

Post-Bar Law Clerk Training Calendar

Nov. 2017

Revision 9

NOVEMBER 2017

Nov. 2, 2017

1:30 – 4:00

Foundations (Courtroom 45 / Chuck Hughes)

Nov. 3, 2017

8:30 – 12:00

DUI Prosecutions (Room 308/ M. Bohl & E. Andrews)

Nov. 6, 2017

8:30 – 10:30

Closing Argument/Rebuttal (MDB Conf Room / Mike Frawley)

Nov. 7, 2017

Nov. 8, 2017

Nov. 9, 2017

9:30 – 12:00

Trial Practice: Voir Dire (Courtroom TBA, Senior Panel)

Nov. 10, 2017

Holiday

Nov. 13, 2017

8:00 – 5:00

ARIDE (VSO Academy Classroom #2 / D. Hong CHP)

This 2-day class will be held at the same place you did your Use of Force Training in Camarillo

Nov. 14, 2017

8:00 – 5:00

ARIDE (VSO Academy Classroom #2 / D. Hong CHP)

This 2-day class will be held at the same place you did your Use of Force Training in Camarillo

Nov. 15, 2017

9:30 – 12:00

Trial Practice: Opening Statement (Courtroom 26, Senior Panel)

Nov. 16, 2017

9:30 – 12:00

Trial Practice: Direct/Cross (Courtroom 26, Senior Panel)

Nov. 17, 2017

BAR RESULTS!!!!

Nov. 20, 2017

Go Get 'Em!

ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: DUI Prosecutions

Date(s) of Activity: November 3, 2017

Time of Activity: 8:30 a.m. to 12:00 p.m.

Location of Activity: District Attorney's Office, 800 S. Victoria Ave., Ventura, CA

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	☐	☐	
Were you provided with substantive written materials?	☐	☐	
Did the course update or keep you informed of your legal responsibilities?	☐	☐	
Did the activity contain significant professional content?	☐	☐	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	☐	☐	

Please rate the instructor(s) of the course below

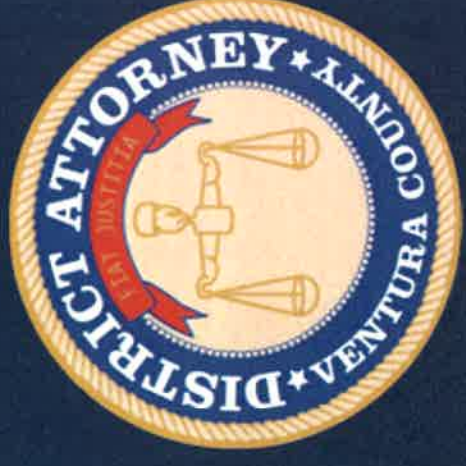
Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Edward Andrews / DUI Prosecutions - Experts	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Melissa Bohl / DUI Prosecutions - Cases & Trials	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

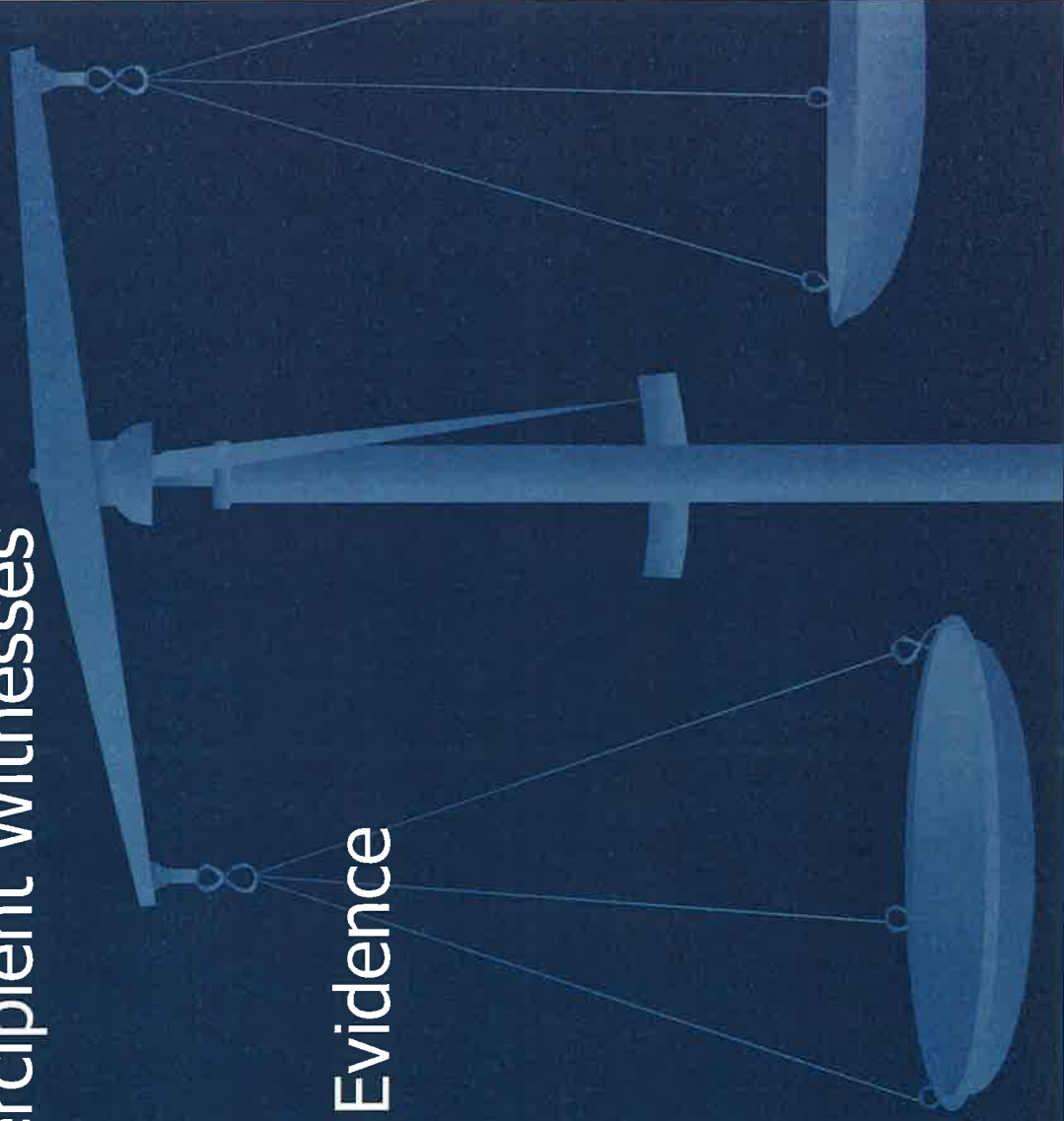
Presenting Forensic Evidence

Edward A. Andrews
Deputy District Attorney



FORENSIC EVIDENCE IN A DUI CASE:

- ❖ Evidence from Percipient Witnesses
- ❖ Expert Testimony
- ❖ Arguing Forensic Evidence

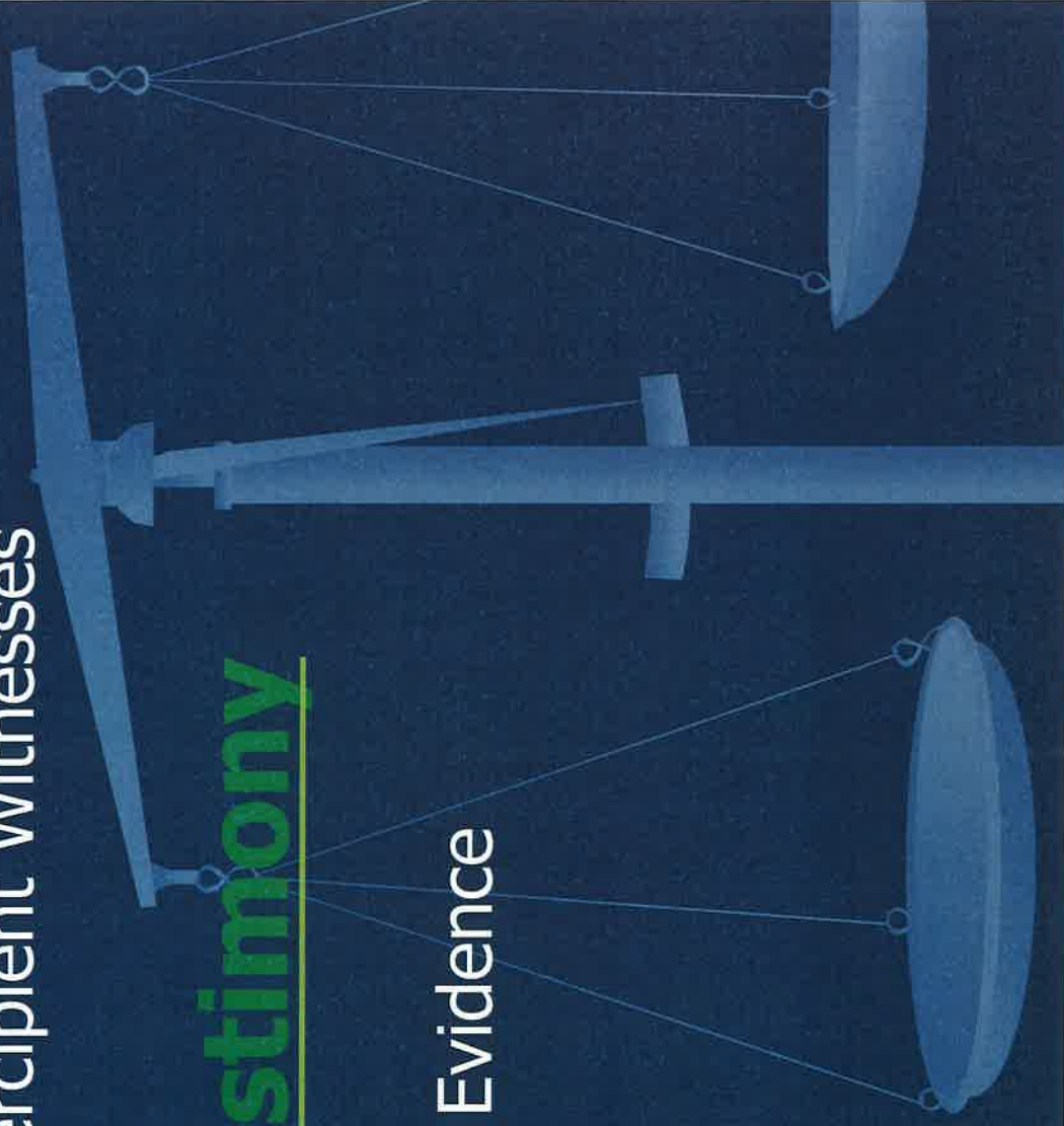


FORENSIC EVIDENCE IN A DUI CASE:

