 Upcoming Trainings:

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**Michigan’s Oral Fluid Roadside Drug Testing Pilot Program Underway**

**By Kinga Canike and Ken Stecker**

All eyes are on Michigan as its oral fluid roadside drug testing pilot program enters its fourth month. It is the first of its kind in the nation created and funded by a state law.

That law is Public Act 242 and 243 of 2016. It puts the Michigan State Police (MSP) in charge of running the one-year pilot program, which began on November 8th, 2017. MSP’s Traffic Safety Specialist Lieutenant James Flegel is in charge of the program. He put together a group of traffic safety professionals to help him put together the details of the pilot program. This subcommittee includes MSP personnel, Michigan’s DRE Program Coordinator, MSP Forensic Laboratory technical director, and Michigan’s two Traffic Safety Resource Prosecutors.

Under the law, only Drug Recognition Expert (DRE) officers may participate in the pilot. DREs are officers who have undergone highly specialized training in

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identifying drivers impaired by drugs. Currently there are 27 DRE officers participating in this program. Even though this is an MSP-run program, DREs employed by county, township, and municipal police agencies are also involved.

These tests are occurring in five counties. They are Berrien, Delta, Kent, Saint Clair, and Washtenaw. These counties were chosen by the subcommittee, which looked at several criteria including the number of impaired driving crashes, number of impaired driving arrests, number of active DRE officers in that county, and geographic diversity.

 Under the pilot program, a DRE may require a person to submit to a preliminary oral fluid analysis to detect the presence of a controlled substance in the person’s body if he or she suspects the driver is impaired by drugs. Refusal to submit to a preliminary oral fluid analysis upon a lawful demand of a police officer is a civil infraction.

The preliminary oral fluid analysis consists of a mouth swab using a handheld device which can be used to test for drugs at the roadside. The instrument being used in Michigan’s pilot program is the Alere DDS2. It can test for the following six classes of drugs in oral fluid: marijuana, cocaine, methamphetamine, amphetamine, opiates, and benzodiazepines. It was chosen for Michigan's pilot program for its portability, easy to use, and rapid test results (within five minutes).

It is important to note that nothing in the pilot program changes the normal protocol in a drugged driving investigation. Even though the Alere can indicate the presence or absence of drugs in a driver’s oral fluid, it cannot determine whether that driver’s ability to operate a motor vehicle is impaired. Officers in the pilot program will still need to establish a driver’s impairment through a roadside investigation, which may include observations of driving, physical observations, driver’s admissions, and field sobriety testing. The oral fluid swab will also not substitute the 12-step evaluation that DREs are trained to perform on suspected drugged drivers.

Drugged driving investigations also include the collection of blood from that driver, oftentimes through a search warrant. The same will continue to be done in this pilot program. First, two oral fluid swabs are collected—the first one is put in the handheld device by the officer for an immediate reading, and the second swab is sent to Forensic Fluids Laboratory in Kalamazoo for confirmatory testing. This swab is voluntary and there is no penalty if a driver refuses. Second, a blood draw is taken and sent to the MSP Forensic Laboratory to confirm the oral swabs.

The oral fluid samples collected pursuant to the pilot program are not admissible in court. Under Michigan law, only breath, blood, and urine samples are admissible as evidence in impaired driving investigations. The oral fluid results are to be used similar to preliminary breath test results in drunk driving cases.

Those involved in organizing the pilot program hope it will provide solutions for dealing with drugged driving. Their end goal is to show that oral fluid testing is accurate and reliable, and they hope to one day see it used by all road officers in the state. Michigan has seen a steady increase in fatal crashes involving drivers impaired by drugs. Last year, drug-involved traffic fatalities rose over thirty percent, from 179 in 2015 to 236 in 2016.

This problem is not unique to Michigan. A 2015 National Roadside Survey by the National Highway Traffic Safety Administration showed that drugged driving is rising all around the country. About twenty percent of drivers in the national survey tested positive for at least one drug—an increase from 16.3 percent in 2007. Of that number, 12.6 percent had evidence of marijuana use in their systems.

Oral fluid collection may also be a better tool for investigation drugged drivers than blood. Getting a mouth swab is quicker, easier, and less invasive than a blood draw. In the United States Supreme Court decision *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177 (2016), the Supreme Court even acknowledged this when it referred to the swabbing of the inside of a person’s cheek for DNA as a “negligible” intrusion under the Fourth Amendment.

Results from Michigan’s pilot program won’t be available until after the completion of the one-year pilot. If the program goes well, oral fluid testing may give law enforcement in Michigan another valuable tool to keep dangerous drugged drivers off the road.

DRUGGED DRIVING VIDEO SERIES NOW AVAILABLE

With funding from AAA and the assistance of the National Judicial College, the National Traffic Law Center has produced a series of ten roll-call type videos concerning drugged driving. Each video is less than 15 minutes in length. Topics include qualifying a DRE as an expert, defending against attacks, toxicology, the use of field sobriety tests to determine impairment by drugs and more. The videos can be found on our website at: [www.ndaa.org/ntlc\_druggeddriving.html](http://www.ndaa.org/ntlc_druggeddriving.html)

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##  State Supreme Court Decisions

### READING BETWEEN THE LINES

***LITIGATION*** is the bread and butter of lawyers in every state and district. Issues determined in two states, whether they are adjacent or distant, are sometimes resolved in the same way, sometimes in opposite ways and often somewhere in between. In the field of traffic safety, the same issues tend to be raised across the country. In order to keep our prosecutors, law enforcement officers, judges and other interested parties informed, we have expanded our newsletter to capture the decisions of State Supreme Courts for your perusal. In order to accomplish this task, we asked Traffic Safety Resource Prosecutors (TSRPs) to send us short synopsis of their various traffic safety related Supreme Court decisions. These decisions were issued between July 1, 2017 and December 31, 2017. The contact information for these TSRPs follows:

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**CDL Hot Topics**

#### National Traffic Law Center Announces New Publication on Commercial Driver’s Licenses

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On October 3, NDAA’s National Traffic Law Center released its newest monograph entitled, **“Commercial Drivers’ Licenses: A Prosecutor’s Guide to the Basics of Commercial Motor Vehicle Licensing and Violations (Second Edition)”**. This publication gives a general overview of the issues surrounding commercial motor vehicle enforcement and the complex federal regulations that govern this topic.  It was written in collaboration with the Federal Motor Carrier Safety Administration (FMCSA), law enforcement, Traffic Safety Resource Prosecutors (TSRPs) and other traffic safety professionals.

Visit our **publications section** to find this and other NTLC publications.

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