

Double Jeopardy - ALR

The double jeopardy defense is becoming a popular tactic in impaired driving cases. Defense attorneys are arguing that administrative license revocation or suspension (ALR/ALS) for DUI prior to being tried in a criminal DUI proceeding, would subject a person to double jeopardy if prosecuted on the criminal charge. The escalating debate between prosecutors, the traffic safety community and the defense bar is the result of two recent Supreme Court rulings, *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 62 USLW 4429, 73 A.F.T.R.2d 94-2140 (1994) and *U.S. v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L.ed.2d 487, 57 U.S.L.W. 4526 (1989), which held that a civil proceeding subsequent to a criminal trial may violate the double jeopardy clause. Although these cases involve issues of civil damages and tax assessment, defense attorneys are nonetheless applying the rationale of these decisions to impaired driving cases.

In the context of impaired driving prosecutions, defense lawyers argue that:

- The civil or administrative and criminal punishments in a DUI case arise out of the same act or violation.
- ALR/ALS hearings and subsequent criminal prosecution for DUI are separate proceedings with separate punishments in violation of the double jeopardy clause.
- ALR/ALS does constitute a "punishment" for double jeopardy purposes.

In response to these arguments, prosecutors maintain that:

- ALR/ALS serves the purpose of protecting public safety, therefore is remedial in nature. Courts should defer to the legislature's determination of what remedial action is necessary in order to achieve the legislature's goals.
- Unlike asset forfeiture and taxation cases in which the prosecution can avoid double jeopardy consequences by seeking both criminal and civil sanctions in the same proceeding, an impaired driver on the road presents an emergency situation which requires a swift and immediate response to protect the public.
- Unlike the sanctions imposed in impaired driving cases, the Supreme Court characterized Halper as "the rare case" where the sanctions sought were overwhelmingly disproportionate to the actual damage.
- Even remedial sanctions carry the sting of punishment, but this sting does not elevate a remedial sanction to the level of punishment.
- ALR/ALS hearings can be distinguished from standard criminal or judicial procedures in which evidence requirements and legal duties are different.

You may contact NTLC for a case law summary, sample memorandum of law and additional information on this subject.

"Train the Trainers" Reunion

Calling all prosecutors who now train with scented markers, use ice-breakers and believe in the power of colors! "Alumni" of the Prosecutor Faculty Development Course (aka "Train the Trainers") are invited to attend the annual reunion of all graduates to be held July 15th during the National District Attorneys Association Summer Conference in Las Vegas. The reunion will be held in the early evening at the MGM Grand Hotel. This is an opportunity to renew acquaintances, trade training war stories and select who

will receive the "Trainer Extraordinaire Trophy" of the year (it could be you). For further details, please contact Kay Chopard at (202) 366-2723 or Patricia Gould at (703) 519-1676. Hope to see you there!

Drugs, Alcohol & Impaired Driving

A Unique training opportunity is being offered to prosecutors by the International Association of Chiefs of Police (IACP). IACP is inviting prosecutors, toxicologists, drug recognition experts, and other professionals to a four day conference that will address issues regarding impaired driving due to alcohol and other drugs. Topics for discussion include: courtroom challenges to the admissibility of DRE evidence, medical conditions that mimic those induced by alcohol and other drugs of abuse, what cannabis drug levels can tell you, and much more. This is IACP's first national event that combines the talents of several professions to confer about new strategies in the field.

The conference is in Phoenix, Arizona, June 10-13th. For more information, please contact Chuck Peltier at 1 (800) THE-IACP.

Quantifying Drug Levels and Impairment

"I need an expert witness who can quantify the amount of drugs found in a defendant's system; someone who can testify that this defendant was impaired." Prosecutors across the country frequently contact NTLC with this request. At first glance it seems that it would not be difficult to respond to this request, but after speaking with experts in the field of drug influence detection it becomes apparent that the response to this request is not simple.

First, the issue is whether the amount of a particular drug or a combination of drugs in an individual's system can be measured. Second, if a quantified drug level is established, can that measurement be correlated with a person's driving ability? This correlation would be the equivalent of establishing that a person with a blood alcohol content of .10 is presumed impaired. Law enforcement officers and prosecutors could then use a quantified drug level as evidence of a person's impairment.

The scientific community has expressed various opinions on the ability to quantify drug levels. Some experts believe it would be difficult to establish a level at which any drug can be presumed to dangerously influence an individual's driving skills because data indicates that subjects administered equal levels of drug concentrations exhibit different degrees of impairment. Experts contend that the following factors could contribute to this variation in impairment:

- Genetic and environmental influences that affect rates of drug metabolism and elimination
- The phenomenon of hysteresis, in which drug effects may be greater as blood concentrations are rising than at the same concentrations when they are falling.
- The degree of prior exposure to the drug in question or other drugs that can lead to tolerance or cross-tolerance to the effects of the drug.
- The presence of other drugs which may interact with the primary drug causing impairment.
- Differences in body weight and composition in relation to dose.

On the other hand, it is possible to quantify levels of alcohol which cause impairment because alcohol has different characteristics than most controlled substances and prescription drugs. Alcohol is different because it:

- is soluble in water and other liquids;
- is distributed in the body's water;

- does not produce psychoactive metabolites; i.e. products of metabolism;
- is readily equilibrated between blood and brain; and
- has a predictable and relatively constant rate of metabolism (i.e. "burn off")

Some experts maintain that while most drugs can be quantified, some drugs may be more readily measurable than others, but correlating the quantifications with impairment is the difficult part of this process. The prosecutor, through the expert witness must take into consideration specific toxicological and pharmacological factors about the drug in question, when addressing the role of the drug in causing impaired driving.

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