

What Kind of Expert?

By John Kwasnoski

Your case file is meticulously organized. You have numbered all your photos, diagrams, lab reports and the clothing of the victim for admission as exhibits at trial. The medical examiner, lab director, accident reconstructionist and an eye witness are all available and on call for the trial date. The victim's family has been very cooperative. All seems to be going well, until the defense discloses its "human factors" expert. You look defense counsel straight in the eye, all the while searching your mind for some lucid response, but find yourself blurting out, "A what?"

What is a human factors expert and what can that person possibly say that will challenge the documented physical evidence in your case? Human factors involves the interrelationship of humans with vehicles, their probable behavior in various situations and their performance capabilities. With its roots in World War II military research, human factors is a type of expert opinion that can be very difficult to examine or challenge because it is based on the expert's interpretation of clinical data and professional experience.

Human factors experts can testify in many areas including:

- visibility and night perception
- conspicuity of pedestrians
- headlight illuminance
- attentiveness and field of view

The human factors expert interprets the bell curve of human variability and explains to jurors why the defendant behaved in the only way s/he could. Note the distinction between forensic experts that testify regarding behavioral elements. Example: Defendant is charged with striking a pedestrian. The state introduces physical evidence, e.g., the measurement of the throw of the headlights, to prove that the pedestrian was illuminated. The defense introduces behavioral evidence by citing studies that examine how a person behaves while looking forward that indicate why the defendant could not have detected the pedestrian. Generally, a human factors expert will testify that under certain circumstances and in certain cases, people will interact with the vehicle and environment in certain ways. What a human factors expert cannot tell you is whether what they claim to be typical can be applied to the defendant in a particular case. So although the expert may cite statistics and research studies to support an opinion, the fact remains that the expert does not know how the defendant did or did not react, and never tested the defendant under conditions that compare to the environment at the time of the fatal crash.

John Kwasnoski, a professor of forensic physics at Western New England College in Springfield, Massachusetts, reconstructs crashes and offers expert testimony.

Prosecutor Training

NTLC announces the first regional training for **Lethal Weapon: DUI Homicide** to be held January 13-17, 1997 in the Washington, D.C. area. This course is designed for experienced prosecutors who want to increase their understanding of the technical evidence required to prove guilt in cases involving vehicular fatalities, and at the same time improve their trial advocacy skills. The four and a half day course includes:

- Participation in a mock trial using real expert witnesses.
- Individual critiques by experienced faculty that provide direct feedback on courtroom skills.
- Assistance in how to:
 - develop more complete witness examinations
 - compose more persuasive arguments

- deliver dynamic presentations
- Strategies to counter common defenses.
- An opportunity to view yourself on videotape as a jury would see you.

Substantive presentations include the following topics:

- Accident reconstruction methodologies.
- Kinematics of vehicles and occupants.
- Retrograde extrapolation of blood alcohol content.
- Prosecutorial immunity issues regarding the role of the prosecutor at the scene.
- Getting victims to work with, not against, the prosecutor.

The course is limited to 35 participants. Registration is \$475.00. For further information please contact the National Traffic Law Center at 99 Canal Center Plaza, Suite 510, Alexandria, Virginia 22314 (703) 549-4253.

Meeting DUI Defense Challenges: Direct Examination

Originally, blood/breath alcohol testing was designed to corroborate the officer's observations of impairment. All too often prosecutors minimize the officer's testimony, relying instead on the "magic" number produced by the chemical test. This tactic allows the defense to shift the focus of the trial from defendant's impairment to the accuracy of the testing procedure. The ultimate question before the jury then becomes whether the test result is valid. If the jury has doubts about the test, the defendant may be acquitted despite other compelling evidence of impairment.

Prosecutors should approach the officer's testimony as if it were the only evidence available on impairment, regardless of a chemical test result. Most jurors have seen impaired individuals, either in person or the media, and have expectations of how impaired persons look and behave. Build your case on what the jurors already know by using the officer's testimony to reinforce the jury's expectations.

- Jurors know that people drink more on Friday and Saturday nights. Ask the day of the week in addition to the time of the arrest.
- Jurors expect impaired persons to look and sound intoxicated as well as exhibit poor balance and coordination. Ask the officer to describe the specific indicators of impairment observed in addition to the field sobriety tests (FSTs).
- Jurors will accept evidence that supports their common understanding of impairment, e.g., the defendant could not follow directions or perform simple tasks. Ask the officer to describe the specific indicators of impairment for which he is looking during the FSTs and which of these indicators the defendant exhibited. Likewise, ask whether the officer has given FSTs to unimpaired persons. Contrast the performance of the defendant with that of unimpaired persons.

Finally, ask how many DUI investigations the officer has conducted. Were all the suspects arrested? Why not? This gives the jury the opportunity to see the officer as fair. It also emphasizes that the officer is a professional doing a job, not someone trying to fill a quota.

Ideally, the jury should have sufficient evidence to convict at the conclusion of the arresting officer's testimony: the chemical test result is the "icing on the cake."

Prior Convictions Manual

While proving a DUI is often hard, it is easy compared with obtaining the required documentation to prove a prior DUI conviction from another state. NTLIC's *Prior Convictions Manual* will ease the burden of

this difficult and time consuming task. This two volume set contains all the information you need to get a certified copy of the prior DUI conviction quickly and easily, including:

- How to obtain out-of-state driving records showing prior convictions
- How to obtain certified copies of conviction from the convicting court
- Citations of cases interpreting DUI law
- Text of DUI statutes of each state from 1988

The manual is priced at \$100 for the two-volume set. Contact Alexa Williams at NTLC for order information at 703-549-4253.

Traffic on the Information Highway

You can reach the National Traffic Law Center via e-mail at trafficlaw@ndaa-apri.org. The National Highway Traffic Safety Administration information is readily available on-line as well at www.nhtsa.dot.gov. For other traffic-related web sites, contact NTLC.

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