



AN EXAMINATION OF SCHEDULING PRACTICES
FOR DRIVING-WHILE-INTOXICATED CASES
IN THE BERNALILLO COUNTY METROPOLITAN
COURT

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INTRODUCTION:

Although alcohol-related fatalities have declined sharply in New Mexico since their peak in 1979,¹ driving while intoxicated (DWI) is a serious public safety problem in New Mexico. A January, 2005 editorial in *The Albuquerque Tribune* commented that:

The impact of drunken driving on New Mexico is horrendous. Even after years of concerted efforts, new laws, and funding, DWI continues to dominate headlines, preoccupy the attention of lawmakers, clog court dockets, and distress citizens.²

A few days later, in his State of the Judiciary Address, New Mexico Chief Justice Richard C. Bosson commented that “DWI cases are now more complex, more contested, and more costly than ever before.”³

As indicated in Table 1, 17,955 DWI cases were adjudicated in New Mexico’s courts during 2005. These cases probably represent only a small percentage of the trips taken by persons with a Blood Alcohol Level (BAC) over the legal limit.⁴

Table 1
DWI Adjudications by Court in 2005⁵

Court	Number of DWI Adjudications
District Courts	2,213
Magistrate Courts	7,456
Bernalillo County Metropolitan Court	6,536
Municipal Courts	1,750
TOTAL	17,955

¹ Governor’s Statewide Multi-Agency DWI Strategic Planning Team, *New Mexico Multi-Agency DWI Strategic Plan*, 1 (2003).

² *The Albuquerque Tribune*, January 15, 2005.

³ State of the Judiciary Address, January 20, 2005.

⁴ Hedlund, J.H. & McCartt, A.T., *Drunk Driving: Seeking Additional Solutions*, 26 (Washington, DC: AAA Foundation for Traffic Safety, 2002).

⁵ New Mexico Administrative Office of the Courts, *A Statistical Report on DWI in New Mexico*, 1 (April 11, 2006).

As the most populous county in the state, Bernalillo County and its Metropolitan Court are particularly affected by cases involving charges of driving-while-intoxicated (DWI). Of the total number of DWI cases filed in New Mexico, over 36 percent were filed in the Bernalillo County Metropolitan Court (41.5 percent of the total misdemeanor DWIs in the state).

Although these 6,536 DWI cases represent only 5 to 6 percent of the Metro Court's substantial caseload, the scheduling of these cases has presented unique and troubling problems to the Court, the criminal justice system as a whole, and the public. In large part due to problems with scheduling, about a third of the DWI cases filed each year in the Metropolitan Court are dismissed.⁶ This compares to a dismissal rate of DWI cases in the Magistrate Courts in other New Mexico counties of 26.6%.⁷ A significant number of these dismissed cases are re-filed, however, so that extent of the impact on DWI prosecutions is not clear.

While the problem is evident, the solution is complex. The processing of a DWI case in Bernalillo County involves nearly all elements of the state and local criminal justice system and often the Motor Vehicle Division of New Mexico's Taxation and Revenue Department and the Albuquerque City Attorney's Office. The resources, organization, management practices, union contracts, culture, and data systems of each segment can affect the operations of the others and the ultimate disposition of a case.

In order to identify methods for addressing the problems being encountered with scheduling DWI cases, the National Center for State Courts was asked to:

- Conduct a systemwide review of the scheduling of DWI cases in Bernalillo County.

⁶ *Id.*, at 6.

⁷ *Id.*, at 5. It should be noted that unlike the Magistrate Courts, the Metropolitan Court is a court of record from which only legal questions may be appealed.

- ⊗ Identify procedures and approaches used in comparable jurisdictions to schedule these cases.
- ⊗ Prepare a set of recommendations regarding what practical approaches might be implemented and resources added or reallocated in order to facilitate disposition of these cases in a fair, expeditious, and appropriate manner.

The goal of the effort was to facilitate the orderly processing of DWI cases in Bernalillo County and increase the proportion of cases disposed of on the merits through trial or plea.

The systemwide review was conducted through review of data and descriptions about the processing of DWI cases in New Mexico generally, and Bernalillo County in particular, and structured interviews with the judges and staff of the Bernalillo County Metropolitan Court, attorneys practicing in the Court, and the leadership of the key offices, agencies, and interest groups involved in DWI cases.⁸ Comparative information was gathered through NCSC's Court2Court Listserv, discussions with judges and court managers of urban limited jurisdiction courts, telephone interviews with staff at the National Highway Traffic Safety Administration (NHTSA), the National Sheriffs Association, the American Prosecutors Research Institute, and a literature review.

FINDINGS:

Description of the DWI Process: The Metro Court has 19 judges to hear the more than 135,000 cases filed annually. Sixteen of these judges hear criminal cases including DWI; the others hear civil matters. The bulk of the Metro Court's DWI cases are filed as a result of an arrest by the Albuquerque Police Department (APD).⁹ Most of the rest are the result of arrests by Bernalillo County Deputy Sheriffs (BCSO). The remainder of the cases stem from arrests by the New Mexico State Police, the Airport and University of New Mexico Police

⁸ A list of interviewees is contained in Appendix A.

⁹ According to its website, APD made 4,920 DWI arrests in 2005.

Departments, the Isleta Police Department, Sandia Tribal Police, and other law enforcement agencies.

