Consensus is generally defined as the ***majority opinion*** or ***general agreement*** of the group. In that vein, this document reflects a consensus of experts who gathered to discuss the difficult issues contained herein. It should be noted, however, that consensus does not mean that all of the participants unanimously agreed on all of the key findings and recommendations. This consensus report is based on publicly available data and information. It is not intended as a legal document, practice guideline, or primary source of detailed technical information. Rather, the report reflects the views of a panel of thoughtful people, who understand the issue before them and who carefully examined and discussed the available data on the issue. The creative work of the panel is to synthesize this information, along with sometimes conflicting interpretations of the data, into clear and accurate answers to the questions posed to the panel. The report includes uncertainties, options, and minority viewpoints.

For questions about the content of this report, contact:

J. Michael Walsh, Ph.D.
President,
The Walsh Group
6701 Democracy Blvd., Suite 300
Bethesda, MD 20817 USA
301-571-9494
jmwalsh@walshgroup.org

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THE FEASIBILITY OF *PER SE* DRUGGED DRIVING LEGISLATION

CONSENSUS REPORT

2002

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SUBSTANCE ABUSE POLICY RESEARCH PROGRAM
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THE WALSH GROUP
SUBSTANCE ABUSE RESEARCH AND CONSULTING

SUBSTANCE ABUSE POLICY RESEARCH PROGRAM

INTRODUCTION

In an effort to examine current public policy on drugged driving, The Robert Wood Johnson Foundation's Substance Abuse Policy Research Program provided funding to The Walsh Group P.A. and The American Bar Association's Standing Committee on Substance Abuse in the Fall of 2000. The objectives of the grant were to review state laws regarding drugged driving, and to convene meetings of experts (Police, Judges, Prosecutors, Health & Safety, Constituent Groups, etc.) in a consensus development process to explore how these laws might be made more effective. The specific goals of this public policy research project were: 1) to evaluate the feasibility of *per se* drugged driving legislation as a prevention strategy to improve traffic safety (i.e. reduce crashes) and deter illegal drug use by drivers; and 2) to examine how these laws might function as a trigger for court-ordered drug treatment and education programs.

Using the ABA's legal expertise, all 50 states' traffic-safety laws were reviewed and researched and a comprehensive report of policy/legal issues has been developed (see Walsh et. al. 2002). Site visits were made to some of the states with existing *per se* drug laws for interviews with key policy, law enforcement, and legal personnel. We also identified key stakeholder organizations in the legal community and sought their advice and counsel. As we developed an appreciation for the complexity of the issues, it became clear that some preliminary meetings to focus the issues would be required before attempting to conduct a consensus meeting. We organized and conducted three symposia to bring together representatives from the law enforcement community (8/2/01), legal/judicial community (10/19/01), and public policy community (1/17/02) respectively, to focus on the issues within each of these interacting groups. These meetings were conducted with support from the National Highway Traffic Safety Administration (NHTSA) and were designed to identify the key issues regarding current DUID laws, the concept of *per se* laws, and to determine the impact of such DUID laws on each of these groups.

Subsequently, on May 16, 2002 we convened a major stakeholder consensus meeting with judges, prosecutors, law enforcement, traffic safety, auto/health insurance experts, legislators, state and federal government officials, and non-government organizations to explore the feasibility and practicality of *per se* laws for drugs. Information gleaned from the ABA state law analysis, the site visits, and the three preliminary issue development meetings were integrated to develop the agenda and focus the discussion issues for the consensus meeting. During this process, we consulted with nearly 70 national, state, and local organizations. (see Appendix A)

KEY FINDINGS OF THE CONSENSUS GROUP

- Driving under the influence of illegal drugs (DUID) has become a significant problem worldwide.
- Drugged drivers are less frequently detected, prosecuted, or referred to treatment compared with drunk drivers.
- There is a lack of uniformity or consistency in the way the 50 U.S. states approach drugged drivers.
- Current law in most U.S. states make it difficult to identify, prosecute, or convict drugged drivers.
- Too few police officers have been trained to detect drugged drivers.
- *Per se* DUID laws are feasible and represent a good strategy for dealing with drugged drivers.
- *Per se* DUID laws can assist in the prosecution of DUID.

