

GEORGIA traffic PROSECUTOR

A PUBLICATION OF THE PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA TRAFFIC SAFETY PROGRAM

>>> OUR MISSION

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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"With the selection of a Georgia prosecutor as the new NACP/NHTSA National Prosecutor Fellow, the quality of traffic prosecution in the Peach State has garnered national attention. In this edition of the GTP, you'll be introduced to Forsyth County Assistant Solicitor Erin O'Mara, who will serve as a front-line resource to prosecutors in Georgia and across the nation for the next two years."

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Don't forget to visit our Training Web page to register for our traffic safety-related conferences and training courses.

Forsyth County Assistant Solicitor Named NACP/NHTSA National Prosecutor Fellow



Erin Ann O'Mara
Senior Assistant Solicitor-General
Forsyth County, Georgia

seminars. She will act as a spokesperson for NHTSA and NACP, making sure that prosecutors and citizens are aware of the research and educational opportunities available throughout the country from NHTSA and its cooperative partners. As a Fellow, O'Mara will be a spokesperson for prosecutors on national issues affecting traffic safety.

O'Mara is currently employed by the Honorable Leslie Abernathy, Solicitor-General of Forsyth County in Northwest Georgia. In this capacity, she represents the State of Georgia in the prosecution of misdemeanor crimes from arraignment through appeal. She is the designated prosecutor for all misdemeanor Vehicular Homicide and Serious Injury by Vehicle Cases. She also is the designated DUI Court prosecutor for Forsyth County. O'Mara is a 2005 graduate of the Georgia State University School of Law.

The National Association of Prosecutor Coordinators (NACP) in conjunction with the National Highway Traffic Safety Administration (NHTSA) has selected Erin Ann O'Mara, Senior Assistant Solicitor-General in Forsyth County, Georgia, to participate in their Prosecutor Fellow Program. The NACP/NHTSA Prosecutor Fellowship is awarded to only one prosecutor nationwide and the recipient serves for up to two years.

"I am deeply honored to have been chosen as a NHTSA Fellow. This collaborative effort brings federal resources to my prosecutor colleagues across the country," said O'Mara. "I look forward to working with NHTSA and NACP."

NACP is responsible for coordinating training and services for the nation's 78,000 state and local prosecutors. The purpose of the Prosecutor Fellow program is to provide strong communication and a mutually beneficial relationship between NHTSA and prosecutors who adjudicate motor vehicle and pedestrian offenses. As the Prosecutor Fellow, O'Mara will participate in community outreach activities, and teach at traffic safety

O'Mara has taught at numerous conferences for the Prosecuting Attorneys' Council of Georgia (PACGA) on the complexities of prosecuting vehicular homicide and serious injury by vehicle cases - including how prosecutors can counter defense experts and work with law enforcement accident reconstructionists. In addition to her other accomplishments, O'Mara is the only prosecutor in Georgia to have completed all five levels of Traffic Accident Reconstruction training conducted by the Georgia Police Academy as well as the in-depth course on Occupant Kinematics for the Traffic Crash Reconstructionist provided by the Institute of Police Technology and Management. She was recently appointed by the Georgia Supreme Court to serve as a new attorney mentor qualifying her to supervise newly admitted prosecuting attorneys during their first year of law practice. Another unique facet of O'Mara's background is her prior experience as a Certified Pharmacy Technician. With a background in pharmacy and health-care, O'Mara brings significant practical pharmacological knowledge and expertise to the field of prosecution. GTP

The Myth of the DUI Defense: GERD

By Brandon Hughes¹, Traffic Safety Resource Prosecutor
Alabama Office of Prosecution Services

Prosecute enough DUI cases and the excuses you will hear for the defendant's behavior will be both numerous and imaginative; you have to be prepared for anything. A DUI defense is typically more akin to a unicorn than a thoroughbred horse. Like myths, DUI defenses usually have some basis in truth; however, it is the perversion of this truth where the DUI defense most often lies. As such, it is important for the prosecutor to understand the underlying truth of the defense in order to be able to point out the fallacy of the defense and make sure the finder of fact renders a verdict based not on fanciful conjecture, but on the evidence.