The peak period for arrests is between 10:00 PM and 2:00 AM. Most DWI arrests by APD involve at least two police officers – the officer who made the traffic stop and an officer from the special DWI Unit, who is trained to conduct the standardized field sobriety test and certified to conduct breathalyzer tests. Having a specially-trained officer conduct at least the breathalyzer test is a common arrangement in large police departments around the country.

One Assistant District Attorney is assigned to each Metro Court courtroom. In about half the DWI cases, the defendant is represented by the State Public Defenders Office. In most of the remaining cases, the defendant has retained private counsel.

Following arrest, a person accused of DWI is arraigned – either the day following arrest if the person is still in custody or within 7-10 days if the person has been released on bond. Police officers are not required to appear for arraignments. Unless the person pleads guilty at arraignment, a rare occurrence, the case will be set for a pretrial conference or for trial, depending on the practice of the judge to whom it is assigned.

In either event, it is likely that two or three pretrial conferences will be held before the actual trial date is set. Again, law enforcement officers are not required to appear at these conferences. However, the primary issue discussed is usually whether discovery has been completed, including provision of the police report and completion of the witness interviews allowed by Metropolitan Criminal Procedure Rule 7-504. The Rule requires the state to make available to the defense, at least 10 days before trial:

Any records, papers, documents and recorded statements made
by witnesses or other tangible evidence in its possession,

custody and control which are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant . . . ; [and] a list of the names and addresses of the witnesses . . . [it] intends to call at trial.¹⁰

The rule then requires that “upon request of a party, any witness named on the witness list shall be made available for interview prior to trial.”¹¹ (The defense has parallel obligations.¹²)

If discovery has not been completed by the first pretrial conference, the judge will set the case for another conference, usually 30 days away. This process is repeated until the requisite information has been turned over and the interviews completed, or the deadline of 182 days after arraignment imposed by Metropolitan Court Criminal Procedure Rule 7-506 is approaching.

If a witness interview has not been completed when the case is called for trial and the witness is available, a 2006 amendment to the Metropolitan Court’s discovery rule directs that:

. . . [T]he court shall order the interview to be conducted at that time and proceed to trial, or, if prejudice can be demonstrated by the party conducting the interview, the court shall continue the trial to the earliest practicable date. The court may also issue an order holding an attorney or party in contempt of court.”¹³

A 2005 study found that in 2002:

Slightly more than 80% of the cases in the sample had at least one continuance granted. Almost 30% of the cases received four or more continuances. On average, there were 2.1 continuances per case [in the Bernalillo County Metropolitan

¹⁰ Rules of Criminal Procedure for Metropolitan Courts, 7-504(A & (C).

¹¹ Rules of Criminal Procedure for Metropolitan Courts, 7-504(C).

¹² Rules of Criminal Procedure for Metropolitan Courts, 7-504 (B).

¹³ Rules of Criminal Procedure for Metropolitan Courts, 7-504 (D).

Court]. The state averaged 1.7 continuances and the defense averaged 1.8 continuances.¹⁴

Again, in most instances, it is the pretrial conference that is reset rather than the trial that is continued.

In setting an initial trial date, court staff use a program that shows the schedule for each law enforcement officer. An APD or BCSO Liaison Officer enters preferred days each week and times (morning or afternoon) for each officer. Each officer is to block out the equivalent of 2.5 days each week for appearances related to DWI and other types of cases. Officers are able to schedule these appearance dates 60-90 days in advance on the court's automated scheduling system. Because a law enforcement presence must be maintained on the streets 24 hours per day, 7 days per week, officers work in shifts.¹⁵ As indicated above, most DWI arrests are late at night. Thus, most patrol and DWI Unit officers appear in court during non-duty hours for which they receive overtime.¹⁶ In order to most efficiently use this time and in accordance with the APD's union contract, officers are scheduled for four cases per setting and may be scheduled for more than one setting per day. APD, BCSO, State Police, and Airport Police personnel have 24-hour access to the Court's schedule from their substations or offices as well as from a kiosk on the first floor of the Metropolitan Court building.

Trial scheduling is based primarily on the law enforcement officer's schedules. The Court staff attempt to find a date and time that has been blocked out by both the arresting officer (in DWI cases, this is generally the DWI Unit officer) and the patrol officer. Attorneys' schedules are generally not considered. If a trial is postponed, the Court consults the officer's schedules in order to try to match availability with the times remaining open for trial. There are at least two

¹⁴ Guerin, P., *Final Report: Bernalillo County DWI Case Dismissal Study*, 7 (June 2005).

¹⁵ Although there is some variation, the Albuquerque Police Department's standard shifts are 4:00 am to 10:00 am; 10:00 am to 5:00 pm; and 5:00 pm to 4:00 am.

¹⁶ This is practice followed by law enforcement agencies around the country.

instances in which this accommodation cannot be made: (1) When officers have not posted their schedules; and (2) when the 6-month rule deadline is approaching.

If a scheduling conflict arises between the time officers have blocked and the appearance date (e.g., the officer will be on leave or will be attending required training), they are required to notify their supervisor who informs the liaison officer who, in turn, advises the District Attorney's Office of the problem. The Assistant District Attorney assigned to the courtroom in which the case is to be heard can then request a continuance. The preferred procedure is for the officer to provide this notice well in advance. Should an emergency arise, the officer is to notify the liaison officer or the appropriate Assistant District Attorney. In practice, however, Assistant District Attorneys often do not receive prior notice that a law enforcement witness has a conflict (or that a required interview has not been conducted), and must seek a continuance when the case is called for trial or to proceed without their full slate of witnesses.

