

# Traffic Safety Standard

Providing relevant information to Montana's prosecutors, law enforcement and judges

ISSUE 11

WINTER 2013

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## *Prosecute the Crime; Sentence the Defendant*

*By Erin Inman. Reprinted with permission. Originally published in "Between the Lines" Vol. 20, No. 1 January/February 2012.*

"Prosecute the crime; Sentence the person." This nugget of wisdom was handed down to me from one of my mentors when I was a new prosecutor. It has become my personal mission statement and guided me throughout my career. This mission statement is a simple idea, yet it encompasses the complex responsibilities involved in being a "good" prosecutor. To me, good prosecutors are not merely those who have the highest conviction rate or make the best arguments to the jury. Good prosecutors are those who tailor their actions to achieve what is best for society including victims and their families, the community at large, and criminals themselves. What is best for one, however, is often at odds with what is best for others. The good prosecutors strive to reconcile these conflicting interests.

Naturally, as a new prosecutor I wanted to be one of the good ones, but when I fully understood what was involved I was overwhelmed. Should I use my prosecutorial discretion to lessen the charge of an otherwise "good kid with a bright future," or should I throw the book at him, because our laws are clear and the consequences were foreseeable to him? What to do with DUI offenders was especially puzzling to me. Most cases did not involve a victim, yet the inherent danger of the crime was the same with or without a victim; people are killed and/ or injured by DUI offenders, and anyone can be a victim. My idealistic notions of justice further confused my thinking. Lady Justice is blind and she balances truth and fairness. How could I claim justice was blind and my actions were fair if I treated a high school boy differently from a 55 year old man when they each committed a DUI? I was struggling with these ideas when I sought the advice of another prosecutor whom I admired. We were on the phone, and I could hear him shake his head and smile. "Erin, prosecute the crime, and sentence the person. That's what I do, and it seems to work best." As soon as he said it I felt my burden lift. At that moment I knew how to approach each case fairly and justly. The course to justice became much more navigable. "Prosecute the crime; Sentence the person."

### **Prosecute the Crime; A Straightforward Task for Lawyers.**

Ever since that day I ask myself two over-arching questions when reviewing DUI cases. First, what actions did the offender take? Second, what sentence would best rehabilitate the offender while protecting the

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Montana's Traffic Safety Resource Prosecutor (TSRP) position is funded by the Montana Department of Transportation as part of a comprehensive effort to reduce the number and severity of traffic crashes, injuries, and fatalities on Montana high-ways.

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victims and the community at large? The first question looks more objectively at the actions of the offender, while the second question takes into account the subjective attributes of each individual case. If a person committed a DUI, I pursued a conviction for the crime of DUI irrespective of their circumstances. When making sentencing recommendations or negotiating plea agreements, however, I considered many factors that were different in each case. In this way I was satisfied that justice and fairness were achieved.

Over time I realized I was well-qualified to objectively assess and try cases. Law school prepared me for this by arming me with a fundamental knowledge of legal philosophy and courtroom skills. Great books, articles, and treatises were also easy to find, so I could continue developing and fine-tuning my litigations skills.

Making appropriate sentencing recommendations and plea agreements was another story. Law school did not teach me how to deal with addiction, criminal thinking, juvenile behavior, co-occurring disorders or any of the other common themes I found in DUIs. My undergraduate degree, Soil and Crops Sciences, was even less useful. Thus began my quest for how to craft the best DUI sentence.

**Sentence the Person; Traditional Versus Non-Traditional Sentencing.**

**Traditional Sentencing**

At first I relied on my judges to create the appropriate sentences. Sentencing was, after all, their responsibility. I quickly realized many judges employed a seemingly cookie-cutter approach to sentencing DUI offenders. Prior offenses were always taken into account and chemical dependency evaluations were always ordered. But the efficacy of the “standard sentence” was less than optimal. For some DUI offenders a traditional sentencing order from a judge to obey all laws was enough to motivate them to change their behavior. For others an order from a judge to behave differently without giving them the tools and support necessary for dramatic lifestyle changes was a recipe for failure. These hard core drinkers would not change their behavior when given traditional sentences. I knew it was only a matter of time before we would be dealing with the same offender for the same offense. Clearly, standard sentencing recommendations for those offenders were inadequate and improvement was necessary. Once again I sought the advice of my colleagues. This time, though, no one had the perfect answer for me. How does a good prosecutor structure a DUI sentence recommendation?