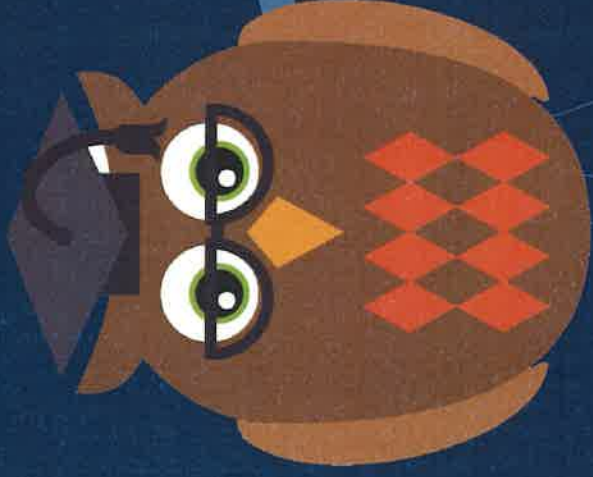
- ❖ Evidence from Percipient Witnesses

❖ Expert Testimony

- ❖ Arguing Forensic Evidence



THE EXPERT



- *Why have an expert?*
- *What can an expert do?*
- *How can I use an expert in my trial?*

THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)
2. Basis for the Opinion
3. Eliciting the Opinion
4. Explaining the Opinion (*If Needed*)

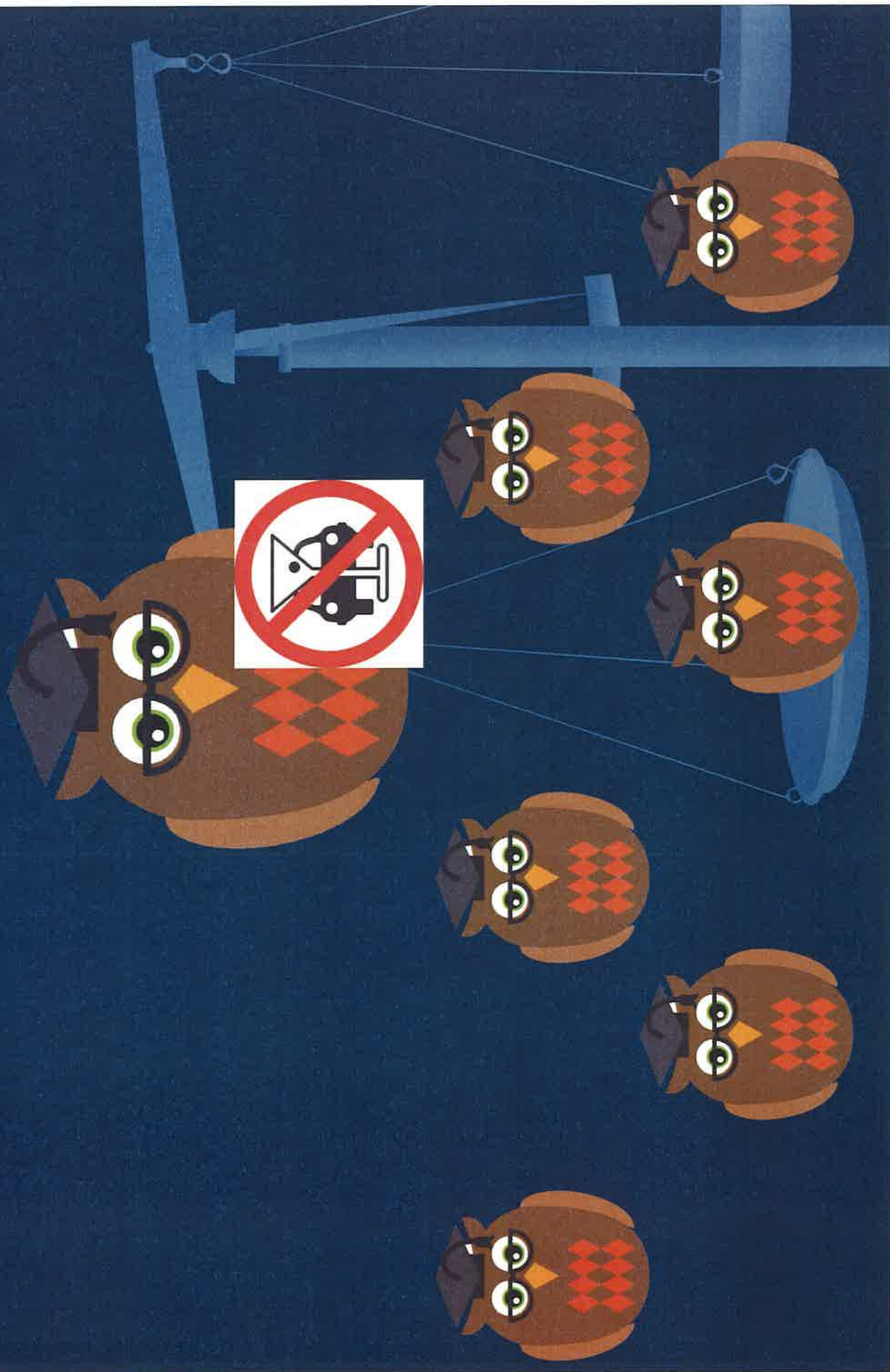
THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)

2. Basis for the Opinion
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4. Explaining the Opinion

A UNIVERSE OF EXPERTS



A UNIVERSE OF EXPERTS



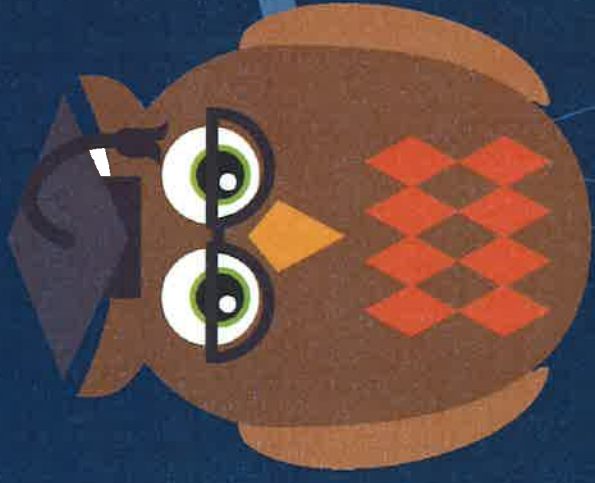


The Expert Witness

Establishing Expertise: Scientific Background

- *Current occupation & employer?*
- *Qualifications: Education; Certifications; Associations; Papers; Research; Awards;*
- *What do you do;*
- *How long have you done that;*
- *Prior testimony;*
- *Testimony for defense (no bias);*
- *Additional compensation? (No bias)*