Officers scheduled to appear for trial are requested to electronically sign-in when they enter the Metropolitan Court building. If an officer is not in a courtroom when a case is called in which he or she is involved, the case will be passed over until later in the calendar for the session. If the officer is still not present when the case is ready to be called again, the courtroom clerk will check to see whether the officer has signed in, and if so, will e-mail the clerks in the other courtrooms in which the officer has cases in order to try to locate him or her. If an interview with the officer has been requested but has not occurred, the judge may ask the defense attorney to step out of the courtroom and conduct the interview in the hallway pursuant to Rule 7-504, and call the next case not involving that attorney and officer. Generally, if the prosecution witnesses are present on the date of trial, a plea agreement will be entered into and the defendant will plead guilty.

Table 2

Types of Disposition in DWI Cases in The Bernalillo County Metropolitan Court (July 2004 - June 2005)¹⁷

Type of Disposition	Percentage of Total Dispositions
Guilty Plea	42.4%
Trial	23.4%
Dismissal	28.2%
Other (e.g., nolle pros)	6.0%
TOTAL	100 %

In Bernalillo County, about four in ten defendants enter a guilty plea and just under a quarter go to trial.¹⁸ Dismissals are the second most common type of disposition. The most frequent reason for cases being dismissed is the failure to appear of one or more prosecution witnesses (usually law enforcement officers). The study by Dr. Guerin using 2002 court data found that over 62% of the dismissals were due to the failure of the arresting officer to appear in court or for a pretrial interview (FTA), the prosecution being unready to proceed (usually the result of an absent witness), or expiration of the 182-day rule. Another 12% were attributed to the “pre-trial interview not being done.” If the dismissals due to filing the case in the District Court as a felony; lack of probable cause; the death, incompetence, or conviction elsewhere of the defendant; a hung jury; or a directed verdict are excluded from the total (another 12%), the proportion attributable to officer FTA’s is even greater.¹⁹

This pattern is unusual. Although precise statistics are not available, the typical pattern is that less than 10% of defendants go to trial and the overwhelming majority of the others plead guilty, mostly as a result of a negotiated plea. Dismissals are considered rare events, and law enforcement officers who fail to

¹⁷ New Mexico Administrative Office of the Courts, *New Mexico Judiciary Annual Report – 2005*, Statistical Addendum (Santa Fe, NM: NMAOC, 2006).

¹⁸ Of those who go to trial, 95% are convicted. *Id.*

¹⁹ Guerin, *supra*, note 12, at 12.

appear are promptly reported by the prosecutor to their captain or the head of their department and are sanctioned. The typical concerns in other jurisdictions are the terms of the negotiated pleas and the number of pleas entered on the day of trial rather than earlier in the process, rather than the frequency of dismissals.

The Bernalillo County practice exacerbates scheduling problems by imposing a greater trial load on the Metropolitan Court judges, Assistant District Attorneys, and Assistant Public Defenders, and requiring law enforcement officers and other witnesses to appear for a larger number of trials. It also adds to the workload of the Clerk, Metropolitan Court staff, and the Albuquerque Police Department Court Liaison Unit because of the number of continuances and re-filings.

Simultaneous to the criminal proceeding in the Metro Court, the Motor Vehicle Division is likely to be proceeding with an Administrative License Revocation process pursuant to New Mexico's "implied consent" law.²⁰ Under New Mexico Statutes Annotated 66-8-111 and 66-8-112, the Department of Taxation and Revenue is authorized to revoke an individual's drivers license if:

- § A law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within New Mexico while under the influence of intoxicating liquor or drugs.
- § The person was arrested.
- § Either:
 - ú The person refused to submit to a BAC test upon request of a law enforcement officer who advised the individual that the failure to submit to a test could result in revocation of the person's drivers license; or
 - ú The person submitted to the test and the results indicated an alcohol concentration in excess of the legal limit.

Within 10 days after receiving a notice of revocation, the individual whose license is at risk may request an administrative hearing. This hearing must be held

²⁰ NMSA 66-8-105 *et seq.* (2006).

within 90 days after notice of revocation. Only 28 percent of DWI arrestees exercise their right to a hearing, though the proportion in Albuquerque is higher than in most other population centers in the state.²¹ The arresting officer is routinely subpoenaed to appear at the hearing to describe the stop, the request to submit to a blood alcohol concentration test, and the results of the test, if any. In 2004, Albuquerque Police officers did not appear or could not be scheduled for 43% of the revocation hearings arising from DWI arrests in the city. Bernalillo County Sheriff Deputies failed to appear in 54% of revocation in which they were the arresting officers. These FTAs and “cannot be scheduled” represented 58% of the total such occurrences in the state. It should be noted, however, that other local law enforcement agencies around New Mexico had comparable or even higher FTA rates for revocation proceedings.²²

In addition, during the pendency of the criminal case, the city of Albuquerque may initiate an administrative vehicle forfeiture proceeding against the owner of a vehicle used by a person arrested within the city limits of Albuquerque for a second DWI arrest or for driving with a license that was suspended or revoked as a result of a DWI conviction or arrest. Under sections 7-6-2 through 7-6-5 of the Albuquerque Code of Ordinances, the vehicle owner may request a hearing before a city hearing officer within 10 days after the Notice of Forfeiture has been mailed. These hearings must be held within 20 working days to determine whether the “law enforcement officer had probable cause to seize the vehicle.”²³ Again, the arresting officer is routinely required to appear when a hearing is requested. Arresting officers apparently appear regularly at forfeiture hearings. This is attributed to forfeiture being seen as a swift, substantial, and sure sanction as well as the relatively small number of these hearings.