RECOMMENDATIONS

- Initiatives should be developed to raise public awareness about drugged driving.
- States should consider *per se* laws which prohibit driving, operating, or being in actual physical control of a motor vehicle when any amount of a drug is present as measured in blood, urine, saliva, or other bodily substance. A model *per se* law should include:
  - Sanctions for refusal to test that should be equivalent to a positive test.
  - Provisions to stipulate that legal prescription use of a drug is an affirmative defense to a DUID charge, however, knowingly using a drug which incapacitates should be prohibited.
  - A mandatory tiered system of evaluation, counseling, treatment (if required), and supervision for convicted offenders.
- License reinstatement and provisional restricted licenses for convicted DUID offenders should be tied to successful participation in a treatment program.
- When treatment is required for those convicted of DUID, there should be a formal monitoring process through completion.
- New drug detection technologies should be used to facilitate the enforcement and prosecution of *per se* DUID laws, and to monitor treatment compliance.
- Training programs in DUID issues should be developed for police, prosecutors, defense attorneys and judges.
- A model statute should be developed and made available to states.

BACKGROUND

There is a growing body of scientific evidence that driving under the influence of illegally used drugs has become a significant problem worldwide.[1,2,3,4,5] Driving is a complex psychomotor task which requires the driver to continuously process information and respond to an ever changing scenario while manipulating a multi-ton vehicle down the road. Clearly, illegal drugs, misused prescription drugs, and other substances that alter a driver's normal brain functioning can create an extremely hazardous situation. An analysis of the 1996 National Household Survey on Drug Abuse[2] data estimates that in the United States nearly 9 million licensed drivers drove within two hours after using marijuana or cocaine during the previous year. Despite mounting evidence that driving under the influence of illegal drugs other than alcohol is common, drugged drivers are less frequently detected, prosecuted, or referred to treatment when compared with drunk drivers.

Over the last 15 years, major policy initiatives in the United States focusing on drunk driving have yielded a significant reduction in accidents/deaths due to alcohol intoxication[6]. To a great extent, this success is due to two factors: 1) States have enacted *per se* alcohol legislation; and 2) biochemical devices to immediately determine blood-alcohol concentration (BAC) are widely available and are used universally by law enforcement agencies to enforce associated *per se* laws. We believe that many of the models used and lessons learned in reducing drunk-driving can be applied to reducing driving under the influence of illegal drugs (DUID).

As individuals develop an addiction, there are often warning signs that provide an opportunity to address the problem through early identification and treatment. Typical warning signs include trouble with the police (e.g. DUI, drunk and disorderly charges, etc) or ending up in a hospital emergency room. We believe these events can and should be used to identify substance abusers and encourage them to seek treatment. Our vision for a more effective public policy to cope with the increasing problem of drugged drivers centers around the concept that detection and prosecution can not only improve traffic safety and create a deterrent, but would also provide an opportunity

for treatment for those drivers who violate the law.

In comparison with the alcohol literature, relatively little information is available regarding the true incidence and prevalence of illegal drug use in reckless driving and driving crashes. Breath-alcohol testing is universally accepted and has established a scientifically sound basis for the estimation of the prevalence of alcohol use among reckless drivers.[7] Until very recently, drug detection devices to routinely test for illegal drugs have not been available. Drug-testing capabilities in the past have been limited to highly specialized forensic laboratories. Studies to evaluate "drugged" driving have primarily used blood or urine to make prevalence estimates.[8,9,10,11,12,13,14] Neither of these specimens can produce an unqualified estimate of the prevalence of "drug-impaired drivers" due to the complexities of the pharmacokinetics of most drugs.

In contrast to alcohol, the interpretation of drug concentrations in biological fluids, especially with regard to behavioral effect, requires some knowledge about the dose, the route of administration, the pattern or frequency of drug use, and the dispositional kinetics (distribution, metabolism, and excretion) of the drug. Interpreting the meaning of either drug/metabolite concentration in a single biological specimen with reference to impaired driver performance is therefore an extremely difficult task for a scientist and even more difficult for a prosecutor. The variables involved create a sufficiently great range of possible interpretations to render any specific interpretation questionable, other than to conclude the individual has used a specific drug in the immediate past (days).[15]

These complicated interacting phamacokinetic/pharmacodynamic relationships have prevented the establishment of specific levels of drug concentrations, which could be interpreted as "***per se***" evidence of impairment either in blood, urine, or other bodily substance.[16] As a result, these factors make it very difficult for prosecutors to prove that a specific drug "caused" the driving impairment which is required under most state laws. Consequently, there is limited enforcement of DUID laws.

CURRENT DUID LAWS IN THE USA[17]

DUID statutes are predominately found in the Transportation or Motor Vehicle Codes or Titles of the respective states' Codes or Statutes. In only three states (Idaho, Minnesota and Texas) can one find the state's DUID statutes in the Penal Code or Criminal Title.