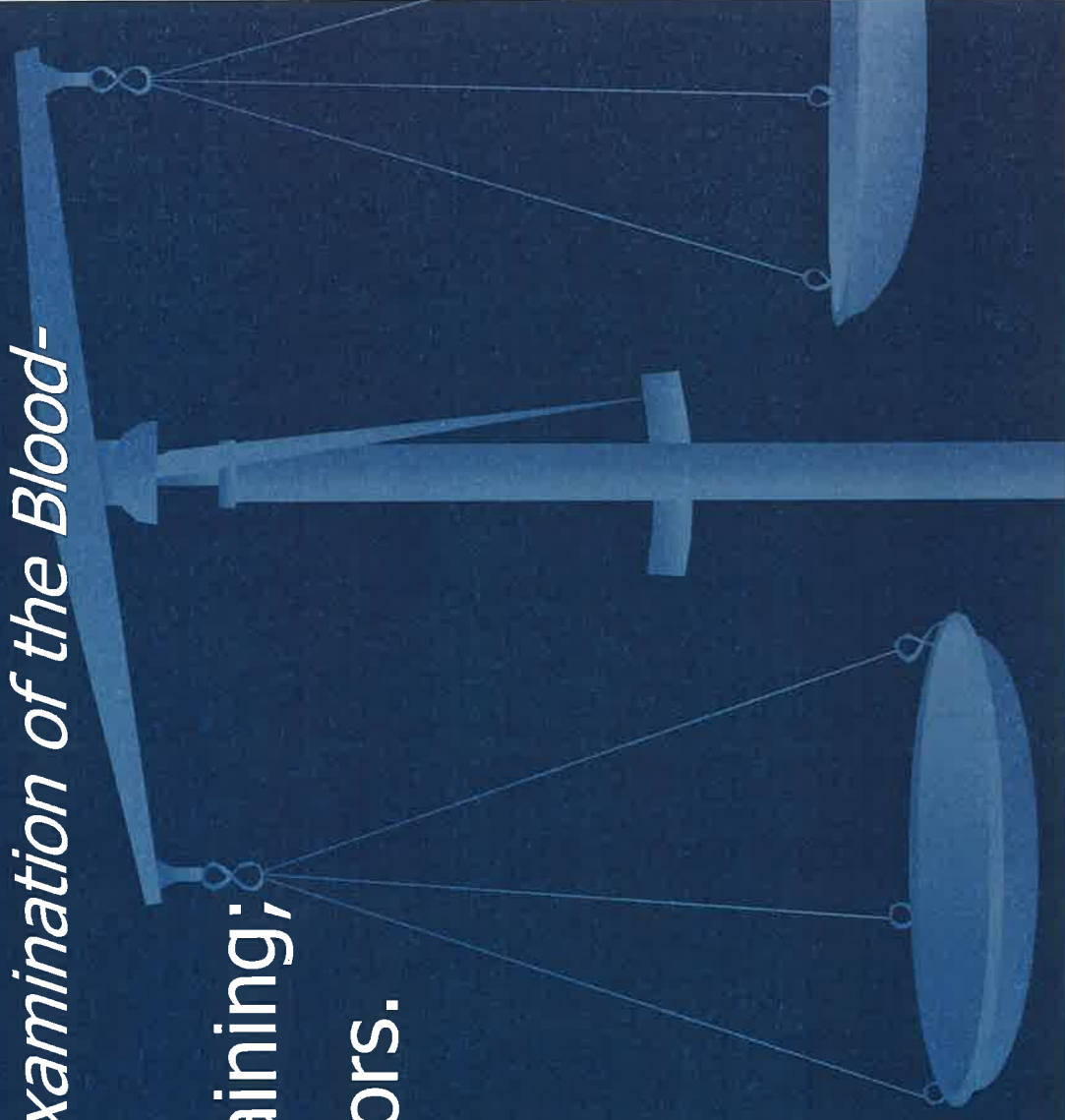
THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)
- 2. Basis for the Opinion**
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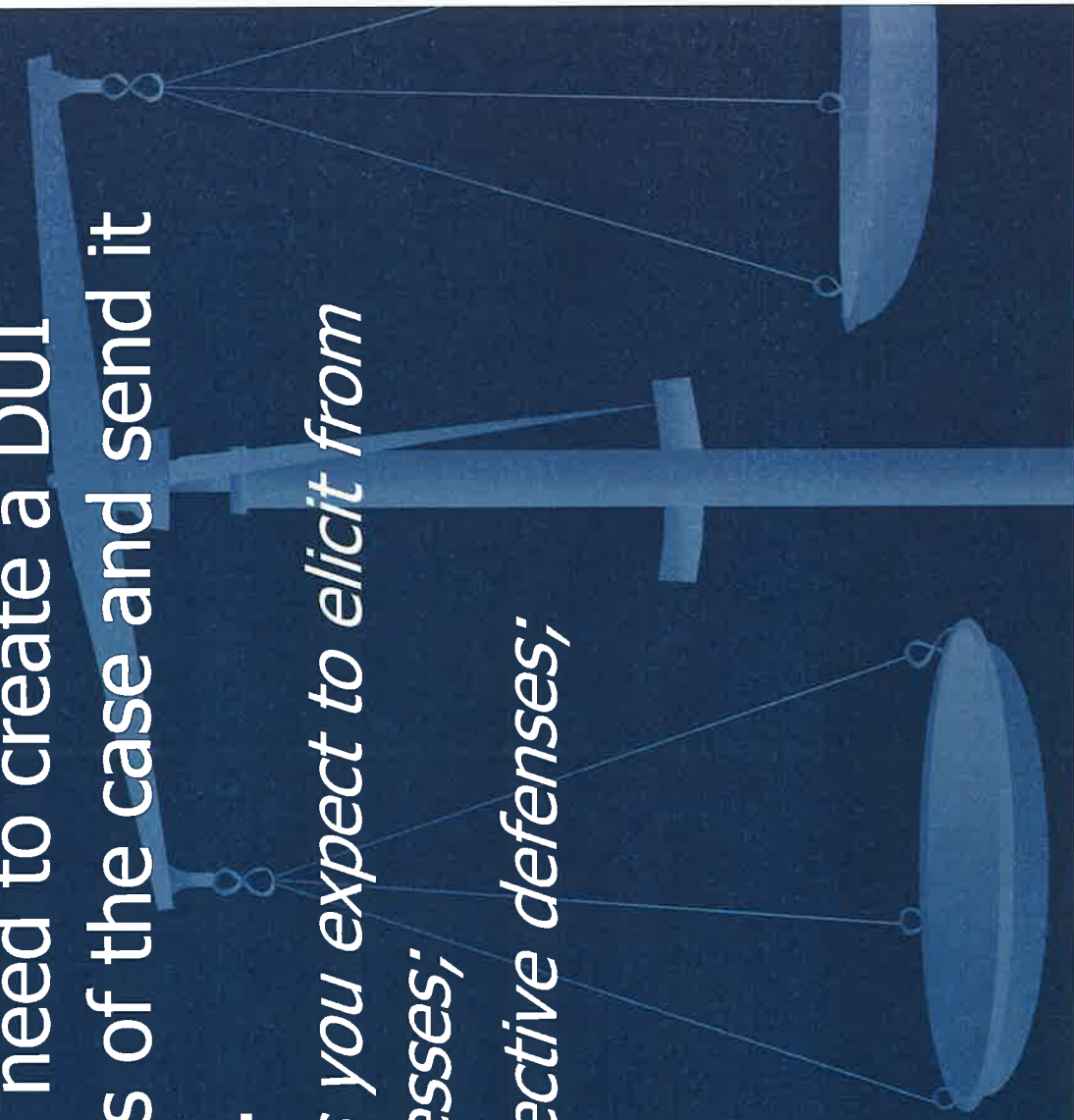
Resources

- CDAA DUI Prosecution Manual;
 - *Chapter XIII: Examination of the Blood-Alcohol Expert;*
- SFST/ARIDE Training;
- Fellow prosecutors.



Before Trial

DUI Hypo

- Before trial, you need to create a DUI hypo of the facts of the case and send it to the crime lab.
 - *Include all facts you expect to elicit from percipient witnesses;*
 - *Consider prospective defenses;*
 - *Discovery;*
 - *Follow-up*
- 

Before Trial

DUI Hypo

DUI Hypo – People v.

Gender: M

Height: 5'7"

Weight: 165 lbs.

DOB: 04-02-1980

Time of Encounter: approx. 2257 hours @ 10-18-2013

Stop Drive Time: approx. 2300 hours

Driving Pattern:

- Driving on 101 freeway
- Driving 45 mph, approx. 20 miles below speed limit
- White light emitting from rear of vehicle

Objective signs and symptoms:

- Strong breath odor of alcohol
- Red/watery eyes
- Slow/lethargic demeanor
- Can of Modelo brand beer on passenger floorboard of vehicle

Pre ESI questioning

Last slept: Yesterday, 11 hours
Last ate: 8 hours prior, tacos and eggs
Drank: Admitted, "1 big can of Budweiser"
Started drinking: 2000 hrs.
Stopped drinking: 2015 hrs.
Medication: No

ESIS

Horizontal Gaze Nystagmus

- Lack of smooth pursuit
- Distinct nystagmus at the extremes
- Eyes were red and watery

Romberg Balance

- Swayed approx. 1 inch front to back, approx. 2 inches side to side, while performing test
- Estimated 27 seconds to be 30 seconds

One Leg Stand

- Stated understood all directions
- Lifted right leg approx. 2 inches off ground, failed to count out loud, was instructed to count out loud
- Started test over
- Counted number 8 twice, and put foot down on numbers 10, 11, and 17
- Then placed foot down and asked if he could count in Spanish
- Started counting and, when he reached number 20, raised arms approx. 10 inches from side to help remain balanced
- Swayed both side to side and front to back as he counted
- Counted out loud until 32, at which time officer instructed subject to stop

Walk and Turn

- Took 9 steps forward
- Unsteady on feet as walked
- Not able to keep footing in a straight line
- Completed turn as instructed
- Lost balance while making turn and nearly fell over
- Took 9 heel to toe steps back
- Unable to keep feet in straight line, and missed heel to toe on step 1
- Raised arms for balance on step 2 and kept them raised throughout the test

Refused to provide a Preliminary Alcohol Screening test

Blood: 17% @ 2358 (Arvenio Ricafreute) [approx. 1 hour after stop drive]

Before Trial

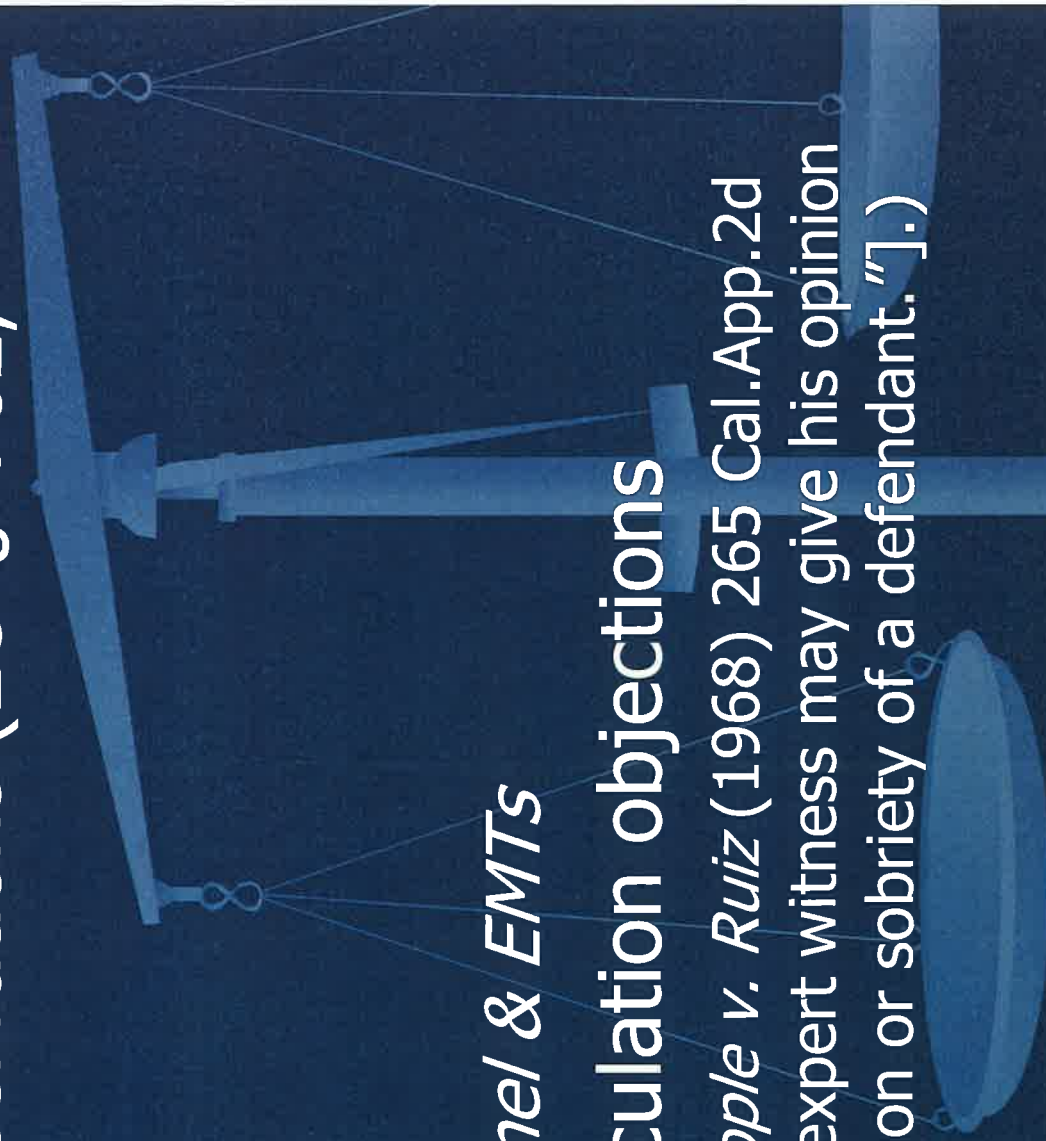
Expert CV

- When you learn who your expert is, obtain their CV & immediately discover it.
 - DUI: Crime Lab analyst;
 - H&S § 11550 (UI): DRE for UI opinion, Crime Lab analyst for tox., perhaps recent use theory;
 - H&S § 11350, 11377 (Poss.): Crime Lab analyst for drugs, perhaps DRE for usable amount.
- *Read CV for basis of experience (e.g., lab v. street), follow-up & hero questions*

Percipient Witnesses

Observations of Defendant

- Any witness' observations (EC § 702, 800):
 - *Civilians;*
 - *Victims;*
 - *Officers;*
 - *Medical personnel & EMTs*
- Prepare for speculation objections
 - (But see, e.g., *People v. Ruiz* (1968) 265 Cal.App.2d 766, 773 ["a non-expert witness may give his opinion as to the intoxication or sobriety of a defendant."].)