²¹ New Mexico Taxation and Revenue Department, *Report on the Administrative Driver's License Revocation Program under the Implied Consent Act: Calendar Year 2004*, 2, 4-6 (2005).

²² *Id.*, at 17-40.

²³ Albuquerque Code of Ordinances, §7-6-5(D) (2006).

Thus, an APD arresting officer may have to appear for an interview and three different types of hearings, scheduled by four different entities as a result of a single DWI arrest. Deputy Sheriffs and officers for other law enforcement agencies may have to appear at least three times.

Impact of the Process: As a result of the current process for addressing DWI cases in Bernalillo County:

- § Scheduling of DWI cases in the Bernalillo County Metropolitan Court is extraordinarily complex due to the need to account for:
 - ú A large number of cases.
 - ú Multiple law enforcement officers involved in each case.
 - ú Multiple judges within the Metropolitan Court hearing DWI cases.
 - ú Multiple proceedings within the Court process.
 - ú The layering of multiple administrative and judicial hearing processes.
- § A significant number of cases are not disposed of on their merits (i.e. They do not result in a determination of innocence or guilt.).
- § The failure of police officers to appear at DWI proceedings (including interviews) is both a cause and a result of the complexity of the process and the large proportion of dismissals.
- § There is little incentive for defendants and defense counsel to seek an early resolution of the DWI charges. Instead, a rational defense strategy is to extend the case as long as possible in the hope of gaining a dismissal and to enter a plea at the last moment if all the prosecution witnesses are present.

RECOMMENDATIONS:

In their survey of effective strategies for reducing drunk driving, Hedlund and McCartt observe:

A strong drunk driving control system increases both the public perception and the reality that drunk drivers will be frequently detected, arrested, convicted, and punished. A weak system sends the opposite message:

drunk driving is not a serious problem, drunk drivers usually will not be caught, and those caught will not be punished.²⁴

It is clear from the above that the drunk driving control system in Bernalillo County is not as strong as it could be. The problems in the current process are not attributable to any one component of the system. All have played a role in creating the current situation; all must play a role in changing it. It is also clear from the interviews conducted during the course of the study that the recognition of the seriousness of the problems and the strong leadership needed to address them is present in Bernalillo County.

The recommendations for ways to strengthen the processing of DWI cases are organized by entity. They are inter-related. That is, implementation of each recommendation will contribute to the success of the others and to improvement in the scheduling, orderly processing, and appropriate disposition of drunk driving cases in Bernalillo County. They are also classified by whether they may be implemented “in the short-term” (i.e. within 90 days of the decision to go forward); “in the medium-term” (i.e. some additional time is needed in order to secure needed resources, obtain legislative action, or develop new policies, protocols, or software); or “in the long-term” (implementation of other recommendations is needed before the proposal is adopted). This prioritization is not intended to indicate the relative importance of the recommendations, only the time required for their implementation.

The Court:

In the short-term:

Recommendation 1. The Bernalillo County Metropolitan Court should make available a room in the Courthouse which can be used to conduct witness interviews pursuant to Rule 7-504. The room should be available from 8:00 am to 6:00 pm.

²⁴ Hedlund & McCartt, *supra*, note 3, at vi-vii.

In order to facilitate the interview process to the greatest extent possible, it would be helpful to have a designated room in the Courthouse in which defense counsel or their investigators can conduct interviews in addition to those now being used at the Law Enforcement Center. The room should be large enough to permit some degree of privacy and should be accessible both before and after the standard court day to enable interviews to be conducted immediately after law enforcement officers complete their shift, immediately preceding or at the beginning of their evening shift, and when officers are at the Courthouse for trials and hearings.

Recommendation 2. The Bernalillo County Metropolitan Court should maintain and regularly publish:

- (A) A list of the DWI cases in which an attorney for the state or the defense requests a continuance on the day set for trial because the attorney is not prepared to proceed,
- (B) A list of the DWI cases in which a bench warrant is issued on the day set for trial because the defendant fails to appear, and
- (C) A list of those DWI cases that are dismissed because a law enforcement officer has failed to appear for an interview or for trial.

These lists should include the name of the attorney requesting the continuance, the name of the defendant who failed to appear, and the name of the law enforcement officer whose failure to appear is the basis for the dismissal.

The criminal penalties enacted for driving while intoxicated are designed to hold accountable those persons found guilty of DWI. It is appropriate, therefore, that the criminal justice system be held accountable as well. Although much of this information is already being collected in some form by the Court's case management system, it is not easy to retrieve. Maintaining and publishing separate lists will make it easier for the Court, the District Attorney's Office, law enforcement agencies, the bar, and the public to define the causes for dismissal, identify who may be repeatedly impeding the orderly and effective operation of

the criminal justice process, and determine the additional resources and remedies required to reduce delay and the number of dismissals.

In the medium-term:

Recommendation 3. The Bernalillo County Metropolitan Court should request the Supreme Court of New Mexico to revise Rule of Criminal Procedure for Metropolitan Court 7-504 to parallel the discovery provisions in New Mexico Rules of Procedure for the District Courts 5-501 through 5-503.2, 505, 507, and 511-512. Delivery of a notice of statement, subpoena, or deposition order for a specified law enforcement officer to the duty officer in that officer's law enforcement department's headquarters or substation should be considered sufficient service under the revised rule.