There are three main types of DUID statutes: 1) Statutes requiring that drugs render a driver "**incapable of driving safely**"; 2) Statutes requiring that the drug "**impair**" the driver's ability to operate safely or require a driver to be "**under the influence**", "or affected by an intoxicating drug"; and 3) "**Zero Tolerance**" *per se* laws which make it a criminal offense to have a drug or metabolite in the body while operating a motor vehicle.

All of the states, save Texas and New York, use the phrase "under the influence" in their DUID statutes. A total of 14 states (Alabama, Arkansas, Illinois, Kansas, Nevada, Maryland, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Vermont, Wisconsin, and Wyoming) define the standard that constitutes "under the influence" within the body of the statute as "incapacity"; i.e., the influence of the drug "renders the driver incapable of safely driving." Incapacity to drive safely is thus linked to the drug ingested and the prosecutor must show a connection between drug ingestion and the incapacity of the driver.

Eight states (Arizona, Florida, Hawaii, Indiana, Kentucky, Montana, South Carolina, and Virginia) use the standard of impairment to define "under the influence" so that the influence is such that the driver's abilities are impaired. This suggests a requirement of proof that is less stringent than one that renders the driver "incapable" of safely driving; nevertheless, the prosecutor must still prove that the impairment is directly related to the drug ingested.

As a result of the overall prevalence of drug abuse in the nation[18] and the growing concern regarding the traffic safety implications of illegal drug use by drivers, eight states (Arizona, Georgia, Iowa, Illinois, Indiana, Minnesota, Rhode Island and Utah) have taken the initiative to enact a different kind of DUID statute that is a *per se* law. In most of these states the compelling argument for adoption of the statute

was that a driver was far less likely to be prosecuted for impaired driving if he/she were under the influence of an illegal substance than if he/she were under the influence of a legal substance (alcohol). This dilemma existed because there was a *per se* level for the latter but no practical or legal way to establish an impairment linked *per se* level for controlled substances. The primary impetus for these statutes was traffic safety. These *per se* laws, or so-called "zero tolerance" laws, make it a criminal offense to operate a motor vehicle while having a drug or metabolite in one's body or bodily fluids. Under such statutes, individuals can be found guilty of violating the law if he/she were operating a motor vehicle while any prohibited substances were present in his/her system. This *per se* strategy creates an important legal distinction between having to prove a nexus between the observed driver impairment and taking a drug (causal relationship) and simply demonstrating that observed impaired driving behavior was associated with specified concentrations of drug/metabolite in the individuals body while operating the motor vehicle. In essence, the *per se* drug statute attempts to remedy the inequality of dealing with alcohol and other drugs by making the *per se* drug limit "any amount" of a controlled substance, and by making this offense equivalent to the *per se* alcohol offense. The feasibility of this *per se* approach as a national strategy for dealing with the increasing problem of drugged driving is the crux of this consensus project.

Drugged driver legislation is very complex. Judge Roderick Kennedy (State of New Mexico, Court of Appeals) has written about the complexities of interpreting DUID law from a legal perspective [19]:

> "Alcohol is a substance which affects the brain in a broad, non-specific fashion. That is, alcohol acts on the entire brain when it is present, in a pretty much uniform, predictable fashion. Drugs often (if not usually) don't act as broadly. Drugs act on specific areas, functions or receptors in the brain, and often with different results in different persons. Poly-drug abuse only increases the possibilities. In a 'normal' drug case like possession or sale the problem pertaining to a drug is ***what it is***. In DUI/DRUG cases, the issue is ***what the drug does***…. Both cases can deal with amount of a drug, but in the first instance, the problem is purely quantitative (how many units?), where the latter blends quantitative considerations with qualitative—is the amount of drug enough to impair this person at the time the person is driving? Lawyers familiar with the vagaries of alcohol effects can expect the effects and symptomatology of alcohol to look very stable compared to what happens when drugs, humans and vehicles hit the road. Quantifying driving behavior, quantifying drug doses which are sufficient to cause a decreased ability to drive a car, and then relating them all is challenging, to say the least. Add to this the differing statutory schemes nationwide (worldwide) concerning driving while under the influence of drugs, and the universal facts become merely that drivers ingest drugs that impair driving abilities, and drug-impaired drivers cause accidents. How these things are handled is not universal."

CONSENSUS PROCESS

Twenty-eight experts from diverse backgrounds attended the consensus meeting. (see Appendix B for complete listing) In order to provide the most accurate account of the collective wisdom of the consensus meeting, the authors have organized the discussion of the issues under the following group headings: Legal/Legislative Issues, Substance Abuse Treatment Issues, Training, Communication, and Research Issues.