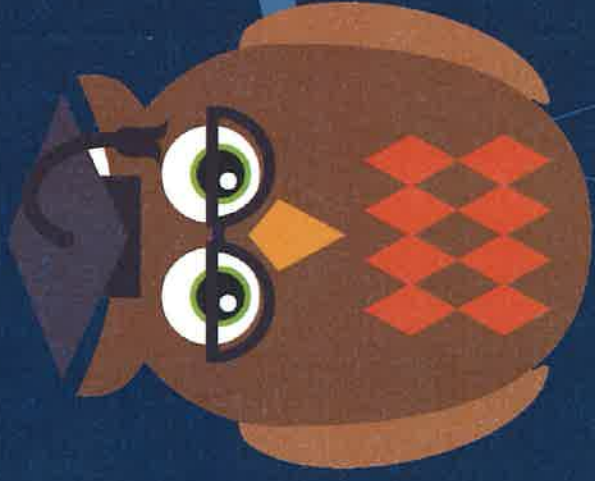
Percipient Witnesses

Tests of Defendant

- Officer or medical personnel
 - *Blood Tests*
 - *Breath Tests*
 - *DIR*
- *Remember to prepare examination of percipient witnesses to include all facts for expert's opinion(s)*

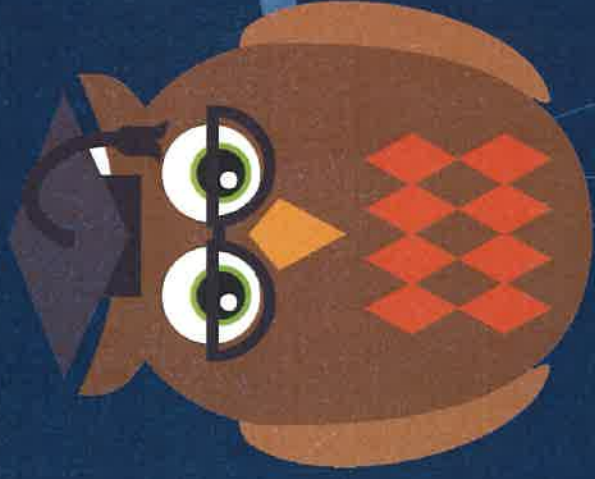


THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)
- 2. Basis for the Opinion**
3. Eliciting the Opinion
4. Explaining the Opinion

THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)
- 2. Basis for the Opinions**
3. Eliciting the Opinion
4. Explaining the Opinion



OPINION

Percipient witnesses' testimony



Basis for the Opinion



Hypothetical



Elicit the Opinion



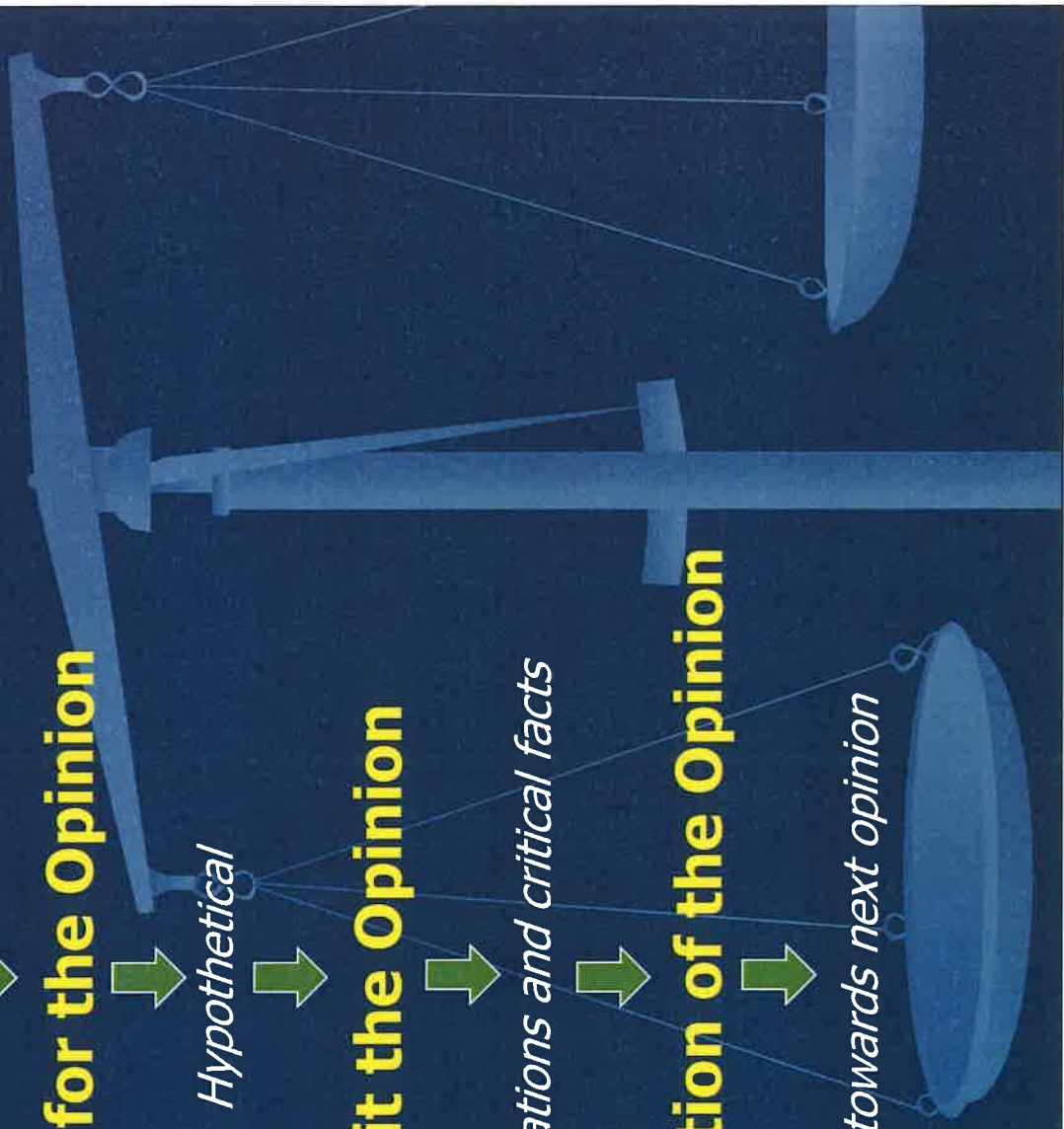
Justifications and critical facts



Explanation of the Opinion



Move towards next opinion





COMMON OUTLINE FOR DUI EXPERT

TOPIC	QUAL/QUANT?	Δ/GEN'L
I. Effects of Alcohol	Qualitative	General
II. FSTs	Both	Defendant
III. Science of Alcohol	Quantitative	General
IV. BAC Sample	Quantitative	Defendant
V. Retrograde Extrapolation	Quantitative	Defendant
VI. Ultimate DUI Opinion	Both	Defendant

- *Use the order that matters in your case;*
- *Opinions every step of the way . . .*

The Expert Witness



Effects of Alcohol: Mental v. Physical Impairment

- **Effects of alcohol, mental and physical;**
- *Establish mental impairment occurs before physical impairment;*
- *First opinions;*
- *Not "drunk" before impaired;*