Rule 7-504(C) is unusual, if not unique. Other jurisdictions have adopted the more traditional discovery approach for both limited and general jurisdiction courts, such as the one that applies in New Mexico's District Courts that allows parties to require potential witnesses to provide a statement or to appear for an interview or deposition. The potential witness who fails to cooperate, rather than the attorney for the party, may be subject to being held in contempt of court.²⁵

The District Court discovery process is generally seen as working well. The current Metropolitan Court rule is not for several reasons. First, the informality of the process encourages defense counsel to request interviews in every case, even if the attorney does not intend to explore the issues, in the hope that the officer will not appear and the case continued or dismissed. This leads to a perception that in many cases, interviews are *pro forma* and non-substantive. Second, the sanctions available under Rule 7-504 are limited and blunt (dismissal), and apply to the prosecution and the justice system as a whole, not

²⁵ New Mexico Rules of Procedure for the District Courts, 5-501 through 5-503.2.

the individual officer who fails to comply with the request for an interview.²⁶ Third, the provision calling for an interview in the hallway immediately before trial if an interview has not been held earlier, does not accomplish the discovery goal of enabling defense counsel to effectively prepare for trial, results in delay and continuances, and inadvertently, may encourage at least a few law enforcement officers to disregard earlier interview appointments knowing that they can meet with the attorney when the case is called. Not only are defense counsel's and the law enforcement officer's other cases delayed while the hallway interview is being conducted, but if information or additional witnesses are discovered during the interview, the attorney is virtually required to seek a continuance in order to prepare and properly represent his or her client.

In the District Court, the more formal discovery process appears to be invoked primarily when there may be a real question regarding the legality of the stop or the condition of the defendant at the time of the arrest and the Court, under certain circumstances, may prohibit the introduction of testimony or evidence or hold a deponent in contempt, not just an attorney or a party.²⁷ Implementation of a discovery rule in Metro Court similar to the District Court's rule may lead to more motions and proceedings initially, but the longer term result will be a more orderly and focused interview or deposition process that will require officers to schedule fewer meetings with defense attorneys. It is also likely to encourage earlier plea agreements and fewer trial settings.

In revising the rule, consideration should be given to moving the standard disclosure date for Metropolitan Court cases from "not less than then (10) days

²⁶ Although the Court is authorized to prohibit the presentation of evidence or testimony for some failures to comply with the discovery provision, paragraph Metropolitan Court Rule of Criminal Procedure 7-504(F) may limit the authority to prohibit the testimony of a witness who fails to appear for an interview.

²⁷ The Metropolitan Court currently may cite a person for contempt for failing to comply with a rule or order under Metropolitan Court Rule of Criminal Procedure 7-111. However, since the responsibility for making a witness available run to counsel for the state and the defense rather than the individual to be interviewed, there is at least a question whether a witness who fails to appear for an interview can be held in contempt absent a subpoena or other court order.

before trial” to a point closer to arraignment. While the “10 days after arraignment” deadline imposed in the District Court rule is not feasible given the limited time between arrest and arraignment in the Metropolitan Court, setting a deadline of 30 or 45 days after arraignment can help to move the process along and provide an added incentive for completing arrest reports, blood analysis, statements, and depositions in a timely fashion. If the rule is changed, the initial pretrial conference should be set to coincide with the new discovery deadline.

In keeping with Recommendation 9, Certificates of Compliance by the District Attorney should be required for Metropolitan Court criminal cases just as they are for District Court cases.

Because of the difficulty in achieving personal service on a law enforcement officer in the field and to avoid disturbing officers at their residences, the rule should permit service to be perfected by delivering notices of statements, subpoenas, and deposition orders to the receptionist, desk sergeant, or other designated law enforcement officer at the law enforcement agency’s headquarters or the substation to which the officer named in the notice, subpoena, or order is assigned. See Recommendation 5.

In the long-term:

Recommendation 4: When the discovery process in DWI cases is being conducted in a timely manner on a regular basis, the Bernalillo County Metropolitan Court should establish and enforce strict limits on continuances.

Currently in DWI cases, there are multiple settings of each case in order to complete the discovery process. For the most part, it is pretrial conferences being re-set rather than trials. While this limits the impact on witnesses and victims, it still delays the ultimate determination of the case, unnecessarily takes up the time of the judge and attorneys, generates additional work for the Clerk’s Office, and adds to the cost of the criminal justice process. In his study of

dismissals in the Metropolitan Court, Dr. Guerin found a direct relationship between the number of continuances and the likelihood that a DWI case ends in a dismissal. His report concludes:

Dismissed cases on average had more continuances granted than convicted cases and had on average more hearings. . . [and] dismissed cases on average had a greater number of days to disposition than convicted cases. This difference is at least partially caused by the average greater number of continuances and hearings for dismissed cases. This initial analysis suggests that Judges are allowing cases to be continued when either the prosecution or defense is not prepared for a particular hearing.²⁸

This finding is consistent effective caseflow management principles:

An important contribution to effective and efficient police appearance scheduling can come from the court's own caseflow management practices. The court should establish firm and credible trial dates and limit continuances, because extensive rescheduling wastes the resources of both the court and law enforcement agencies if police officers must appear and then reappear.²⁹

An example of a firm continuance policy has been adopted by the 11th Judicial Circuit Court in Petersburg, Virginia.

. . . Once a case has been set for trial, a continuance of that trial date will be granted only for good cause. All requests for continuances should be made at the earliest possible time in advance of the trial date.

