not only in cars, but in other modes of transportation.

3. Consider Not Stipulating to Your Expert's Training and Experience

Often prosecutors are so anxious to delve into the substantive trial testimony that they agree to stipulations of their experts' qualifications. For example, they offer the reconstructionist's CV into evidence, without any live testimony concerning training, experience, and expert qualifications by other courts.

A jury's verdict is a vote on the credibility of the respective experts and the attorneys proffering their testimony. Jurors are more likely to accept the conclusions of a reconstructionist they view as professional, experienced, and competent. Their perceptions of the reconstructionist will impact their opinions of your case and of you.

¹ Some states have "EDR laws," allowing for downloads only with a court order or consent. In addition, the federal Driver Privacy Act of 2015, passed as part of the Fixing America's Surface Transportation ("FAST") Act, appears to impose the same requirements on crash reconstructionists engaged in criminal investigations.

4. Ask the Reconstructionist to Perform as Complete a Reconstruction as Possible

A motor vehicle case can be won or lost in the investigation phase, soon after the crash. Even when your expert believes an analysis of an EDR download gives a complete picture of how a crash occurred, ask for as much of a traditional reconstruction as the circumstances allow. Not only does this additional work act as a check on the EDR analysis, but, later, it will demonstrate to the jurors that the reconstructionist did not jump to conclusions after the download. They will appreciate the thoroughness of the reconstructionist's work, not only in support of the prosecution's theory, but, more importantly, in the quest for the truth.

The failure to perform a traditional reconstruction could be fodder for cross-examination. Further, the defense might claim the manifest unfairness to the defendant by an incomplete investigation or that the prosecution avoided efforts that could have uncovered potentially exculpatory evidence. A judge might also instruct the jurors that if they believe an investigation was conducted shoddily, they may reject it in its entirety. Be aware, too, of the "CSI Effect," in which jurors, often unrealistically, have come to demand the scientific tests they have seen on the television show.

5. Anticipate Challenges from the Opposition

You cannot avoid potential challenges to your case by ignoring them; anticipate what they will be. Talk to your reconstructionist — even while on-scene — and discuss how you might handle those challenges at trial. Choose whether to address a particular issue in your case-in-chief or in cross-examination, rebuttal, or closing arguments. Whatever you decide, you must have a plan for dealing with the problem areas of your case. As you handle more crash cases, you will become more adept in identifying the weaknesses of your case quickly.

6. Effectively Use Your Trial Exhibits and Physical Evidence

Too often, when a prosecutor asks a witness to discuss a document, photograph, or piece of physical evidence, that item is marked as an exhibit and handed to the clerk out of the jury's view. The jurors see it for the first time in the deliberation room. *Use exhibits*, as they are our invaluable currency. Jurors want to see them and they often expect them from us.

When you ask a witness to testify about an exhibit's significance, request the Court's permission for the witness to travel the length of the jury box, with the evidence in hand, and point out the subject of the testimony. Alternatively, ask the Court to "publish" the exhibit to the jury; when this occurs, the trial stops and does not resume until each juror has had the opportunity to hold and to view the item.

Of course, you should take full advantage of any modern courtroom technology available to you. Projectors, large screen televisions, and "smart boards" ensure jurors have a clear view of the evidence as the witness is testifying.

7. Run the Most Recent Version of the CDR Software Before Trial

With each version of the CDR software comes the potential for more of the raw data file from the EDR to be interpreted. Ask the reconstructionist to run the most recent version of the software available just before trial. If he or she does not have the most recent version, find someone who does. You never know what you might find, even if that evidence turns out to be exculpatory.²

Motor vehicle cases with crash reconstructionists and EDR data can fill prosecutors with quite a bit of anxiety. Remember, though, that your goal is to explain this evidence so that everyone understands it. If you do so, you will be able to present expert or technical evidence of any type effectively at trial.

² A prosecutor must always keep in mind his ethical and legal obligations of discovery. The ABA Model Rules of Professional Conduct, Rule 3.8 Special Responsibilities Of A Prosecutor, paragraph (d) provides that the prosecutor in a criminal case shall: "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged

mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal...." Also, the suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

The Blue Guardian Program

BY JULIA E. KOCIS AND JAMES B. MARTIN

BLUE GUARDIAN IS AN INITIATIVE among the Lehigh County, PA District Attorney, the Lehigh County Regional Intelligence and Investigation Center (RIIC), police departments in Lehigh County, the Lehigh County Department of Drug & Alcohol, and treatment providers. The program leverages the existing relationships between police and their communities to assist individuals and their families plagued by opioid addiction in accessing treatment. When law enforcement successfully uses Naloxone/Narcan to reverse the effects of an opioid related overdose, a uniformed officer of the appropriate municipality and a Certified Recovery Specialist (“CRS”) make a joint home visit within 48-72 hours post incident. The appropriate municipality is considered the governing municipality where the individual resides. For example, if the Allentown (PA) Police Department has administered the naloxone, but the individual resides in Bethlehem, PA a Bethlehem police officer is part of the home visit team.