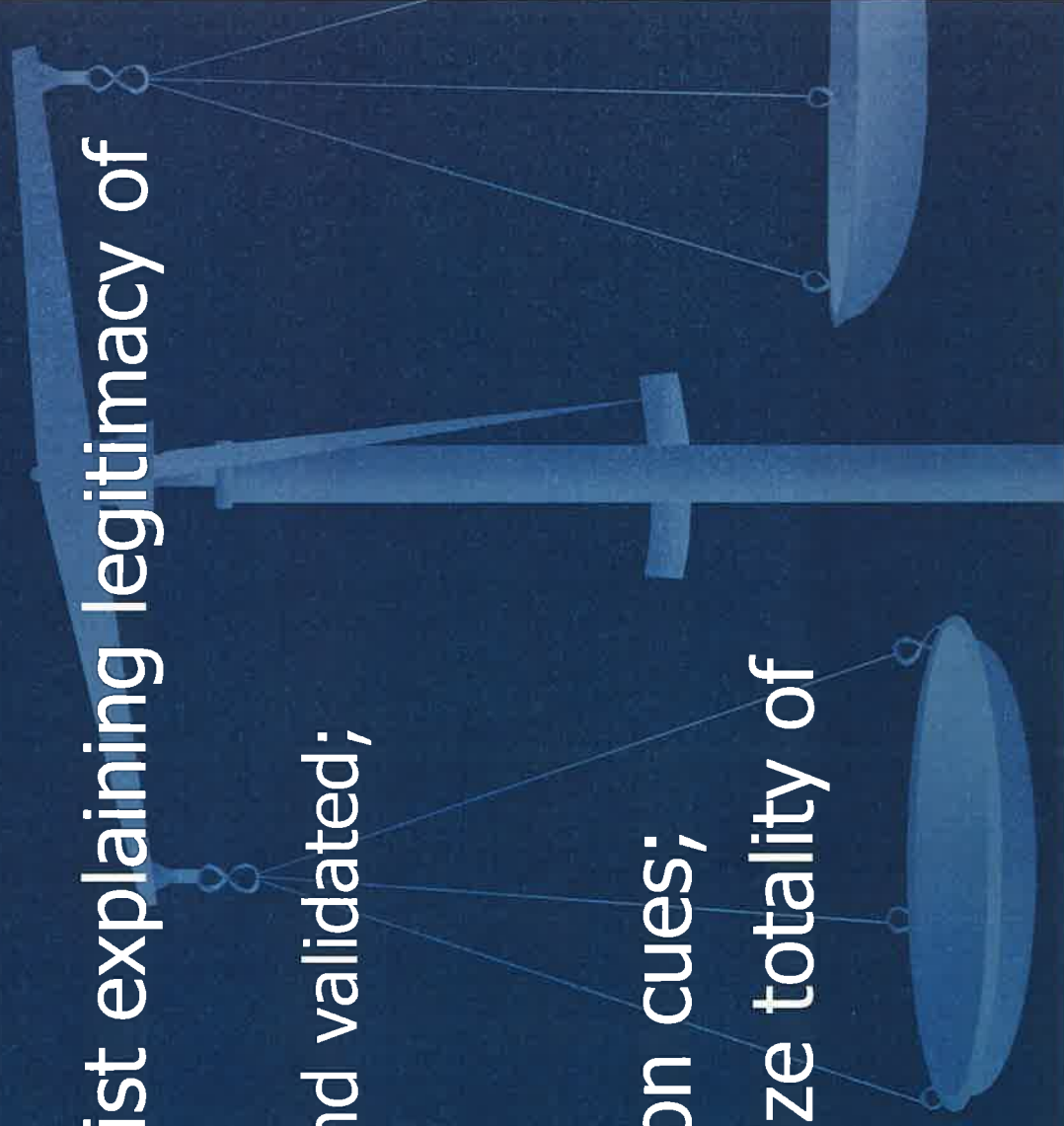


The Expert Witness



FSTs

- Unbiased scientist explaining legitimacy of FSTs to jury;
 - Standardized and validated;
 - NHTSA;
 - Cues/clues;
- Initial opinions on cues;
- Always emphasize totality of circumstances.



The Expert Witness



FSTs

- **Walk & Turn and One Leg Stand**
 - Cues/clues;
 - Demonstration – typically bad idea
- Anticipate cross:
 - Expert has never tested defendant;
 - Expert was not there;
 - Expert cannot opine based only on this test that defendant was DUI



The Expert Witness



FSTs

- **HGN**
 - Cues/clues;
- Anticipate cross:
 - Expert has never tested defendant;
 - Rare reasons someone would have HGN without being UI-Alcohol
- HGN can be very effective evidence;
 - Explain lack of control over HGN



The Expert Witness



FSTs

- **Romberg and Finger-to-Nose**
 - Standardized but not validated FSTs:
- Questions:
 - How helpful;
 - How used in DUI investigation;
- Anticipate cross and argument:
 - Do not include in ultimate hypothetical;
 - Argue to jury Def. UI-Alcohol even discounting these tests.



The Expert Witness

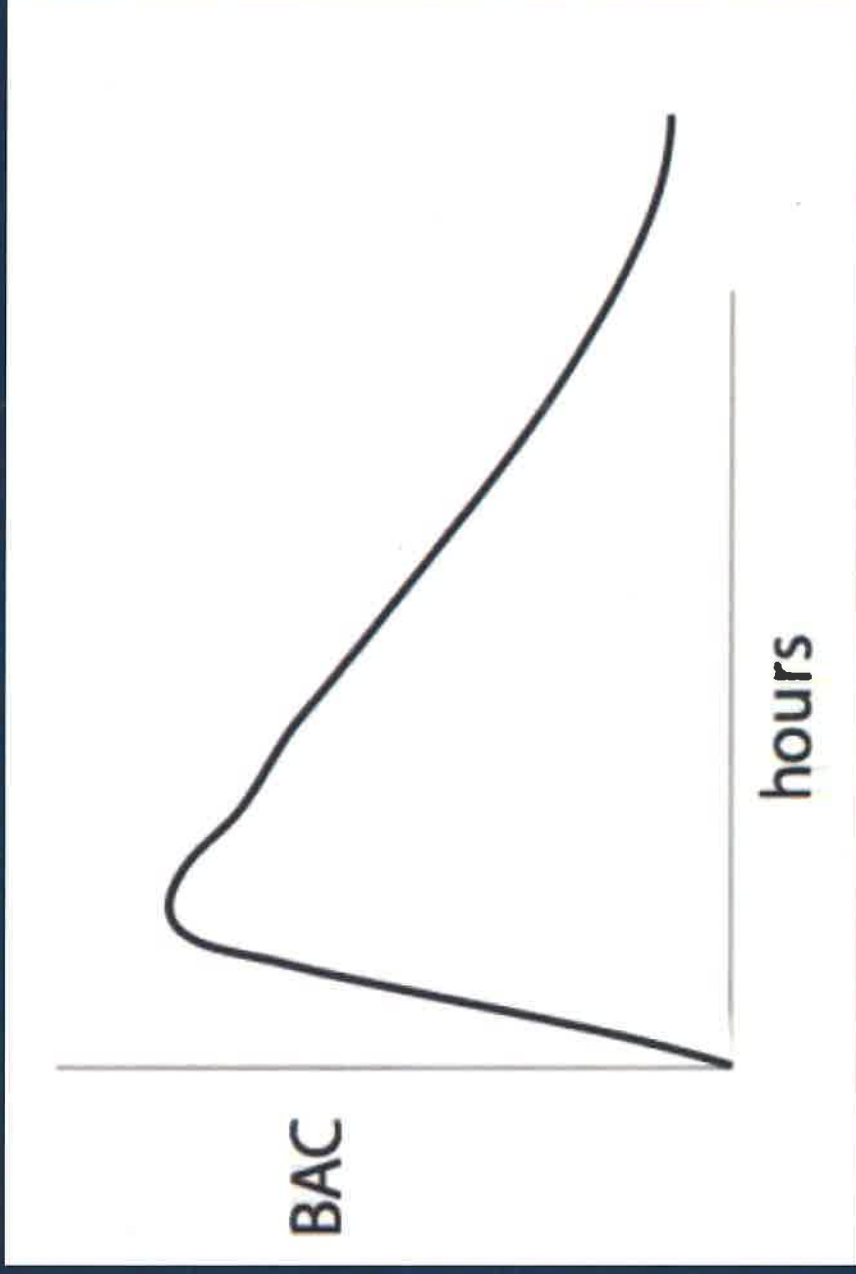
Science of Alcohol: Elimination Rate

- How the body absorbs alcohol;
- Typical length of absorptive phase;
- Elimination conceptually;
- Elimination rate
 - E.g., 0.018% avg.; Conservatively, 0.015%
 - Explanation of conservative rate;
- Widmark curve

The Expert Witness



Science of Alcohol: Widmark Curve



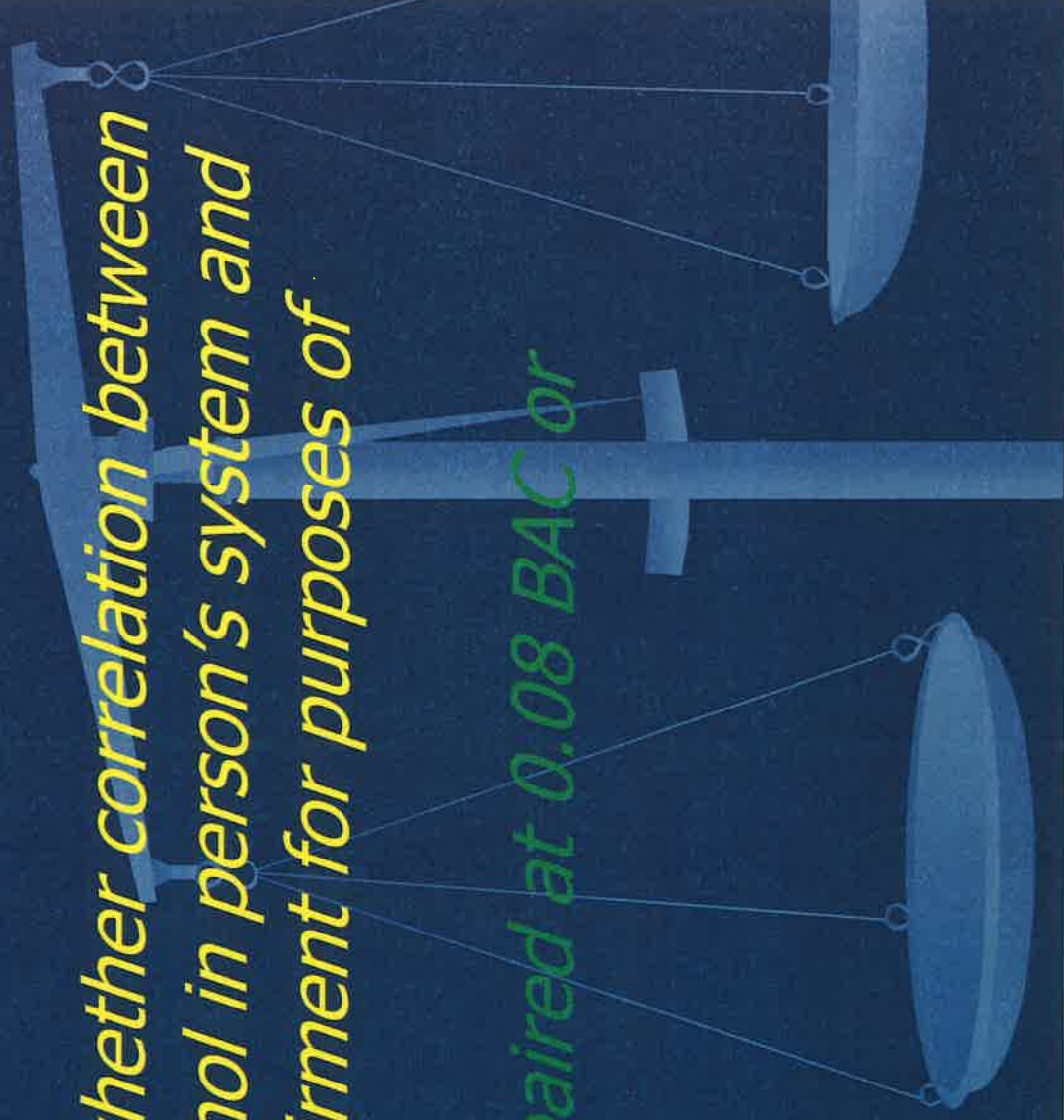
Conceptual likely better, as defendant/circumstances differ

The Expert Witness



0.08 percent = Impairment

- *Opinion as to whether correlation between amount of alcohol in person's system and degree of impairment for purposes of driving?*
- *Everyone is impaired at 0.08 BAC or higher.*



The Expert Witness



Testing: Reliability of Sample

■ Breath

- Crime lab often maintains PAS and EPAS, usually same device. If CHP or old, another agency may maintain PAS and/or EPAS;
- Approved device;
- Instrument maintained, checked for accuracy, calibrated if needed;
- Instrument safeguards;
- Instrument properly functioning;
- Expect breath tests to be valid and accurate.