Grounds for Continuances Generally Deemed Sufficient:

- a. sudden medical emergency (not elective medical care) or death of a party, counsel, or material witness who has been subpoenaed;
- b. a party did not receive notice of the setting of the trial date through no fault of that party or that party's counsel;
- c. the case was inadvertently set on a religious high holy day, if the continuance request is made substantially in advance of the trial date;

²⁸ Guerin, *supra*, note 12, at 14.

²⁹ Steelman, D.C., Goerdts, J.A., & McMillan, J.E., *Caseflow Management: The Heart of Court Management in the New Millennium*, 40 (Williamsburg, VA: NCSC 2004).

- d. in the case of a defendant's trial where the existence of a plea agreement calls for the defendant to testify against a co-defendant at the co-defendant's trial;
- e. facts or circumstances arising or becoming apparent too late in the proceedings to be fully corrected and which, in the view of the Court, would likely cause undue hardship or possibly miscarriage of justice if the trial is required to proceed as scheduled.

Grounds for Continuance Generally Deemed Insufficient:

- a. the case has not previously been continued;
- b. the case probably will settle if a continuance is granted;
- c. discovery has not been completed;
- d. new counsel has entered an appearance in the case or a party wants to retain new counsel;
- e. unavailability of a witness who has not been subpoenaed;
- f. plaintiff has not yet fully recovered from injuries when there is no competent evidence available as to when plaintiff will be fully recovered.³⁰

Once a continuance policy is established or a local rule adopted, it is essential that all the judges on the Court apply and enforce it consistently. This is necessary to change the expectations of all participants from anticipating that the trial date will inevitably be postponed, to assuming that the case will proceed as scheduled.

Law Enforcement:

In the short-term:

Recommendation 5: The leadership of all the law enforcement agencies whose officers regularly appear before the Metropolitan Court should emphasize that as part of Departmental policy and regulations that testifying in the Metropolitan Court, complying with the Court's rules regarding discovery, appearing at license revocation hearings, and appearing at vehicle forfeiture hearings, are an inherent, necessary, and important part of the duties of a law enforcement officer. This policy should be stringently enforced.

As part of this study, NCSC staff consulted with judges and court officials in other states (including jurisdictions in AR, AZ, OH, and VA) regarding the frequency of

³⁰ www.courts.state.va.us/courts/circuit/Petersburg/continuance.html

dismissals of DWI cases and failures to appear by law enforcement officers. (National data on these issues is not available.³¹) In none of these jurisdictions were dismissals or failure of law enforcement officers to appear perceived as a common occurrence. These respondents all indicated that in the event an officer misses a court hearing, the prosecutor will call the officer's supervisor and the matter is handled quickly and stringently by the police department. For example in one police department, the first missed appearance will result in a letter of reprimand that can affect future promotion; the second results in suspension without pay for up to five days; and the third missed appearance results in dismissal from the force. Police officers in these jurisdictions know that, absent highly unusual circumstances, a failure to appear, particularly without prior notice, will not be tolerated.

While court appearances are included as part of the officially prescribed duties of law enforcement officers in metropolitan Albuquerque, the FTA rates suggest that officers' failures to appear may be dealt with more leniently than elsewhere. Therefore, concomitant with the recommendations for lessening the burden on officers of multiple appearances and improving scheduling procedures, it is essential that departmental leadership and unit supervisors make clear that officers are obligated to appear for the court and administrative hearings that emanate from DWI arrests and to advise their supervisors or the Assistant District Attorney assigned to the case in a timely manner, if for some reason they are not able to be present, and that reprimands, suspensions, or dismissal will result if those obligations are not met.

³¹ See *e.g.*, Jones, R.K., Wiliszowski, C.H., & Lacey, J.H., *Examination of DWI Conviction Rate Procedures* (Washington, DC: NHTSA, 1999).

In the medium-term:

Recommendation 6:

(A) The Albuquerque Police Department and the Bernalillo County Sheriff's Office should increase the number of staff assigned to schedule interviews and appearances in court, at license revocation hearings, and at forfeiture hearings.

(B) In addition, the Albuquerque Police Department should station an experienced member of the force in the Bernalillo County Metropolitan Court Courthouse to serve as the Liaison Officer to the Court.

As indicated above, the responsibility of posting the preferred court availability dates for APD officers and BCSO deputies, overseeing the number of sessions scheduled, establishing times for interviews, and notifying officers and deputies of their commitments is assigned to a court liaison office. Staffing for this office has varied, but is not currently sufficient to keep up with the thousands of DWI, domestic violence, and traffic matters scheduled for Albuquerque Police Officers and Bernalillo County Sheriff Deputies each year. These are critical functions that must be accomplished quickly, accurately, and effectively if the criminal justice process is to operate efficiently. Improved automation can help, but a staff of one or two persons is not sufficient given the volume of appearances and interviews and the number of law enforcement officers involved.

A number of mid-sized police departments station a senior officer at the courthouse to act as a liaison. The responsibilities of these Court Liaison Officers include:

- § Ensuring that individual officers know of their court appearances.
- § Coordinating movement among courtrooms when an officer's cases are before different judges.
- § Facilitating adjustments to court schedules when necessary.
- § Alerting courtroom personnel when an officer is delayed.

§ Serving as a conduit for praise and concerns between the court and their department.

Both judges and law enforcement executives have cited the success of these court-based liaison officers in reducing friction between departments and the courts.