**Non-Traditional Sentencing**

I began to find answers when I became the prosecutor on our local drug court (treatment court) team. There I learned how to properly address common DUI themes, and which local resources were available (and effective) both within and -out of the state system. One of the most significant and beneficial differences between treatment court and traditional sentencing is that in treatment court the offender’s chemical dependency, criminality, and life situation are fully assessed prior to making a plan for the offender. This is a common practice in traditional sentencing of felons, but rarely occurs in misdemeanor cases. Having these assessments prior to making the treatment plan helped the judge and the treatment team better understand the different needs of individual offenders. I also learned about the challenges offenders faced in changing their lifestyle. For example, cessation of alcohol use for some is impossible without monitoring and treatment. Others had used drugs for so long they lacked life skills such as money and time management. Without those skills, offenders were likely to become frustrated and turn back to their old lifestyle. Traditional sentencing orders did little to address these issues. Treatment court was a success, because it outlined what the community expected of the participant while it addressed what the participant needed from the community in order to achieve success.

While drug court was a viable option in my jurisdiction, drug and DUI courts are not practicable for all jurisdictions and offenders. In my current role as Montana’s TSRP I encourage the implementation of DUI courts,

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but I recognize that there are limitations. Many communities lack the financial and/ or professional resources necessary to implement and sustain a functional treatment court. Some offenders live so far away from treatment court that mandatory attendance and drug testing unreasonably inhibit their ability to focus on work, family, health, and everything else the community expects of its citizens. However, I have found that many of the principles that make treatment courts successful can be applied to non-treatment court sentences.

Treatment court plans are made after much information is gathered about the offender. Similarly, chemical dependency evaluations can be completed prior to sentencing. This is optimal. It is common practice to look at an offender's prior criminal history before making a sentencing recommendation. It makes little sense to sentence a person with a long criminal history the same way as a person who has no criminal history. This is also true for chemical dependency assessments. When a judge, prosecutor, and defense attorney understand the offender's treatment needs prior to plea negotiations or sentencing, those needs can be addressed and tailored to optimize rehabilitation. This may require a change in the judge's sentencing process. It might mean that when a DUI offender pleads guilty or is found guilty, the judge should order that the evaluation be completed prior to a later sentencing date. Prosecutors can avoid a backlog by working with evaluators in advance to anticipate and avoid delays.

Another treatment court strategy is the close monitoring of participants' alcohol/ other drug use through random testing and the immediate consequences for use. Transdermal alcohol sensory systems can help monitor offenders' compliance, and, when coupled with a program like 24/7, violations are addressed immediately. Prior to the 24/7 program, drinking alcohol and using drugs were considered minor violations of suspended sentences for which there was no real consequence. There was no room in the jail for all those who violated this condition, and there was no way to consistently monitor whether they violated their sentence. The 24/7 Program addressed the process issue of how to track the offender by making it the offender's obligation to demonstrate compliance. It has also shown that accountability for these violations may be a burden on the jail system today, but ultimately reduces the burden on the system by significantly reducing recidivism.

### **Conclusion**

When it comes to rehabilitation of DUI offenders, we are just beginning to understand how to solve the problem. My mission statement of prosecuting the crime and sentencing the person is a starting point for fulfilling my duty as a prosecutor in these cases, and it has served me well. As prosecutors it is our duty to honor Lady Justice by prosecuting DUI offenders. But it is our obligation to society to rehabilitate these offenders. Working with the judges in these cases and giving them the information needed in order to tailor sentences to the individual rehabilitation needs of the offenders ultimately serves society's needs. In so doing, we are not only good prosecutors, but we are saving lives, and that makes it all worth while.

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Thank you Mike Weber, Richland County Attorney.