I. LEGAL/LEGISLATIVE ISSUES

1. Are "Zero Tolerance" *per se* laws a good strategy to decrease drugged driving?

"Zero Tolerance" *per se* laws refer to statutes which make it illegal to operate a motor vehicle when there are levels of drug or drug metabolites in the driver's body.

The consensus of the Group was that *per se* DUID laws are an acceptable extension of DUI laws and represent a reasonable strategy to deal with the increasing problem of drugged driving. Some representatives from the defense bar voiced a dissenting opinion in that the defense community objects to all types of "Zero Tolerance" laws, regardless of the issue. A critical point of view made repeatedly by police, prosecutors, and judges was that from a practical point, a *per se* DUID law is a good concept but not a panacea. Legal requirements and practicality tell us that reasonable suspicion, and ultimately probable cause is required to obtain toxicological evidence of drugs in the person's body. Generally, judges will require that the state present some evidence of impairment, and have some reasonable suspicion that drugs have been used. If the state cannot meet these prerequisites, the toxicology data may not be admissible in court. The consensus was that a *per se* DUID law could arguably facilitate or at least assist in the prosecution of drugged drivers and could produce real improvements in traffic safety. Furthermore, the judicial process would identify a population of drug users for evaluation/treatment.

The Group consensus was based on a number of issues:

- For a variety of reasons, existing laws often hinder the prosecution of drugged drivers.
- Notwithstanding sufficient evidence, it is often very difficult to prove a nexus between the observed impairment and a drug as required by most state statutes.
- In most states, there is no incentive for police to look for drugs if alcohol is present above the legal limit.

2. What elements would a model *per se* statute contain?

It was the consensus of the Group that a model *per se* law should include the following:

- A prohibition of driving, operating, or being in actual physical control of a motor vehicle when any amount of a drug is present in the person as measured in the blood, urine, saliva, or other bodily substance.
- Drugs covered by the law should be defined broadly but the practical application (i.e. the number of drugs actually tested for) could be narrowed.
- Standards for testing would be established nationally or by the state toxicologist.
- A legal prescription for a drug would be a valid defense to a charge under a *per se* statute, however, knowingly using a drug which incapacitates should be prohibited.
- Probable cause for arrest should exist prior to conducting a drug test under a *per se* statute.

3. Should there be sanctions for refusal to test in a model statute?

The consensus of the Group was that sanctions for refusal to test following arrest must be included as a key component of the statute. Typically, most states deal with "refusals" through administrative sanctions (e.g. license suspension or revocation) but some states criminalize "refusals" (i.e. It is a crime to refuse to submit to a test). The Consensus Group agreed that the criminalization of "refusals" was a reasonable strategy, but the bottom line was that the sanction for "refusal to test", whether administrative or criminal, must be the same as that for a positive test.

4. Should the model statute require substance abuse evaluations for those who violate the *per se* DUID statute?

The consensus of the Group was that model statutes should include mandatory evaluation followed by a graduated system of counseling, and supervised treatment (where needed) for those convicted of DUID. There was considerable discussion regarding the importance of monitoring and supervising those entering treatment programs. The Group felt that accountability (e.g. through drug testing and other measures) to monitor progress was absolutely critical to encourage and maximize successful outcomes. There was some disagreement regarding the presumed value of counseling/education. Some of our experts felt that sentencing substance abusers to educational sessions often was of little value. Others

however, (especially from the defense counsel community) strongly disagreed asserting that for middle and upper class violators who often have much to lose (as a result of a DUID conviction), education/counseling may dramatically change behavior.

5. Should there be additional penalties when both alcohol and drugs are present?

The consensus of the Group was that "Dispositions" (sanctions/penalties) for drug use should take into consideration the fact that both alcohol and drugs are present. Sanctions following conviction – in addition to mandatory evaluation, education, and treatment – should give the judge discretion to apply the following: Community service, restitution, probation, and penalty assessment/incarceration. The combination of alcohol plus drugs should be considered an aggravating circumstance. There is considerable precedence for this strategy. Twenty-eight states currently have "extreme alcohol" provisions which permit judges to levy heavier penalties for high BAC levels (e.g. > 0.15), or when other aggravating circumstances exist (e.g. driving with illegal BAC when there is a child in the vehicle). The mix of alcohol and drugs should be handled in the same manner.