One such defense is the GERD (Gastro-Esophageal Reflux Disorder) defense, and if you have not seen it yet, odds are you will. The basis in truth for this defense is that GERD is a *real* medical condition; the perversion of this truth is that persons with GERD produce artificially high Breath Alcohol Concentrations (BrAC) and, as a result, are not guilty of Driving Under the Influence of Alcohol. Understanding what GERD is and, more importantly, what it is *not*, is the first step in overcoming this defense.

The Truth

Put simply, GERD is a severe form of acid reflux disease, which is the backward flow of the stomach's contents into the esophagus. It is important to understand that GERD is more than just occasionally experiencing heartburn. A person who *truly* suffers from GERD will most likely have been diagnosed by a physician and will have prescription medication—often taken daily—to deal with the problem. In fact, it is not unusual for GERD-sufferers to require surgery to address the condition. It is estimated that approximately 7-10% of the population of the United States suffers from GERD² to some extent. Drinking alcohol, smoking and eating spicy foods have been known to exacerbate the symptoms of GERD.

The Defense

It is crucial for DUI prosecutors to understand that the GERD defense is *nothing more* than a mouth-alcohol defense. The defendant will claim that since he or she suffers from GERD, the BrAC as measured by the Intoxilyzer 5000 was inflated and therefore not an accurate representation of his or her actual BrAC. The claim is that the BrAC measurement was inflated because the GERD caused alcohol from the stomach to flow up through the esophagus and into the mouth, creating mouth-alcohol and producing a flawed BrAC result.

According to "Developing a GERD Defense,"³ the fact pattern that supports a *scientifically valid* GERD defense includes: (1) a defendant diagnosed by a physician as having GERD; (2) impairment that is not consistent with the

defendant's BrAC; and (3) a *strong* possibility of alcohol present in the stomach at the time of the breath test. (Emphasis added). As you can see, there is more to it from the defense perspective than just throwing out the term "GERD."

The GERD Effect

The question defendants asserting a GERD defense force prosecutors to confront is, "does GERD really have a significant impact on BrAC results?" Perhaps the most notable study on this issue was conducted at the University Hospital in Linköping, Sweden in 1998.⁴ The participants in the study were 10 individuals (five men and five women) who had been diagnosed as chronic sufferers of GERD and who were in line for antireflux surgery. The subjects were dosed with either beer, white wine, or vodka mixed with orange juice after a 10 hour overnight fast. At specified intervals, blood was drawn from each subject and the subject gave a corresponding breath test immediately after the blood sample was taken. Some of the subjects were even subjected to having a GERD episode *induced* prior to giving a breath sample. In every case, the subjects were able to blow an adequate volume of air for an adequate amount of time. The conclusion reached in the study was "that the risk of alcohol erupting from the stomach and into the mouth owing to gastric reflux and falsely increasing the result of an evidential breath-alcohol test is *highly improbable*." The study further concluded "that the risk of a person experiencing gastric reflux during the time he or she participates in a breath-alcohol test procedure is very low. Even if reflux does occur, our study shows that it is not very likely that an abnormally high BrAC reading will be obtained." In arriving at these conclusions, the authors of the study reiterated the importance of the pre-test deprivation period as well as taking duplicate breath samples as safeguards against a GERD defense. Both of these safeguards are built into Georgia's Intoxilyzer 5000 evidential breath testing protocols in order to ensure that mouth alcohol—even if introduced as a result of GERD—does not interfere with or contribute to a suspect's BrAC result. As the Linköping study indicated, *active* GERD episode *may* cause the presence of mouth alcohol—but simply saying it doesn't make it so.

Handling the Defense

When trying a case where a GERD defense has been asserted, it is important that the prosecutor not allow the case become solely about whether or not the defendant was suffering from GERD at the time of the breath test. It is critical that prosecutors keep the jury focused on the defendant's driving behavior, the observations by the officer, and the defendant's performance on the Standardized Field Sobriety Tests. Officers are trained to

make their arrest decision based on evidence observed *prior* to the evidentiary breath test. Therefore, as nice as it is to have, an evidential breath result is simply the "sprinkles on the cake;" prosecutors should not let the facts of the case become clouded by arguing over a suppositious defense. Instead, prosecutors should make sure the jury understands that the reason for the defendant's behavior at the time of the incident was alcohol impairment and *not* a severe form of indigestion.