I recommend *The Art of Prosecution: Trial Advocacy Fundamentals from Case Preparation Through Summation*, John Bugliosi, Esq. Looseleaf Law Pubns Corp (December 1, 2000). Also check out the [National Traffic Law Center](#) and the [National District Attorneys Association](#) publications and the many evidence and trial advocacy books by Thomas A. Mauet.

ii To learn more about non-traditional sentencing read *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 Ind. L.J. 1307 (2007).

To learn more about South Dakota's success with the 24/7 Program, read the Winter 2008 edition.

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The National Traffic Law Center is a program of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number DTNH22-10-R-00360 from the U. S. Department of Transportation National Highway Traffic Safety Administration and Grant Number CD099913NDAAOP from the U.S. Department of Transportation Federal Motor Carrier Safety Administration.

## Recent Traffic Safety Case Highlights

Court decisions affecting enforcement on our roads:

**State v. Gai, 2012 MT 235.** Montana Rule of Evidence 803(6) does not prohibit a defendant from challenging the accuracy of the Intoxylizer during trial.

**State v. Chavez-Villa, 2012 MT 250.** Audio recording which indirectly tells the jury the implied results of PBT and HGN is inadmissible without the proper foundation. Evidence of PBT results requires testimony establishing the reliability of the instrument and HGN evidence requires 1. The officer administering the test was trained in HGN administration, 2. The office administering the HGN did so in accordance with his/ her training, and 3. An expert must explain the correlation between consumption/ use of the intoxicant and HGN.

**State v. Young, 2012 MT 251.** Idaho's DUI statute is similar enough to Montana's DUI statute to allow Idaho convictions from 1991, 1997, and 2000 to count toward enhancement.

**City of Missoula v. Paffhausen, 2012 MT 265.** An element of every crime is a voluntary act, so defendant in DUI case is allowed to assert the affirmative defense of automatism when she claims to have been surreptitiously given the date rape drug.

**State v. Lozon, 2012 MT 303.** Admission of video of PAST being used and shown to Defendant followed shortly by his arrest was prejudicial error when the jury could infer from the video that Defendant failed the test and the proper foundation for admission of PAST evidence was not laid.

*For the complete text of the opinions, go to <http://searchcourts.mt.gov/>.*



Past issues of the Traffic Safety Standard are online at:  
[www.mdt.mt.gov/tsrp/newsletters.shtml](http://www.mdt.mt.gov/tsrp/newsletters.shtml)



## Montana TSRP

**Erin T. Inman, PLLC**

11 Friendship Lane, Ste 101  
 Montana City, Montana 59634

Phone: 406-449-1255

FAX: 406-449-2188

Email: [erin@inmantraining.com](mailto:erin@inmantraining.com)

Website: <http://www.mdt.mt.gov/tsrp/>

## Training Dates

Course Title	Date	Location	Registration Information
<a href="#">Drug Court Conference</a>	February 20	Billings	<a href="#">Agenda</a>   <a href="#">Registration</a>
<b>Webinar: Designer Drugs of the Present and the Future</b>	February 22	Online	<a href="#">For more information and registration</a>
<b>Drug Recognition Expert (DRE) Certification Training</b>	February 25-March 1, and March 4-8, 2013	Fort Harrison Helena, Montana	For more information <a href="#">email Kurt Sager</a> or call him at (406) 444-9873.
<b>Prosecuting the DUI</b>	April 23-25, 2013	Helena	Contact Barbara Watson at 406/498.6941
<b>Legal and Legislative Update and Death Notification Training</b>	TBD May 2013	TBD	Contact Barbara Watson at 406/498.6941
<a href="#">Conducting Compliance Check Operations</a>	Ongoing	Free - Online course	<a href="#">course details</a>
<a href="#">Environmental Strategies</a>	Ongoing	Free - Online course	<a href="#">course details</a>
<b>Party Prevention and Controlled Party Dispersal</b>	Coming Soon	Free - Online course	<a href="#">course details</a>

For information about more trainings and conferences, please go to <http://www.mdt.mt.gov/tsrp/> and click on "Education and Training Opportunities"

MDT attempts to provide accommodations for any known disability that may interfere with a person participating in any service, program, or activity of the Department. Alternative accessible formats of this information will be provided upon request. For further information call (406) 444-3423, TTY (800) 335-7592, or the Montana Relay at 711.