II. SUBSTANCE ABUSE TREATMENT ISSUES

1. Is there a role for drug treatment in DUID convictions?

Per se DUID laws certainly have the potential for identifying drug abusers and could be used as an innovative way to encourage substance abusers to enter a treatment program. It was the general consensus of the Group that DUID *per se* laws could positively affect referrals to treatment as an outcome of a DUID conviction. There was considerable discussion regarding ways in which the courts can encourage participation in treatment programs. Many states tie provisional/restricted licenses and license reinstatement to participation in "voluntary" treatment. Some courts will reduce or suspend jail sentences for "voluntary" enrollment and participation in treatment. Courts can waive or defer the cost of treatment, or in many cases treatment is available on a sliding scale based on income level.

2. If treatment is indicated, should there be a formal monitoring process through completion?

There was a very strong consensus that monitoring treatment progress was critical to success. From a practical perspective, the amount of monitoring will be a function of resources available, but the sense of the experts was that without close monitoring the probability for successful outcomes is low. Prosecutors, defense attorneys, and treatment professionals all agreed that frequent drug testing and graduated sanctions for treatment failures constitute the most effective strategy.

3. Should license reinstatement after DUID be tied to successful participation in a treatment program?

There was general consensus that provisional licenses permitting the individual to drive to work and to a treatment center be permitted. However, the privilege of such provisional licenses, other restricted licenses, and license reinstatement should be tied to successful participation in the treatment program.

4. Is there a way to effectively encourage voluntary treatment through administrative incentives?

The prosecuting attorneys and state legislators stated that this could be addressed in the disciplinary rules of the administrative code, offering incentives to those willing to enroll in treatment. Both prosecuting and defense attorneys could play a role in encouraging treatment and agreed that attorney advocacy is not inconsistent with zealous representation of the client. The defense community expressed concern that treatment may not always be available to the indigent client and may place those who are not able to pay for treatment at a disadvantage.

5. Are drug courts an effective model for coerced treatment?

It was the consensus of the Group that drug courts work well and the results have been

impressive. There are currently 45 drug courts in the United States that take DUI/DUID cases and seem to be effectively dealing with the caseload. There was some concern expressed over the high cost of operating drug courts, which might limit the use of the drug court strategy to major metropolitan areas.

6. Are deferral or diversion programs helpful in encouraging voluntary participation in treatment programs?

It was the consensus of the group that diversion and deferral programs for DUI (alcohol) have not been very effective unless progress is closely monitored. There is little experience with such programs for drug offenders. Some states do not permit deferral or diversion in DUI/DUID cases. There was strong opposition to locating the diversion or deferral programs in the prosecutors' office due to clear conflicts of interest. The level of supervision and monitoring in deferral/diversion programs varies considerably as does the overall effectiveness.

III. TRAINING, COMMUNICATION AND RESEARCH ISSUES

For some of our diverse experts, the consensus meeting was the first opportunity for exposure to the many complex issues that are dealt with by their fellow stakeholders. This interactive experience provided those in attendance with a better understanding for the training, communication, and research issues that require attention.

1. What kinds of training are needed for police, prosecutors, and judges to effectively support *per se* DUID legislation?

Most street level police officers receive four hours of training on drunk/drugged driving as part of their police academy training. Officers who are assigned to DUI squads generally have some additional training. NHTSA also sponsors a comprehensive police-training program to qualify officers as "Drug Recognition Experts", but participation in these programs is limited because of time and cost restraints and because the programs are not available in all states. It was the consensus of the Group that the small number of police officers trained to detect drugged drivers is inadequate considering the prevalence of illegal drug use in the nation. There was a strong recommendation that federal, state, and local entities should commit resources to train more officers to detect drugged drivers.

While there are some training programs for judges, prosecutors, and treatment professionals available on substance abuse, there are no specific programs on the issues related to drugged driving. It was the consensus of the Group that in order to have an effective public policy dealing with drugged drivers, police, toxicologists, prosecutors, judges, and treatment professionals, all had to be well informed and working together. The Consensus Group strongly recommended that training programs should be developed in all aspects of detecting drugged drivers for police, prosecutors, defense counsel, and judges. The Group felt that such training programs should be certified as continuing legal education units and include:

- Drug detection technology, meaning of positive drug test.
- Pharmacology and toxicology (e.g. behavioral effects of drugs, interaction with alcohol) etc.
- Accepted laboratory methods, certifications, credentialing toxicologist experts.
- Specific training for police officers in what "evidence of proof" is required.