Furthermore, even if the defendant suffers from GERD and has been diagnosed by a doctor, the defense must show that the defendant was suffering from a GERD episode *at the time of the breath test*. It is difficult for a defendant to make such a showing if it was not so, and prosecutors must be vigilant in requiring defendants to actually do so.

In DUI - *Per Se* cases where attacking the GERD defense head-on may be best strategy, prosecutors in Georgia can be grateful that the breath-testing protocols established by the Georgia Bureau of Investigation makes attacking a GERD claim fairly straightforward. There are three safeguards built into the program that essentially eliminate the threat of mouth-alcohol affecting the BrAC result. The first safeguard is the 20-minute waiting period prior to testing. When a person drinks an alcoholic beverage, residual alcohol remains inside the mouth for several minutes after the drink is taken, and if a breath sample is taken within a few minutes of that drink, the breath-testing instrument could measure the mouth-alcohol and render an inflated BrAC. There have been numerous studies done to determine how long residual mouth-alcohol remains in the oral cavity, and it is widely accepted that mouth-alcohol is eliminated within 12 to 15 minutes after alcohol has been introduced. Georgia's 20-minute waiting period exceeds that 12 to 15 minute window, creating an even greater assurance that the final BrAC result is not affected by mouth-alcohol. It is important to note that this 20-minute period in Georgia is a *waiting* period and not an *observation* period. This is a critical distinction, because defense attorneys will argue that since the officer did not maintain a 20-minute "eyes-on" watch of the defendant, then the 20-minute wait requirement was not met. This is not true. All that is required is that officers prevent suspects from consuming any liquid that contains alcohol, ensure that the suspect has not regurgitated or vomited, and prohibit the introduction of any foreign objects (such a food, drink, tobacco, or gum) during the 20-minute waiting period.⁵ It is important to note that this time period can and should include the period of time that the officer is in direct contact with the suspect on the side of the road and the ride from the scene of the traffic stop to the instrument. Of course, defense attorneys asserting a GERD defense will likely argue that the officer "couldn't" know if the defendant silently burped, hiccupped or

continued >

regurgitated causing the introduction of alcohol into the mouth, however the next two safeguards in the GBI's breath testing protocol put such claims to rest and further debunk the GERD argument.

The second of Georgia's mouth-alcohol safeguards is the "Slope Detector" employed in the design of the Intoxilyzer 5000. The Intoxilyzer 5000 measures the BrAC in real time as a suspect is providing a breath sample and calculates the "breath curve" associated with the measurement of the sample as the defendant is blowing into the instrument. A proper breath curve (i.e., one that does not indicate any problems or interference with the sample) will start with a low BrAC at the beginning of the blow and continue to rise until the alveolar (deep lung) air is obtained, at which time the BrAC will gradually level off, or "plateau." (See Figure 1 below.) Significant drops or erratic fluctuations in the alcohol concentration during the course of breath sampling indicate the possible presence of mouth alcohol.⁶ (See Figure 2 below.) Because the Intoxilyzer 5000 monitors the entire breath sample as it is provided, if such significant drops or fluctuations occur, the instrument will abort the test and report an "Invalid Sample" error message. When such an error message is received by Intoxilyzer operators, they simply restart the 20-minute waiting period to allow for the dissipation of the mouth alcohol that was detected, and then retest the suspect. In short, the Intoxilyzer 5000 is designed and equipped to detect mouth-alcohol, and when it does so, it will not render a BrAC result.

The third safeguard against the Intoxilyzer 5000 rendering a BrAC result based on mouth-alcohol is that the instrument requires *two* breath samples, and both samples must

agree within 0.020 g/210L. For example, if a subject's first breath result is 0.125 and the second sample is 0.127, the Intoxilyzer will report the result. However, if the first breath sample is measured at 0.125 and the second sample measures at 0.146, the Intoxilyzer will indicate "Outside Required Parameter - Wait 20 Min and Retest," and *will not report a result*. The Intoxilyzer 5000 operator should then restart the 20 minute waiting period, and administer a new test to the suspect. By that time, any mouth alcohol that compromised the initial test will have dissipated, permitting the Intoxilyzer 5000 to accurately measure the suspect's actual BrAC.

