



Between the Lines

Mark Your Calendars

Drive Safely Work Week
Network of Employers
for Traffic Safety
October 7–11, 2014

**National Teen Driver
Safety Week**
State Farm
October 19–25, 2014

121st IACP Annual Conference
International Association of
Chiefs of Police
Orlando, Florida
October 25–28, 2014

**Halloween Drunk Driving
Prevention**
Buzzed Driving is Drunk Driving
NHTSA
October 31, 2014

**National Drunk & Drugged
Driving Prevention Month**
NHTSA, MADD, GHSA
December 2014

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New Electronic Outline Resource to Combat Defense Experts

by the National Traffic Law Center Staff

Making sense of confusing technical or scientific information offered by the defense expert in everyday terms can be one of the more challenging aspects of any trial.

Effectively cross examining an expert witness can be another. In cases involving impaired driving, prosecutors often face both of these challenges. Therefore, adequately addressing those challenges can be the difference between obtaining a conviction or an acquittal.

Defense counsel have offered an ever increasing number of experts in trials in the past few years, such as ophthalmologists and other medical doctors, engineers, computer scientists, crash reconstructionists, statisticians, psychologists, pharmacologists, as well as a host of others. These experts have testified on a variety of topics from physical limitations, diseases, mechanical failures, design flaws, software bugs, and others. Other experts, including former government toxicologists, law enforcement, and drug recognition experts present additional challenges for the prosecutor because they have first-hand knowledge of the states' programs.

In some cases, experts have addressed legitimate issues and prosecutors need to understand the science to elicit helpful information. However, more often, experts generally try to obfuscate the evidence or science. To overcome the confusion, a prosecutor must understand the science offered by an expert, effectively cross examine the expert to obtain testimony that supports the government's theory, and then artfully and convincingly explain the information to the factfinder.

Over the years, Traffic Safety Resource Prosecutors (TSRPs) and other prosecutors have provided a substantial amount of information to the National Traffic Law Center (NTLC) on more than 400 experts. NTLC continues to accumulate information on experts and issues pertinent to impaired driving and houses more than 37,000 documents for that purpose. NTLC maintains a database, cataloged under the expert by name or topic.

To help effectively cross examine an expert, the National Association of Prosecutor Coordinators (NAPC), NTLC, several TSRPs throughout the United States, and prosecutors have developed a cross examination outline (Outline) for prosecutors to utilize in preparation for trial and trial itself. The Outline contains a summary or background section and additional sections with statements previously made by the expert. The Outline is designed to save time for the prosecutor because an experienced traffic safety prosecutor reviewed the transcripts, resumes, articles, and other expert information and synthesized it into a standardized format. In essence, the Outline provides points taken from previous testimony that prosecutors can use to cross examine the expert in the current case. It is as if the prosecutor deposed the expert and made an outline from which to utilize in his or her trial.

After an experienced prosecutor has reviewed the material on an individual expert, he or she enters pertinent information into an electronic form, along with the citation to the transcript or other document where he or she found the information. NTLC staff then organizes the information into the Outline format for use. Because the Outline is in Word format,

a prosecutor who requests the Outline can delete categories that are not relevant to his or her case, add information for the specific case, or otherwise modify the Outline and print out a copy to take to court to use in cross examining the expert. The Outline can aid the prosecutor by providing a basic outline of the topics and specific areas for cross with citations to transcripts and other documents available for impeachment. The printed Outline may be used similar to a deposition summary.

As an alternative to printing a paper copy of the Outline, the prosecutor can use the electronic version, which provides some additional features. In its electronic version, the Outline is linked to other documents for instant retrieval of those documents, cross referencing, and fact checking simply by clicking the link. The electronic version also contains a table of contents, linked to other sections of the Outline, which makes it easier to navigate to the expert's background and points for cross examination. The points for cross examination may be taken from prior testimony of the expert, his or her curriculum vitae (CV), articles or other published work, National Highway Traffic Safety Administration (NHTSA) information, or other sources.

Because the Outline is available electronically and linked to other documents, the prosecutor can access the entire database anywhere he or she has access to the web, even in the courtroom. This can be very advantageous in some jurisdictions where defense counsel are not required to identify expert witnesses prior to trial. Even if defense counsel are required to identify experts prior to trial, it can be helpful for prosecutors when experts testify about a certain issue unexpectedly. Most linked documents in the database can also be searched electronically for specific words, providing an avenue for the prosecutor to "fact check" the expert.

An example of how a prosecutor can utilize the Outline follows. The prosecutor is prosecuting a DUI case and the defense notifies him that the defense intends on calling a certain expert. The prosecutor contacts the local TSRP and/or NTLC and requests information on the expert. The TSRP and/or NTLC provides the Outline to the prosecutor as an attachment in an email with links to supporting material. In reviewing the Outline, the prosecutor learns that the expert testified in a previous trial about the Tyndall effect. When cross examined by the prosecutor in that case, the expert admitted that a subsequent study in Virginia concluded that the substances released by the deployment of an airbag in a crash does not increase the reading of a breath-alcohol instrument. In the Outline, the admission is listed under the category for Tyndall effect and provides a citation and link to the transcript where the defense expert made the statement. The prosecutor could then click on the link to the transcript and review that portion of the transcript. In addition, the Outline also includes information about the Virginia study. It contains a simple

statement in the body of the Outline under the same category with this conclusion and provides a link to the study for the prosecutor to review and utilize at trial as necessary (to get the defense expert to admit to the results of the study or indicate that he has not done his homework because he is unaware of the study).

In this example, that information, recorded in the transcript or published in the article, would be linked to the outline. The prosecutor could cross examine or impeach the expert through information in the outline and then back it up with the transcript or article as needed. Remember, it is still the best practice to read the entire transcript because it may contain information that is unique to your state or circumstances, which was not included in the outline. Prosecutors must efficiently prepare as best as possible within the time available.

Another example presented in the below linked expert cross Outline involves Standardized Field Sobriety Tests (SFSTs) generally. The expert testified in the past that the One-Leg Stand (OLS) is only 65 percent reliable and the Walk and Turn (WAT) is only 68 percent accurate. Note, some courts will not allow the expert to testify as to the accuracy of the tests. The expert supports this with the first study sponsored by NHTSA conducted in 1981 when the BAC was .10. In cases where accuracy testimony is allowed, NHTSA provides information on a subsequent study that shows that OLS is 83 percent accurate, WAT is 79 percent accurate, HGN is 88 percent accurate, and, when all three are combined, 91 percent accurate in determining impairment at the .08 BAC level in 1998. This study is linked to the Outline for impeachment of the expert and prosecutor review.

The electronic version is currently undergoing migration to remote storage for easier access and connection to all the supporting documents. This will make access and navigating to additional documents easier and seamless for the end user. Users must establish that they are prosecutors or otherwise employed by law enforcement to gain access. In addition, the Outline does not generally provide "setup" questions, which are left to the prosecutor to adequately set up the expert for the cross point.

A sample [Outline](#) is provided as a link to this document (click on the word "Outline" in this sentence). Please contact NTLC or your state TSRP if you have any questions.

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