2. What kinds of communication efforts are needed?

Given the somewhat technical and complex nature of drugged driving, the Consensus Group believes that public information is critical to garner support for DUID laws. The Group discussed the following specific recommendations:

- Efforts should be made by government and non-government entities to raise public awareness regarding the scope of the problem of drugged driving. Such efforts should provide relevant data and evidence, along with epidemiological studies on the prevalence of illegal drug use among drivers to the media, schools, courts, and civic organizations.
- The medical and public health community should fully inform patients regarding the effect(s) of medicine(s) on driving.

- Information and statistics should be "packaged" in such a way as to garner public, private, and governmental support to create legislative initiatives.
- A model statute should be developed to provide states with a springboard for discussing and initiating activity around a *per se* statute.
- Improvements should be made in drug detection devices for use at the roadside.
- Studies should be conducted of emergency room admissions to investigate the connections between illegal drug use and motor vehicle crashes.
- There should be standardized procedures/protocols for medical and toxicological examinations.
- Treatment strategies and program geared to drugged drivers should be evaluated.
- The deterrent effect of *per se* laws on traffic safety should be evaluated.

3. What are the research needs and is there a role for Federal Leadership?

A unique opportunity to directly confront substance abuse and its impact on traffic safety exists when a police officer stops a vehicle and finds a driver under the influence of alcohol/drugs. In order to capitalize on this potential, federal leadership should engage in the following:

- Encourage the States to develop statutes to make the drug-impaired driving offense as prosecutable as the alcohol-impaired driving offense.
- Encourage the States to ensure that drivers who are convicted of drugged driving are provided with counseling, and treatment as necessary.
- Federal programs, such as the Office of National Drug Control Policy's media awareness campaign, should mobilize parents and communities to develop and implement campaigns aimed at drugged driving.
- Federal funding should be provided to:
  - support research efforts to develop new technology to detect drug use;
  - sponsor more epidemiological and prevention studies; and
  - assist in the development of toxicology laboratory resources to enable states to process toxicology evidence in a timely manner.
- Additional federal funding should be provided to enhance police training efforts.

In summary, the Consensus Group believes that the nation should invest in managing the drugged driving problem through increased research, as the scope of the problem has clearly outgrown our knowledge base, through better communications to improve public awareness, and through training a larger cadre of police officers to detect drugged drivers. The problem of drugged driving appears to be growing – consequently, there is a critical need to improve our scientific and technical knowledge and to bring additional resources to bear in order to build a foundation for developing a sound public health policy to confront this problem and improve traffic safety.

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APPENDIX A – AFFILIATE LIST

American Bar Association (ABA) - Gloria Danziger, Debra B. Koehler

American Insurance Association - David Snyder

American Prosecutors Research Institute - Marcia J. Cunningham

Arizona - Maricopa County Attorneys Office - Jerry Landau

Arizona - Mesa Police Department

Arizona - Pima County - Bruce Chalk

Arizona - Scottsdale Department of Toxicology

Arizona State Patrol

California District Attorneys Association - Larry Brown, Frank Horowitz

California - Orange County Sheriff's Department - Yvonne Shull

Connecticut - Office of The Chief States Attorney - John Cronan

Florida - Palm Beach County - Chief Assistant State Attorneys Office - Ted Booras

Florida - Tampa Police Department - Sergeant Kenneth "Buddy" Brogdon

Georgia - City Court of Atlanta - Judge Andrew Hairston

Georgia Department of Human Resources - Karl Schwarzkops

Georgia Highway Safety Office - Spencer Moore

Hazelden Foundation - Carol L. Falkowski

Hawaii - Honolulu Prosecutors Office - David Sandler

Illinois Court Administrative Office

Illinois Governors Office

Illinois State Bar Association on Traffic Courts

Illinois State Police

Indiana Governors Council on Impaired Driving

Indiana Law Enforcement Training Academy

Indiana - Marion County Sheriff Department - Alan Driver

Indiana Prosecutors Council

Indiana State Toxicologist Office

Indiana - Superintendent, Indiana State Police

Indiana University - Judge Linda Chezem

Insurance Institute for Highway Safety - Michele Fields, Dr. Allan Williams

International Association of Chiefs of Police - Ernest (Ernie) Floegel

Iowa Attorney General's Office - Peter Grady

Iowa Crime Laboratory, Division of Criminal Investigations

Iowa Division of Substance Abuse & Health Promotion - Janet Zwick

MADD - Stephanie Mennen

Massachusetts District Court - Judge Thomas Merrigan

Maryland - Alcohol & Drug Abuse Administration - Stephen A. Bocian, Peter Luongo, PhD