The Expert Witness



Testing: Reliability of Sample

■ Blood

- Rely on percipient witnesses.
- Blood draw reliability (*People v. Cuevas* (2013) 218 Cal.App.4th 1278, 1285-1286)



The Expert Witness



Testing: Reliability of Sample

■ Defenses

- Chain of custody important but quick;
- Consider thoughtfully which defenses to anticipate (e.g., do I need to spend the jurors' time on mouth alcohol?);
- Jurors already working to follow reliability safeguards outside everyday experience;
- Often more effective to establish safeguards and address specific challenges to reliability in redirect.



The Expert Witness

Testing: Forensic Alcohol Analysis

- If **breath**, basically occurs at the scene;
- If **blood**, explain method of analysis and safeguards



The Expert Witness



The Idea of a Standard Drink

- What a **standard drink** is;
 - Jurors often think a “drink” is more than a standard drink;
- Number of standard drinks acting on system at given BAC;
- If factor in burn-off, standard drinks would be higher.

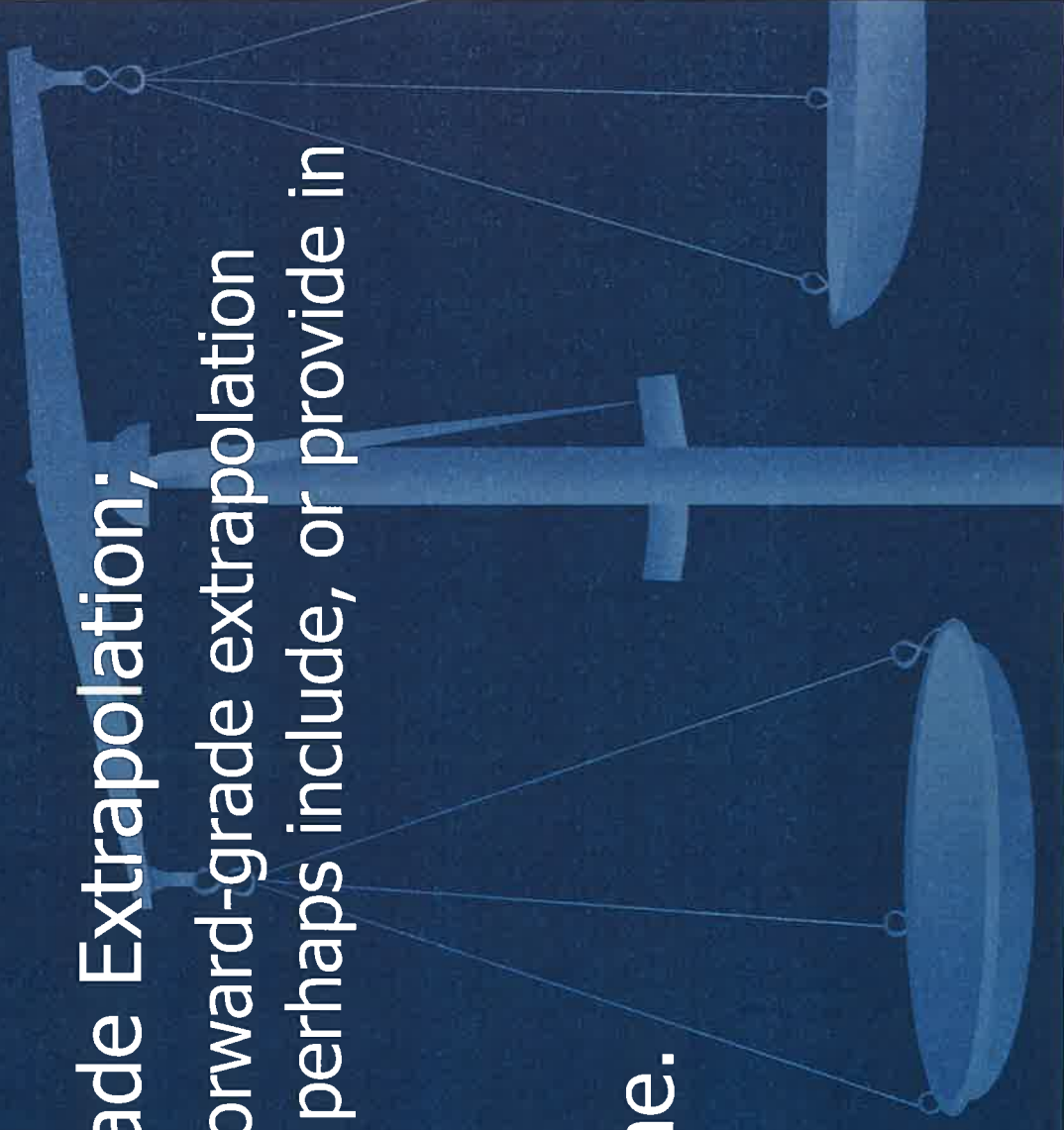


The Expert Witness

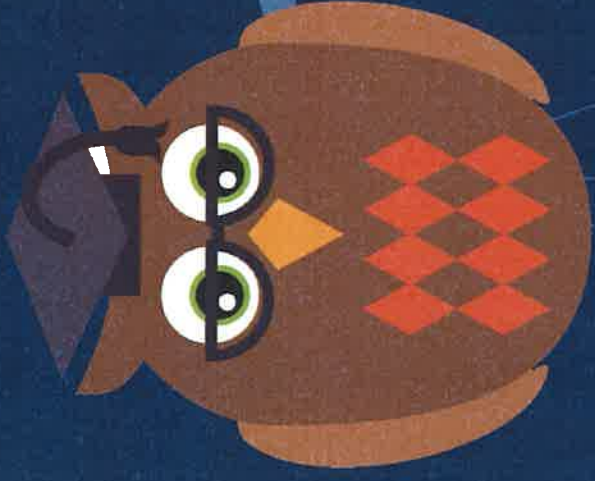


Retrograde Extrapolation – Applying Science the Jury Has Learned

- Explain Retrograde Extrapolation;
 - If anticipating forward-grade extrapolation based defense, perhaps include, or provide in rebuttal;
- Hypothetical;
- BAC at drive time.