Recommendation 7: If it has not already done so, the Albuquerque Police Department should train or re-train traffic patrol officers to be able to conduct standardized field sobriety tests and establish a policy of having the officer making the traffic stop conduct these tests when driving under the influence is suspected, before calling in a DWI unit officer.

Currently, an officer from the Albuquerque Police Department's DWI unit is called in a substantial proportion of the traffic stops or accidents within the city in which DWI is suspected to conduct the standardized field sobriety test and, if the driver fails the test, to arrest the driver for DWI and transport him or her to a facility in which breath testing equipment is available. The DWI unit officers receive special training in order to be certified to use the BAC testing apparatus. Specialized DWI units have been established by many law enforcement departments, in part, because of the expertise required to utilize the increasingly sophisticated testing equipment in a proper and consistent manner. Use of these units also helps keep patrol officers on the road for longer periods, by not requiring the stopping officer to transport the driver to the police station or detention center and completing the paperwork required to document the BAC test and its results. However, given the volume of DWI arrests in Albuquerque, this procedure imposes a substantial workload on the relatively small DWI unit.

Having the stopping officer conduct the standardized field sobriety test and requesting the assistance of a DWI unit officer only when a driver fails the test would reduce, somewhat, the number of cases in which the DWI unit officer is involved. It would also enable the stopping officer to testify about both the reasons for the stop and the driver's condition should the DWI unit officer not be

available. Spreading the burden in this manner will require making certain that all or most patrol officers' training is current on conducting the standardized field sobriety tests.³² While increasing the responsibilities of patrol officers will inevitably increase their paperwork, interviews, and court appearances, the net result should be a more equitable workload and easier scheduling.

Recommendation 8: The Albuquerque Police Department reconfigure the standard schedule of officers assigned to the DWI Unit so as to enable them to more easily meet the full range of their responsibilities and expand the size of the Unit as necessary.

Devising work schedules involves balancing competing work responsibilities, workloads, and resources. Every work schedule involves trade-offs between the optimal and the possible. Currently, DWI Unit officers must work a long night shift and then appear for trials, hearings, and interviews without an opportunity to rest. While they receive overtime pay for the appearances and interviews that occur after their standard shift, this work pattern creates inherent strain and contributes to the difficulty in scheduling and processing DWI cases. Other schedules are possible – e.g., two weeks on patrol and one week on a day shift or three weeks on patrol and one week on day shift. This would allow appearances and interviews to be scheduled during shift time, thus avoiding 12 hour or longer work days. The cost of increasing the number of officers in order to implement such a schedule is likely to be offset, at least in part, by the reduction in overtime payments required. Collecting the information needed to recommend any particular shift schedule was beyond the scope of this study, but an examination of alternatives that would permit already the hardworking officers of APD's DWI unit to work smarter would improve not only their working conditions, but also the operation of the system as a whole.

³² NHTSA, *Development of a Standardized Field Sobriety Test*, 4 (www.nhtsa.dot.gov/people/injury/alcohol/SFST.htm).

Prosecution:

In the short-term:

Recommendation 9. The District Attorney's Office, in collaboration with the law enforcement agencies in metropolitan Albuquerque, should establish a process for reminding officers of court appearances, informing them about which cases are likely to be resolved without trial, and advising the law enforcement agency if an officer fails to appear.

One of the responsibilities of any trial attorney is to ensure that the witnesses for his or her case are present when the case is called for trial. This responsibility is particularly significant for prosecutors, who bear the burden of proof and must answer to victims and the public if they are unable to proceed with their case. Thus, the District Attorney's Office must play a role in making certain that police witnesses are available and ready to testify. Ideally, an easy to use and effective e-mail process can be developed to facilitate reminders and notices that a case is likely to plead the officer's presence will not be needed, and the task of sending out these notices can be undertaken by paralegals or administrative staff rather than the courtroom Assistant District Attorney. If additional funding is required to implement this recommendation (e.g., hiring additional non-attorney staff), the District Attorney should request it these additional resources at the first opportunity.

In the long-term:

Recommendation 10: When the discovery process in DWI cases is being conducted in a timely manner on a regular basis, the District Attorney should establish and the Bernalillo County Metropolitan Court should help to enforce a policy to encourage those defendants who wish to plead guilty to do so well before the date set for trial.

At the present time, there is little incentive for defendants to plead guilty before the time set for trial. Not only do they wait to see whether all the prosecution witnesses will appear, but also the terms of the plea agreement offered is little

different on the day of trial than it was earlier. Although the District Attorney's discretion is sharply limited in DWI cases, there are some opportunities for providing incentives to agree to a plea at an earlier point in the process in terms of recommendations regarding the severity and extent of the sanctions beyond the minimums prescribed by law, or reduction or dismissal of charges in addition to the DWI charge. Thus, once the discovery process is operating more smoothly, the District Attorney should establish and enforce a "plea deadline" policy – for example, that pleas entered less than two weeks before the day of trial must be to all the charges filed.

Prosecutors should be prepared to make realistic plea offers as early as possible. Defense counsel, in turn, should be prepared to negotiate, balancing the best interests and constitutional rights of their clients. The court should . . . be prepared to enforce a "plea cutoff date" policy. Under such a policy, the court in a scheduling order might establish a date for prosecutors and defense counsel to meet to discuss the possibility of a plea, at which the prosecutor's office would . . . make its best offer. A plea cutoff date, perhaps a week after that conference and one or two weeks before the scheduled trial date, would be the last date on which the defendant could accept the prosecution's best offer.³³

The New Mexico Department of Taxation and Revenue and
City Attorney of Albuquerque:

In the long-term:

Recommendation 11. The Department of Taxation and Revenue should request the Legislature to amend NMSA §66-8-112 and the City Attorney of Albuquerque should request the City Council to amend Ord. §7-6-5(D) to specify that the sworn report of the arresting officer constitutes *prima facie* evidence of the facts required for license revocation or vehicle forfeiture and that the report is admissible without further evidentiary foundation.