Maryland State's Attorneys Association - Ara Crowe

Maryland State's Attorneys Office - Alison Leach

Maryland State Police - Lieutenant Bill Tower

Minnesota House of Representatives - Jim Cleary

Minnesota - Minneapolis City Attorneys Office - Karen Herland

Minnesota Office of Traffic Safety

Minnesota State Patrol

Minnesota - University of Minnesota Law School

Mississippi Assistant District Attorney - Bob Taylor

National Alliance for Model State Drug Laws - Amy Powell

National Association of Criminal Defense Lawyers - Steve Oberman

National Commission Against Drunk Driving - John V. Moulden

National Drug Court Institute - West Huddleston

National Highway Traffic Safety Administration (NHTSA) - Bryan Chodrow, Richard Compton, Ph.D., James F. Frank, Glen Karr, Chuck Peltier, Sandy Richardson, Jeffrey W. Runge, M.D., Karen Sprattler

National Institute on Drug Abuse (NIDA) - Steve Gust, Ph.D.

National Traffic Law Center - Marcia Cunningham

National Traffic Safety Board - Kevin Quinlan

Nationwide Insurance Enterprise - Tim Hoyt

Nebraska State Patrol - Captain Darrell Fisher

New Mexico – Albuquerque Police Department – Sgt. Murray A. Conrad

Northwestern University Traffic Institute

Office of National Drug Control Policy (ONDCP) - Edward Jurith, Kate Malliarakis

Oklahoma District Attorneys Council - Steven Alcorn, Donna Benke

Oregon District Attorneys Association - Judge Kimberly Frankel, Captain Chuck Hayes, Carolyn Norris

Rhode Island District Court

Substance Abuse and Mental Health Services Administration (SAMHSA)

Tennessee District Attorneys General Conference - Wally Kirby

Texas Department of Public Safety - Dan Gene Webb

Utah Prosecution Council - Mark Nash

University of Utah's Center for Human Toxicology - Dennis Crouch

APPENDIX B
FEASIBILITY OF PER SE DRUGGED DRIVING LEGISLATION CONSENSUS GROUP MEETING
MAY 16, 2002, WASHINGTON, D.C.
PARTICIPANT LIST

Ann E. Brenden
Assistant Iowa Attorney General
1305 E. Walnut Street
Des Moines, IA 50319
Tel: 515-281-5428
Fax: 515-281-4313
abrende@ag.state.ia.us

Donna Bush, Ph.D.
Substance Abuse Mental Health Services Admin.
5600 Fishers Lane
Rockwall II Bldg., Room 815
Rockville, MD 20857
Tel: 301-443-6014
Fax: 301-443-3031
dbush@samhsa.gov

Leo A. Cangianelli
Vice President
The Walsh Group, PA
6701 Democracy Blvd.
Suite 300
Bethesda, MD 20817
Tel: 301-571-9494
Fax: 301-571-2417
leocan@walshgroup.org

Yale H. Caplan, Ph.D.
(Representing National Safety Council)
National Scientific Services
3411 Philips Drive
Baltimore, MD 21208-1827
Tel: 410-486-7486
Fax: 410-653-4824
ForTox@aol.com

Bruce Chalk
Pima County Attorney's Office
32 North Stone Avenue
Tucson, AZ 85701
Tel: 520- 740-5693
Fax: 520-628-1012
bchalk@pcao.co.pima.az.us

The Honorable Linda L. Chezem, J.D.
Division of Toxicology
Department of Pharmacology and Toxicology
635 Barnhill Drive, MS 1021
Indianapolis, IN 46202
Tel: 317-274-7824
Fax: 317-274-7787
lchezem@iupui.edu

Brian Chodrow
National Highway Traffic Safety Administration
400 7th Street SW
Washington, DC 20590

Richard Compton, Ph.D.
Chief, Research & Eval. Division
National Highway Traffic Safety Admin
NTS-30, Room 6240
400 7th Street, S.W.
Washington, DC 20590
Tel: 202-366-2699
Fax: 202-366-7096
rcompton@nhtsa.dot.gov

Marcia J. Cunningham
Senior Attorney
National Traffic Law Center
American Prosecutors Research Institute
99 Canal Center Plaza – Suite 510
Alexandria, VA 22314
Tel: 703-519-1641
Fax: 703-836-3195
marcia.cunningham@ndaa-apri.org

Gloria Danziger
Staff Director
Standing Committee on Substance Abuse
American Bar Association
740 15th Street, NW
Washington, DC 20005
Tel: 202-662-1784
Fax: 202-662-1787
gdanziger@staff.abanet.org

Michele Fields
General Counsel
Insurance Institute for Highway Safety
1005 N. Glebe Road, Suite 800
Arlington, VA 22201
Tel: 703-247-1515
Fax: 703-247-1587
mfields@iihs.org