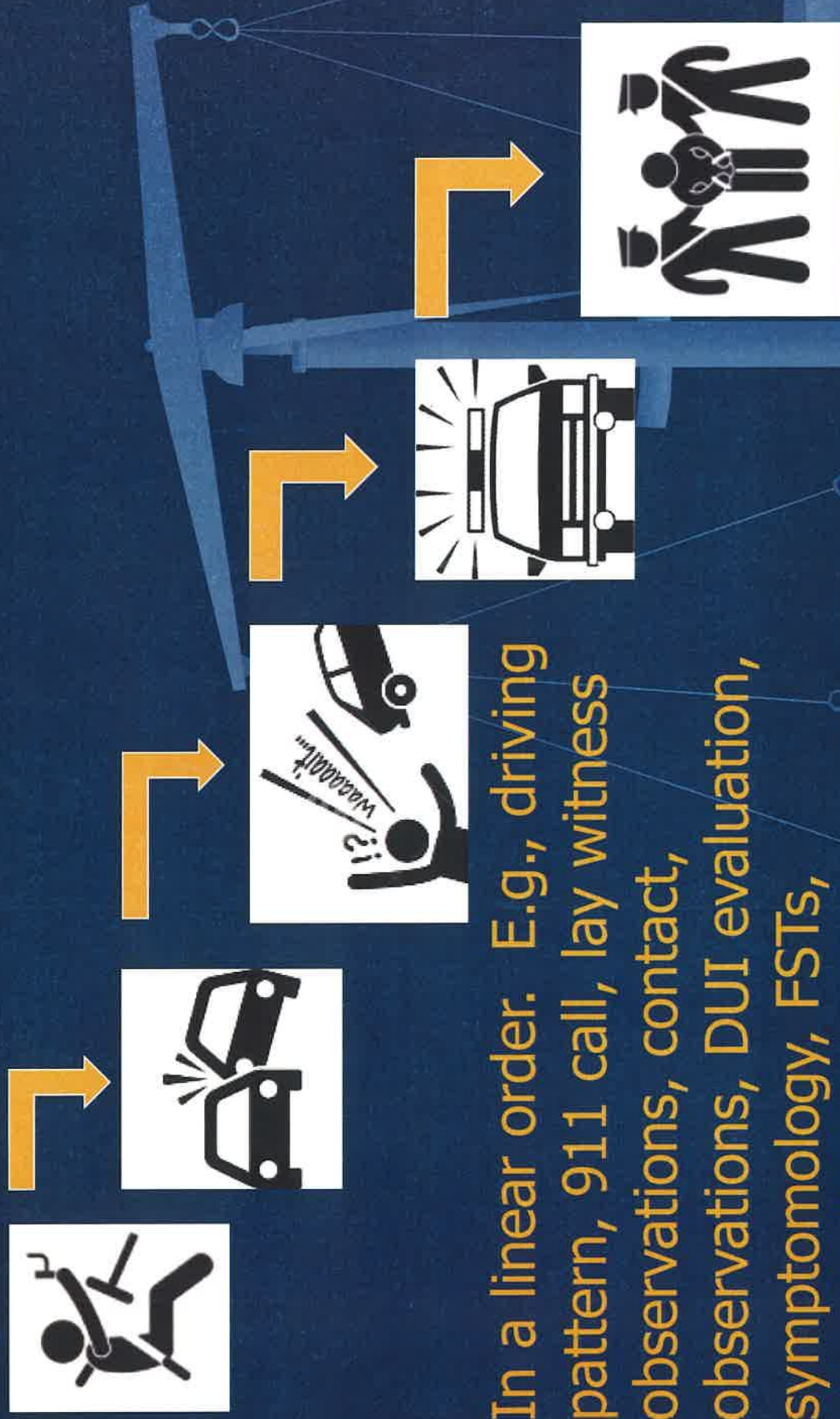


THE EXPERT



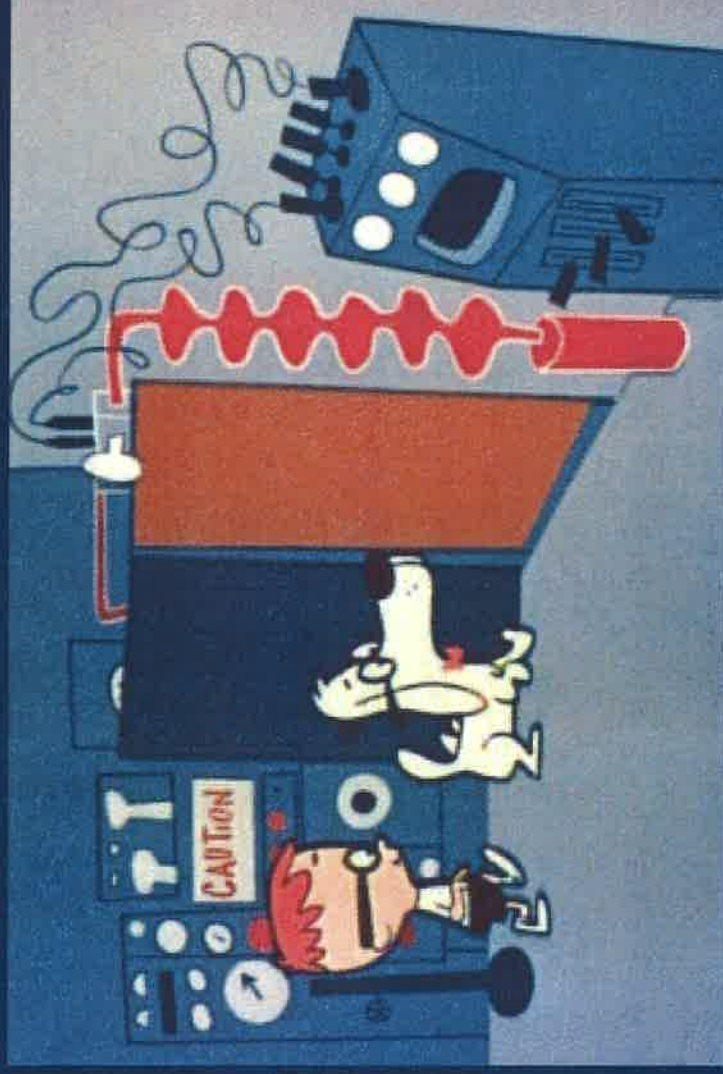
1. Qualifying Expert to Testify (EC § 720.)
2. Basis for the Opinion
- 3. Eliciting the Opinion**
4. Explaining the Opinion

The Way It Happened



In a linear order. E.g., driving pattern, 911 call, lay witness observations, contact, observations, DUI evaluation, symptomology, FSTs, chemical test.

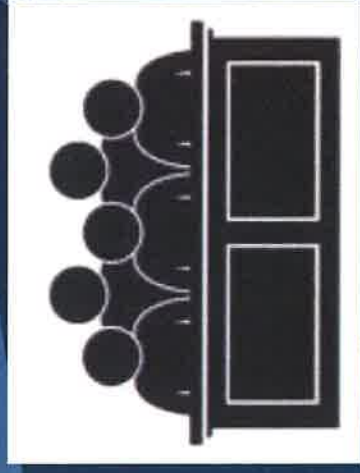
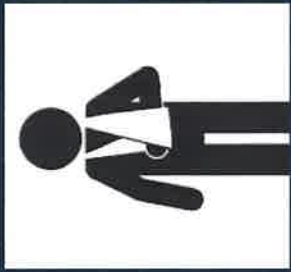
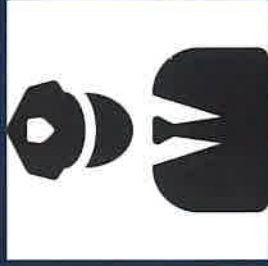
WABAC Machine?



No. Worth emphasizing in voir dire. How will facts be shown?

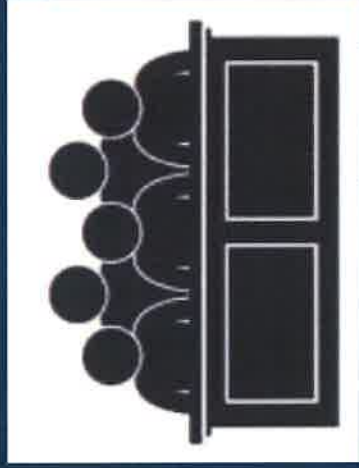
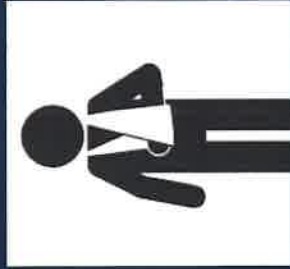
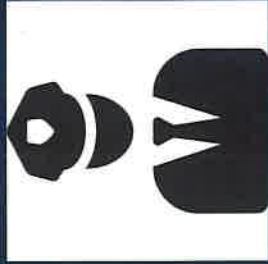


PERCIPIENT WITNESSES & CUSTODIANS OF RECS.



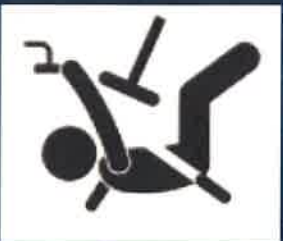
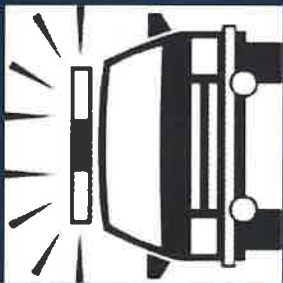
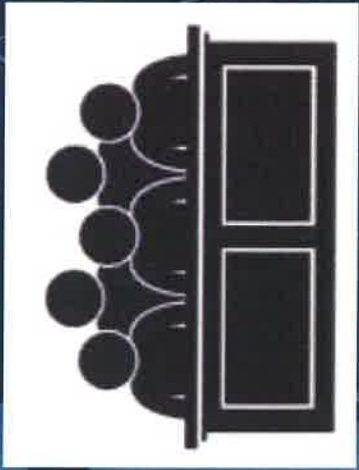
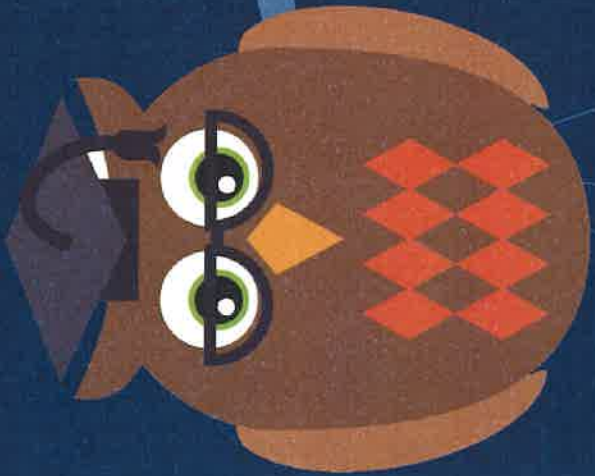
- Coming in based on witness availability.
- Will provide foundation for exhibits that will be used for multiple reasons, some of which will seem out-of-order or irrelevant.
- Some statements may be coming in through other witnesses via hearsay.

PERCIPIENT WITNESSES



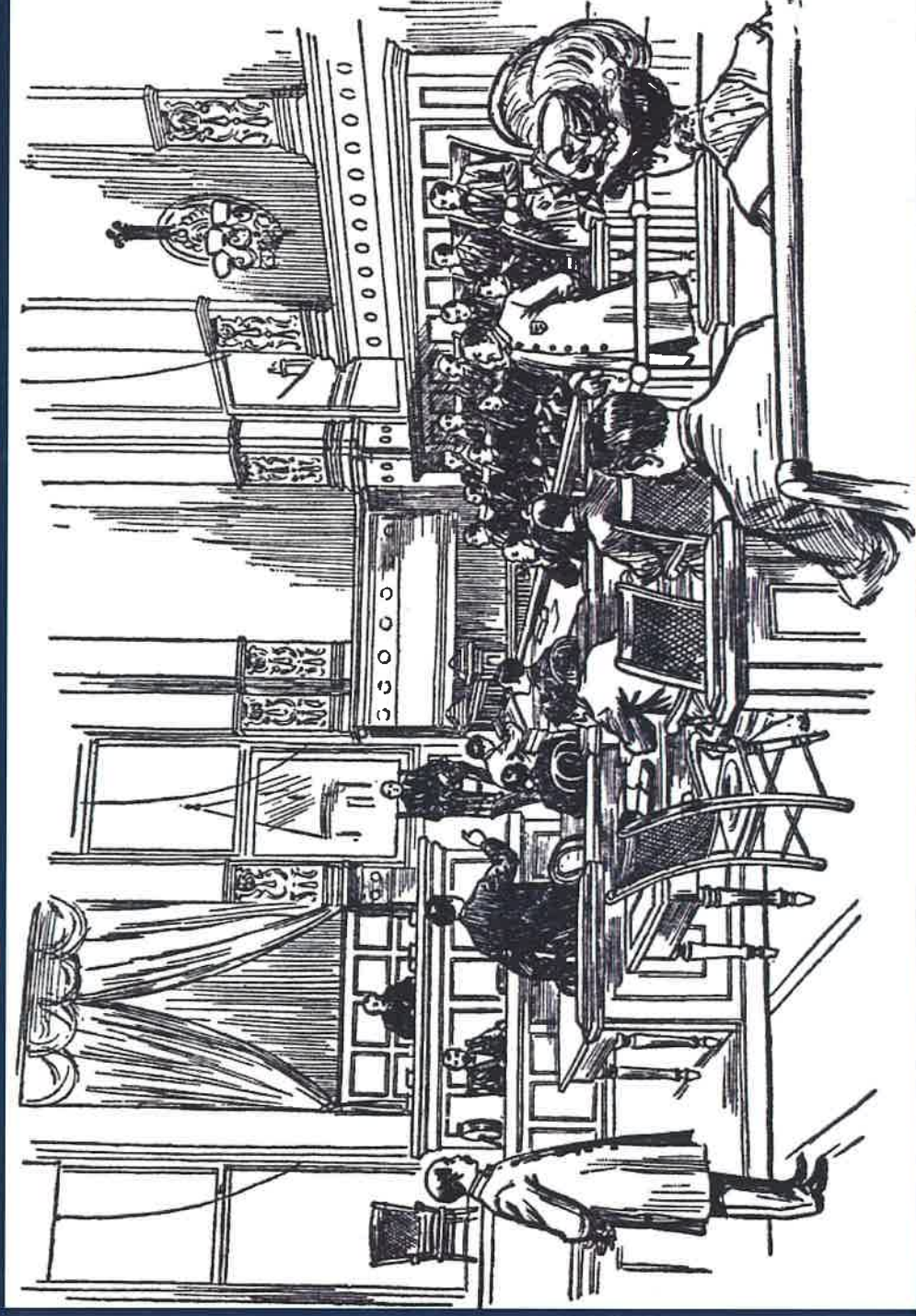
- This is one reason a clean, easy-to-follow closing argument is critical.
- It is also an opportunity to give a logical presentation of critical facts in a linear order through a witness who is usually required, but also useful . . .