The Role of Law Enforcement

Law enforcement officers can play a vital role in quashing GERD defenses. First, during the DUI investigation, officers should note when the defendant had his or her last drink. This is important because "a prerequisite for such interferences is, of course, that there is a relatively high concentration of alcohol remaining in the stomach *at the time of the test*. Without any alcohol erupting from the stomach into the mouth and throat prior to a breath-test, *the GERD defense is bogus*. Accordingly, an important element for a valid GERD defense is a *relatively short time after end of drinking until making the breath-test*." For GERD to even have an opportunity to play a role, alcohol must be present in the stomach. If the stomach is devoid of alcohol, there can be nothing to regurgitate to even remotely impact the BrAC. The stomach could be empty of alcohol within 30 minutes of the defendant's last drink, so knowing how much time has elapsed between the last drink and the breath sample could be key in disproving the GERD claim. Second, officers must carefully observe and record the defendant's behavior. Specifically, was he or she belching, hiccupping or coughing (all signs of an *active* GERD episode)? Third, officers should ask the defendant if they suffer from GERD. As noted earlier, if a suspect suffers from GERD, they likely know it and have been diagnosed accordingly. A defendant who denies having GERD at the time of their stop, but later asserts GERD as a defense at the 11th hour is much easier for prosecutors to handle than a suspect who was never asked about it.

Conclusion

When dealing with GERD - or any defense in a DUI case - it is important to determine what the nugget of truth is at the heart of the defense's claims, and then determine how that truth is being exploited to accomplish their goal of a "not guilty" verdict. In order to overcome a GERD defense effectively, remember these things:

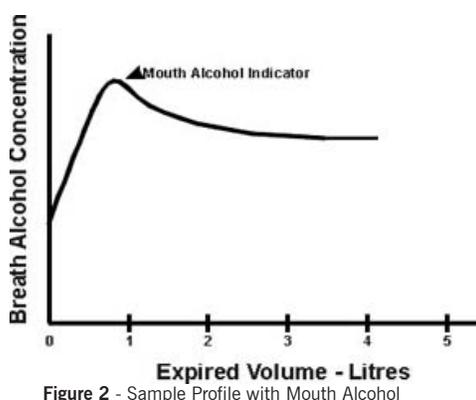
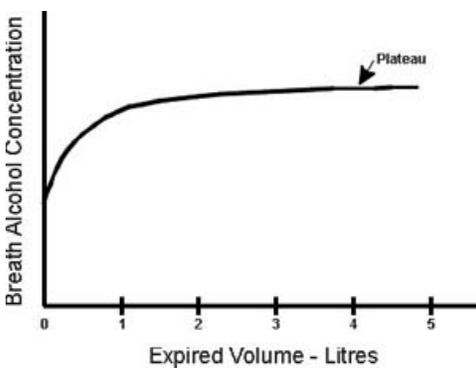
1. GERD is simply one form of the "mouth-alcohol" defense.
2. The *defendant* must show that he or she was having an active GERD episode at the time of the breath test before the defense is viable.

3. Use the facts of your case and scientific data to disprove the claim;
4. Don't lose sight of all the other evidence of the defendant's impairment at the time of the offense.

Armed with the little bit of knowledge in this article, and based on the safeguards in Georgia's breath testing program, prosecutors can directly address any GERD defense that might be asserted with confidence in their ability to secure a conviction. **STP**

Endnotes

- ¹ Specific revisions made to address Georgia law and the breath testing protocols of the Georgia Bureau of Investigation made by Todd Hayes, Georgia Traffic Safety Resource Prosecutor, with the express permission of the author.
- ² Jones, A.W. (January 2007). "Gastric Reflux, Regurgitation, and Potential Impact of Mouth-Alcohol on Results of Breath Alcohol Testing," *DWI Journal: Law & Science*, Vol. 22, No. 1.
- ³ McShane, Justin J., et al. "Developing a GERD Defense." *Understanding DUI Scientific Evidence*, 2011 ed., West, Aspatore Books, 2011, pgs. 135-156.
- ⁴ Kechagias S, Jönsson K-Å, Franzén T, Andersson L, and Jones A.W. "Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease," *J. Forensic Sci.* 1999; 44(4): 814-818.
- ⁵ Intoxilyzer 5000 Georgia Operator's Training Manual, 2011 Revision, Issued 2/25/11, pg. 25.
- ⁶ Intoxilyzer 5000 Georgia Operator's Training Manual, 2011 Revision, Issued 2/25/11, pg. 25.
- ⁷ Jones, A.W. (September 2005). "Reflections on the GERD Defense," *DWI Journal: Law & Science*, Vol. 20, No. 9, *emphasis added*.