Darrell Fisher
Captain, Troop Area Commander
Drug Recognition Expert
Nebraska State Patrol, Uniformed Traffic Services
3601 W. Mathis Street
Lincoln, NE 68524
Tel: 402-471-4680
Fax: 402-471-4588
dfisher@nsp.state.ne.us

James F. Frank, Ph.D.
National Highway Traffic Safety Admin.
400 7th Street SW
Room 6240
Washington, DC 20590
Tel: 202-366-5593
Fax: 202-366-7721
jfrank@nhtsa.dot.gov

Steve Gust, Ph.D.
Special Asst. to the Director
National Institute on Drug Abuse
6001 Executive Blvd.
Room 5274
Bethesda, MD 20892-9581
Tel: 301-443-6480
Fax: 301-443-9127
sgust@ngmsmtp.nida.nih.gov

The Honorable Andrew Jasper Hairston
City Center of Atlanta
104 Trinity Ave., SW
Atlanta, GA 30303-3518
Tel: 404 - 658-6919
Fax: 404 - 658-7125
jeandy2@aol.com

West Huddleston
National Drug Court Institute
Director
4900 Seminary Rd. Suite 320
Alexandria, VA 22311
Tel: 703-575-9400
Fax: 703-575-9402
whuddleston@ndci.org

Edward Jurith
General Counsel
ONDCP
Exec Office of the President
750 17th Street
Washington, DC 20503
Tel: 202-395-6709
Fax: 202-395-6708

Cliff Karchmere
Director, Program Development
Police Executive Research Forum
1120 Connecticut Ave, NW
Suite 930
Washington, DC 20036
Tel: 202-454-8336
Fax: 202-466-7826
ckarchmere@policeforum.org

Glen Karr
National Highway Traffic Safety Administration
400 7th Street SW
Washington, DC 20590
Tel: 202-366-0743
Fax: 202-366-7394
akarr@nhtsa.dot.gov

Jerry Landau
Maricopa County Attorney
301 West Jefferson, 8th floor
Phoenix, AZ 85003
Tel: 602-506-5781
Fax: 602-506-594-7027
landau@mcao.maricopa.gov

Kate D. Malliarakis
ONDCP
Executive Office of the President
750 17th Street
Washington, DC 20503
Tel: 202-395-5299
Fax: 202-395-6744
kathleen_d._malliarakis@ondcp.eop.gov

Stephanie Mennen
Director of Federal Relations, MADD
1025 Connecticut Ave., NW, Suite 1200
Washington, DC 20036
Tel: 202-974-2483
Fax: 202-293-0106
mennen@madd.org

John V. Moulden
National Commission Against Drunk Driving
1900 L Street NW, Suite 705
Washington, DC 20036
Tel: 202-452-6004
Fax: 202-223-7012
jmoulden@trafficsafety.org

Steve Oberman
550 West Main Avenue
Suite 950
Knoxville, TN 37902
Tel: 865-546-4292
Fax: 865-546-4294
oberman@daolaw.com

Chuck Peltier
National Highway & Traffic Safety Admin
Traffic Law Enforcement Division
400 7th Street, S.W.
Washington, DC USA
Tel: 202-366-4295
Fax: 202-366-7721

Amy Powell, M.Ed.
Nat'l Alliance for Model
State Drug Laws
1219 First Street
Alexandria, VA 22314
Tel: 703-836-6100

Kevin Quinlan
National Traffic Safety Board
490 L'Enfant Plaza East, SW
Washington, DC 20594
Tel: 202-314-6170
Fax: 202-314-6178
quinlak@ntsb.gov

Sandy Richardson
National Highway Traffic Safety Admin
400 7th Street, S.W.
NTS-13
Washington, DC USA
Tel: 202-366-4294
Fax: 202-366-7721
srichardson@nhtsa.dot.gov

Robert Stephenson, II
Director, Division of Workplace Programs
SAMHSA
5600 Fishers Ln, Rockwall II Bldg., Room 815
Rockville, MD 20857
Tel: 301-443-6780
Fax: 301-443-3031
rstephen@samhsa.gov

T. William Tower, II
Commanding Officer, Rockville Barracks
Maryland State Police
7915 Montrose Road
Rockville, MD 20854
Tel: 301-424-2101

J. Michael Walsh, Ph.D.
President
The Walsh Group, PA
6701 Democracy Blvd
Suite 300
Bethesda, MD 20817
Tel: 301-571-9494
Fax: 301-571-2417
jmwalsh@walshgroup.org