The purpose of the visit is to engage the family and provide access to resources (family codependency, family intervention and/or family support group) and to encourage the individual to enter treatment. Many times, after the over-

dose event, the individual agrees to treatment at the hospital which is considered a warm hand-off. For those that do not, the home visit is used to attempt to reengage the individual. A secondary and unique impact of the joint home visit is changing the public perception of law enforcement — they are a source of support and an additional link to assist individuals into treatment. By joining law enforcement and treatment supports together and meeting individuals and their families where they live, we can lessen the barriers and obstacles that exist and concurrently support those in need.

The program and software developed can be easily deployed to other areas of the country. We recently hosted a pilot program of Blue Guardian for the city of Boise, Idaho, and are in current talks to host this initiative for the city of York, Pennsylvania. State Representative Doyle Heffley of the 122nd Legislative District introduced House Bill No. 2727 to encourage adoption of the Blue Guardian program at the state level. Our team has also been interviewed by Temple University for a best of breed approach in cross sector collaboration to tackle the opioid crisis. For more information on the Blue Guardian Program, please contact Julia Kocis at juliakocis@lehighcounty.org.

Julia E. Kocis is the Director of the Regional Intelligence and Investigation Center and James B. Martin is the District Attorney of Lehigh County, Pennsylvania

The PROSECUTOR

Stalking the Law: When Prosecutors and Police Become Victims



BY WENDY L. PATRICK

DESPITE ENTERTAINMENT SCRIPTS and stereotypes, the reality is that anyone can become a stalking victim. Even those who prosecute stalkers for a living, can be stalked. Law enforcement professionals are not spared from the toxic behavior of unstable ex-partners or disgruntled ex-employees merely by virtue of their profession.

Who is most likely to become a stalking victim? Those who give stalkers what they want most: attention. That is what keeps them stalking. We think we are “being nice,” “reasoning” with them, or “talking them out of” their obsessive behavior. But all we are doing when we engage, is fueling the fire.

ELEMENTS OF STALKING

Members of the general public are unfamiliar with stalking laws, often relying on Hollywood portrayals of chilling episodes of following behavior, or glamorized depictions of romantic pursuit, fueled by unrequited love. Although such scripts can be realistic, proving the crime of stalking often requires much more.

Stalking laws also require more than Facebook shadowing or “showing up” at an ex-partner’s usual haunts. Stalking requires a credible threat of death or great bodily injury.

Yet in terms of qualifying behavior, stalking often requires less than people realize. Contrary to the false belief that stalking requires a flurry of threatening messages or weeks of following a victim to and from work, in many jurisdictions, the term “repeatedly” is defined as more than once.

Stalking laws also recognize the potentially increased amount of danger presented by repeat offenders, imposing enhanced penalties if a stalker violates a restraining order protecting the victim.

Because law enforcement professionals hold many different types of assignments, even seasoned members appreciate a refresher on exactly what the crime of stalking does and does not require in their jurisdiction. This is particularly important given the reality that legislative updates often create changes in the law.

Although it happens less frequently, those with the power to prosecute stalkers can become victims themselves.

Wendy Patrick is a San Diego Deputy District Attorney in the Special Operations Division. She is president of the Association of Threat Assessment Professionals (ATAP) San Diego Chapter, and an ATAP Certified Threat Manager.

STALKING THE LAW

You would think people might be afraid to stalk law enforcement professionals. Not so. Although statistically less frequent, it happens.

A 2015 study by Angela Guldimann *et al.* titled "Stalking Victimization Among Police Officers" found the frequency with which police officers became stalking victims to be low. The researchers listed possible explanations as including both professional status and personal habits. They noted that their status as armed law enforcement officials might cause a would-be stalker to perceive them as a "strong opponent," as would their close affiliation with the criminal justice system.

They also suggested that police officers might be

tion. Depending on the mental health and emotional makeup of an ex-flame, after you say your final *au revoir*, communication may take a turn.

When phone calls and messages change from amorous to ominous, some victims resist reporting the behavior. Feeling responsible for allowing the door to remain open for so long in the first place, they suffer in silence.

This "say-nothing" mindset can result in extended suffering, because some grievance-collecting ex-suitors manage to hold grudges for years after the relationship ends.

The solution? Once you have resolved to close the door, keep it shut. Do not become a human slot machine by providing intermittent reinforcement. If you ignore 29 phone calls or text messages but answer

Law enforcement professionals have personal relationships just like everyone else, and are not immune from abusive ex-partners merely due to their occupation.

more diligent about protecting private data, which makes them more difficult stalking targets as compared to public officials, who maintain an information-rich webpage.

One interesting alternative possibility they suggested is somewhat ironic. They noted that police officers have a higher threshold for what they consider to be stalking behavior, resulting in lower reporting. So, it's possible lower reporting might account for the perception that police officers are stalked less often.

SHEDDING PAST RELATIONSHIPS REQUIRES RESOLVE

Law enforcement professionals have personal relationships just like everyone else, and are not immune from abusive ex-partners merely due to their occupa-

tion. Depending on the mental health and emotional makeup of an ex-flame, after you say your final *au revoir*, communication may take a turn.

KNOWLEDGE IS POWER

When we as law enforcement professionals team up with our community leaders, we can improve education, empower victims, and dissuade potential stalkers. Working together, we can tackle this invisible epidemic, and protect unwitting enablers who think that by extending kindness and graciousness they will somehow stop stalking behavior on their own. They won't.

Instead of reasoning with suspects, or rationalizing bad behavior, victims need to report the crime.

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