Current practice in New Mexico and many other states is for arresting officers to testify at all revocation and forfeiture hearings. However, Washington State and a few others permit the findings to be made on the basis of the arresting officer's

³³ Steelman, *et al.*, *supra*, note 30, at 33.

sworn report. The driver or car owner may subpoena the officer to appear and examine the officer at the hearing if he or she chooses to do so. The relevant provision of the Washington Code provides in part:

The sworn report . . . submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle with this state while having alcohol in his or her system in a concentration of 0.02 or more and was under the age twenty-one and that the officer complied with the requirements of this section. . . . The sworn report . . . of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation³⁴

Enactment of a similar provision should, in most cases, reduce the number of appearances for which an officer will need to be scheduled as a result of a DWI arrest.

All Entities Involved in the Enforcement of DWI Laws:

In the long-term:

Recommendation 12: The Metropolitan Court, the District Court and all the governmental entities involved in DWI litigation including the New Mexico Department of Taxation and Revenue and the City of Albuquerque should have direct access to a single scheduling program that will enable them to determine when and in what cases officers from all law enforcement agencies in Bernalillo County are scheduled to appear and when they have openings on their preferred court days. Non-government attorneys should be able to obtain read-only access to the scheduling program.

The Metropolitan Court's current scheduling program already includes many though not all of the involved agencies. Whether it is an expanded version of the Metro Court's current scheduling program, the new software being developed for

³⁴ Revised Washington Code Annotated §46.20.308(8) (2006).

the Albuquerque Police Department, some combination of the two, or entirely new software, all the courts, agencies, and individuals involved in DWI litigation should be able to determine at a glance, when a law enforcement officer is available and when he or she is not. The scope of this project did not include a detailed examination of the current Metropolitan Court software to determine whether it can be easily expanded nor the capabilities of other products that are available. However, the Metro Court's program, together with the recognition of the common interests and benefits involved, provide a solid foundation for creating and implementing this needed electronic coordination tool.

The availability of this software creates obligations as well if it is to facilitate scheduling. Those scheduling adjudicatory hearings and interviews or depositions must consult it, use it for scheduling, and update it. Law enforcement officers must regularly add their preferred court days, keep those dates and times free for the proceedings set, and check and update their schedules (e.g., to insert times set for depositions by defense attorneys).

CONCLUSION:

Judicial policies increasing the swiftness of adjudication and the certainty of punishment of convicted offenders are greater deterrents than policies increasing the severity of punishment.³⁵

Currently, the processing of DWI cases in Albuquerque is neither as swift nor as sure as it can be. The above recommendations for reducing the number appearances required, enhancing the accountability of the process, and improving communication offer possible approaches for addressing one of the major impediments to increasing the proportion of DWI cases determined on their merits through a fair, effective, and orderly adjudicatory process. However, new laws, rules, policies, and software will not be sufficient to change the

³⁵ National Association of State Judicial Educators, *Hardcore Drunk Driving Judicial Guide: A Resource Outlining Judicial Challenges, Effective Strategies and Model Programs*, 7 (Washington, DC: The Century Council, 2003).

operation of the system or make failure of a law enforcement officer to appear and the dismissal of a DWI case rare events. Along with adopting new written provisions and procedures, the leadership of the criminal justice system must make known that a page has been turned and that dilatory practices will not be tolerated.

APPENDIX A

LIST OF PERSONS PARTICIPATING IN INTERVIEWS

Eileen Adams, Information Office, Albuquerque Police Department

Linda Atkinson, Executive Director, DWI Resource Center, New Mexico Victim's Rights Project

Kari Brandenburg, District Attorney, 2nd Judicial District

Gary Cade, Chief Deputy District Attorney, 2nd Judicial District

Hon. Benjamin Chavez, Judge, Bernalillo County Metropolitan Court

Paul Chavez, Deputy Chief, Field Services Bureau, Albuquerque Police Department

Thomas De Martino, Attorney, Public Defender Office, 2nd Judicial District

Hon. Theresa A. Gomez, Judge, Bernalillo County Metropolitan Court

Hon. Victoria J. Grant, Judge, Bernalillo County Metropolitan Court

Philip Hedrich, Network Systems Administrator, Bernalillo County Metropolitan Court

Stan Harada, Assistant City Attorney, City of Albuquerque

Vickie Huertaz, Executive Director, MADD of New Mexico

Daniel Ivey-Soto, Esq.

Albert J. Lama, Chief Hearing Officer, New Mexico Taxation and Revenue Department

Hon. Judith K. Nakamura, Chief Judge, Bernalillo County Metropolitan Court

Marcella M. Neville, Esq.

Rachel O'Connor, DWI Coordinator, Officer of the Governor

Ralph M. Oldenwald, 2nd Judicial District Public Defender

Ousama M. Rasheed, Esq.

Maria Romero, Deputy Court Administrator, Bernalillo County Metropolitan Court

Raymond D. Schultz, Chief of Police, Albuquerque Police Department

Warren Segal, Deputy District Attorney, 2nd Judicial District

Darren P. White, Sheriff of Bernalillo County