Back by Popular Demand: Lethal Weapon Returns in March

Because of the overwhelming response to PACGA's September 2012 presentation of NHTSA's "Lethal Weapon: DUI Homicide," the Traffic Safety Resource Program will offer the course again on March 13-15, 2013 at the Georgia Public Safety Training Center. Interested law enforcement officers and prosecutors responsible for the investigation and prosecution of Vehicular Homicide and related crimes are encouraged to attend. Attendees will receive advanced training on accident reconstruction and toxicology methodologies

and techniques, *and* will have the chance to see the Georgia State Patrol's Specialized Collision Reconstruction Team (SCRT) in action.

Completion of the course will allow prosecutors and officers alike to better investigate, understand and analyze automobile crashes and to report their findings more effectively. In addition, prosecutors will better understand how to cross-examine defense reconstruction experts and how to communicate more effi-

ciently with the officers investigating crashes in their jurisdictions. To preregister for this event, call Debbie Brown at (404) 969-4001 or visit the PAC website at <http://www.pacga.org/site/event/134>. ETP

Lethal Weapon: DUI Homicide
Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, Georgia 31029
March 13-15, 2013



DeKalb Solicitor-General Sherry Boston argued before the Georgia Supreme Court in *Ogilvie v. State*

Supreme Court Clarifies Intent Element In Strict Liability Traffic Offenses

By Gary D. Bergman, Staff Attorney,
Prosecuting Attorneys' Council of Georgia

In *State v. Ogilvie*, S12G0703 (November 5, 2012), the Georgia Supreme Court considered whether a person can commit a strict liability traffic offense without a culpable mental state. The question arose after appellant struck and killed a seven-year-old boy with her car as she drove through a crosswalk while the child was crossing the street. Appellant was convicted of second degree vehicular homicide based on her failure to stop for a pedestrian in a crosswalk in violation of O.C.G.A. § 40-6-91(a). The trial court declined to give appellant's requested jury charge on the defense of accident. However, on appeal she contended that the accident charge was authorized by her testimony that she could not stop before hitting the child because he ran across the street in front of her car, giving her only a second or two to avoid striking him. The Court of Appeals concluded that appellant's testimony warranted an accident charge, and that the failure to give it was harmful. Therefore, The Court of Appeals reversed her convictions based on the proposition that there is no criminal intent element for the "strict liability" traffic offenses set forth in Chapter 6 of Title 40 of the Georgia Code.

The Georgia Supreme Court found the Court of Appeals' premise was incorrect. The Court explained that if appellant had been indicted for a crime that required her to have *intentionally* or *maliciously* hit the child, like murder, then this evidence would have supported an accident instruction, because it would tend to show that she did not act with the requisite "criminal ... intention." However, the Court held that this was not the type of intent required to commit a strict liability traffic offense. The Court noted that, "[c]riminal intent does not always equate to mental fault, guilty knowledge or purposeful violation of the law." The Court stated that while criminal intent is an element that must be proved by the state in every prosecution, in

a "strict liability" traffic offense "there is no requirement of specific intent or wrongful purpose that is an element of other crimes, but [it] require[s] the defendant has voluntarily committed the act that the statute prohibits, which typically involves driving at a particular time and place (e.g., through a red light, see O.C.G.A. § 40-6-20(a)) or in a particular way (e.g., too fast, see O.C.G.A. § 40-6-181)." In other words, the State must prove only *general* criminal intent, which is "simply the intent to do the act which results in the violation of the law, and not the intent to commit the crime itself." Here, the appellant testified that she could not avoid hitting the child because he unexpectedly ran across the street in front of her, giving her only a second or two to stop. Thus, the Court held, appellant's defense was not that she acted involuntarily, but rather that the act (or failure to act) of another person - the child in running into the crosswalk (or the crossing guard in failing to stop him) - was a *proximate cause* defense. Consequently, the trial court was not required to give an accident instruction. Moreover, the Court stated that the trial court committed no error in this regard since it gave the jury a full charge on proximate cause. ETP

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UPCOMING TRAINING EVENTS

JANUARY 23-25, 2013

Winter Conference

Brasstown Valley Lodge
Young Harris, GA

Capital Litigation Conference

Savannah DeSoto Hilton
Savannah, GA

FEBRUARY 1, 2013

**Joint Prosecutor & Law Enforcement
DUI Training**

Lowndes County EMA Conference Facility
250 Douglas Avenue
Valdosta, GA 31601
8:00 AM - 3:00 PM

FEBRUARY 12, 2013

**Joint Prosecutor & Law Enforcement
DUI Training**

Centerville City Hall
300 E Church Street
Centerville, GA 31028
8:00 AM - 3:00 PM

FEBRUARY 22, 2013

**Joint Prosecutor & Law Enforcement
DUI Training**

Hall County Government Center
2875 Browns Bridge Road
Gainesville, GA 30504
9:00 AM - 4:00 PM

MARCH 7, 2013

**Joint Prosecutor & Law Enforcement
DUI Training**

Warren County Community Services Building
Juvenile Courtroom
48 Warren Street
Warrenton, GA 30828
8:00 AM - 3:00 PM

MARCH 13-15, 2013

Lethal Weapon

Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, GA 31029

June 7-14, 2013

Basic Litigation

Georgia Public Safety Training Center
1000 Indian Springs Drive
Forsyth, GA 31029

July 21-24, 2013

Summer Conference

Jekyll Island Convention Center
Jekyll Island, GA

Visit the PAC website to read more about our training events or to register to attend a course www.pacga.org

Heartfelt Thanks to Fay Eshleman after a Decade of Service



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The editors of the *Georgia Traffic Prosecutor* and the staff of the Prosecuting Attorney's Council (PAC) would like to take this opportunity to express our appreciation to Fay McCormack Eshleman for her years as Traffic Safety Resource Coordinator.

After almost a full decade of service to Georgia's driving public, Fay recently accepted an appointment as a Staff Attorney at PAC. Fay came to PAC in September 2003 as Georgia's founding Traffic Safety Resource Coordinator after 18 years with the Fulton County Solicitor-General's Office. In the years that followed, Fay played a vital role in the establishment of PAC's Traffic Safety Resource Program. Her successes

include the establishment of this newsletter - which has become an invaluable source of knowledge for those involved traffic enforcement and prosecution across the country - the institution of PAC's Joint Prosecutor / Law Enforcement One-Day DUI Training Programs, and bringing all of NHTSA's traffic safety related training programs (including "Protecting Lives, Saving Futures," "Lethal Weapon: DUI Homicide," "Prosecuting the Drugged Driver," and "Cops in Court") to Georgia. She has served as a valuable resource for Georgia officers and prosecutors in need of assistance on traffic safety issues, and has acted as an important link between Georgia traffic prosecutors and their colleagues in other states and within the federal government. Thank you, Fay, for your years of service and for your leadership in combatting traffic crime on Georgia's roads. 

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DID YOU KNOW?

According to preliminary traffic fatality data released by the NHTSA, traffic fatalities increased a projected 9% in the first half of 2012 compared with 2011, which represents the largest percentage increase for a half-year time period since NHTSA began collecting fatality data in 1975. Most disturbing was the 13.5% increase in the first quarter of 2012 compared with the first quarter of 2011. In addition, the estimated number of fatalities per million vehicle miles traveled increased to 1.12 for the first half of 2012, compared to a rate of 1.04 per 100 million vehicle miles traveled in the first half of 2011. In terms of actual numbers, it is estimated that 16,290 people died on our nation's roads in the first half of 2012, compared to only 14,950 during the same period in 2011 - **an increase of 1,340 people.**

Source: "Early Estimate of Motor Vehicle Traffic Fatalities for the First Half (January-June) of 2012," U.S. Department of Transportation publication DOT HS 811 680, available at <http://www-nrd.nhtsa.dot.gov/Pubs/811680.pdf>.

GEORGIA traffic PROSECUTOR

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>>> GEORGIA TRAFFIC SAFETY RESOURCE PROGRAM



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>>> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than \$51 billion.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Todd Hayes at PAC.