THE EXPERT



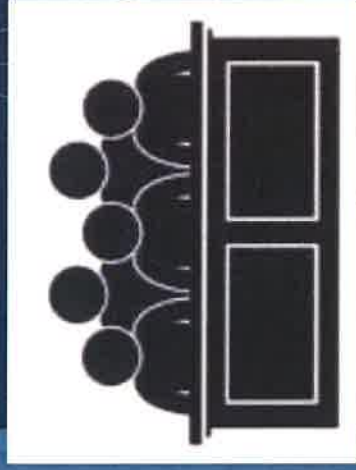
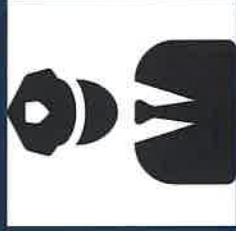


THE EXPERT

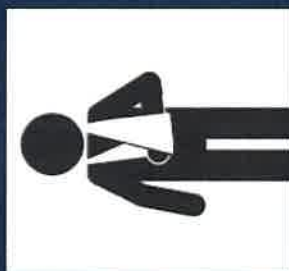
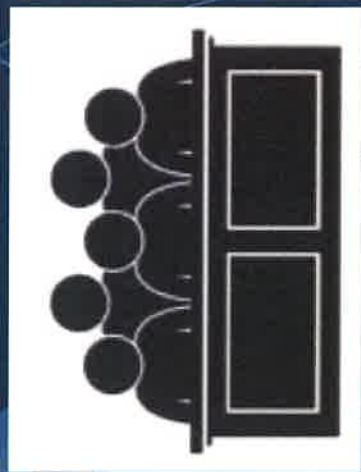


Opportunity:
A Focused Retelling of Percipient Witnesses' Testimony,
with a Conclusion

CLOSING ARGUMENT



THE EXPERT



ULTIMATE DUI OPINION



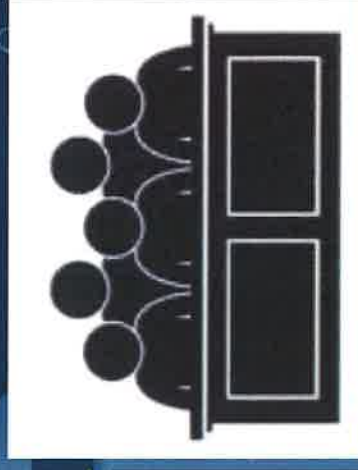
*Objective Signs
of Impairment*

Admissions

FSTs

*Testing
Results*

*Retrograde
Extrapolation*



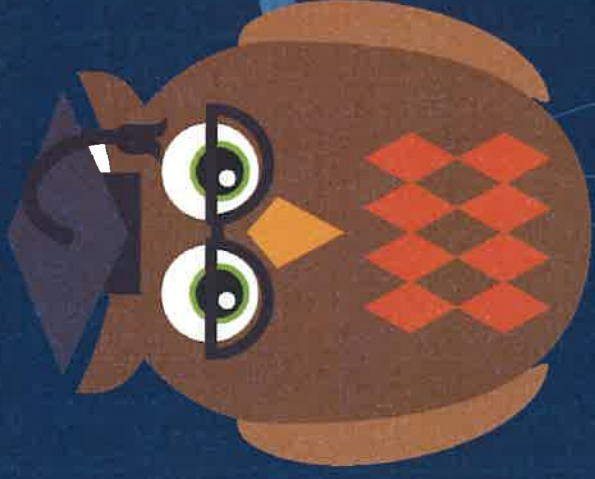
The Expert Witness



Ultimate DUI Opinion

- Provide all information in hypothetical;
 - Opportunity to list *all* evidence that supports ultimate conclusion;
 - Even information on which expert may not rely, emphasizing expert opinion is conservative and correct;
- Opinion for each count – (a) and (b);
 - Expert opinion can go to “ultimate issue” for trier of fact (EC § 805).

THE EXPERT



1. Qualifying Expert to Testify (EC § 720.)
2. Basis for the Opinion
3. Eliciting the Opinion

4. Explaining the Opinion

... If needed. Often better to frontload explanations, so that ultimate opinion is last set of questions.

A UNIVERSE OF EXPERTS



THE H&S 11550 (UI) EXPERTS



DRE:

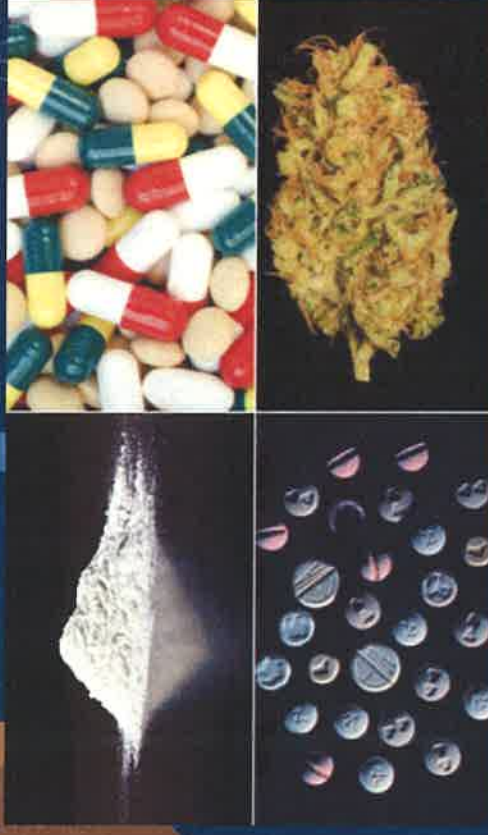
- More field tests and field information go into opinion;
- Supports that Def. UI of something;
- Supports that Def. UI of substance within specific category (e.g., CNS Stimulant, not Cannabis)

THE H&S 11550 (UI) EXPERTS



Crime Lab Analyst:

- Toxicology;
- Chain of custody;
- Recent use, depending on substance, depending on case.



THE H&S 11350, 11377 (POSS.) EXPERT



Crime Lab Analyst:

- Analysis of drugs;
 - typically “dry drugs”;
- Chain of custody.



THE H&S 11350, 11377 (POSS.) EXPERT(S)



DRE:

- Perhaps, for usable amount;

On usable amount: *People v. Rubacalba* (1993) 6 Cal.4th 62

(*Id.* at p. 66 [“usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven.”].)



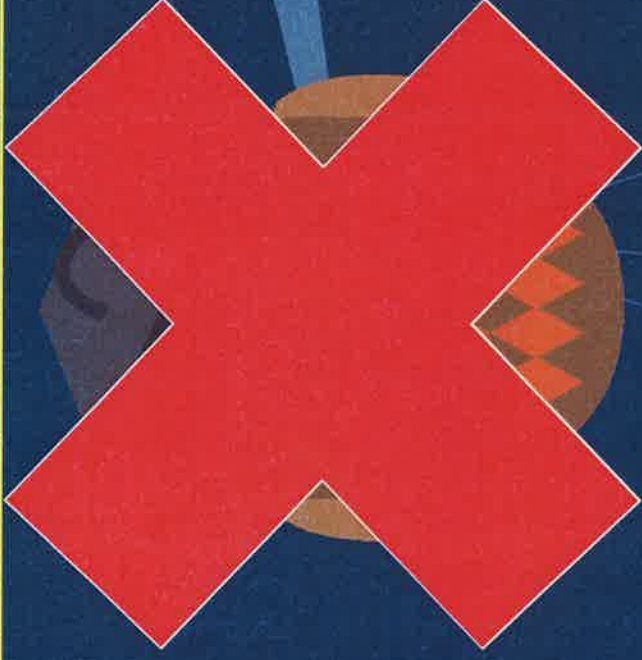
The Expert Witness

Example Common Legal Issues

- Always be prepared with business records exception & public records exception (EC § 1271, 1280);
- Anticipate Confrontation Clause issues;
- Prepare for issues under *People v. Lopez* (2012) 55 Cal.4th 569.



CROSSING THE EXPERT



1. Preparing for cross-examination of People's expert;
2. Specific example: Partition ratio;
3. Cross-examination of defense expert.

Expert Cross-Examination: **Protecting Your Expert**

Anticipate typical areas of cross and prepare:

- *Expert has no knowledge of defendant/item;*
- *Adding or subtracting facts to test out defenses;*
- *Claiming bias;*
- *Demeaning credentials or training;*
- *Eliciting improper opinions;*
- *Example: partition ratio in breath cases.*



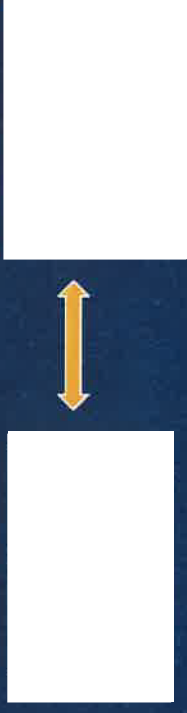
Partition Ratio



- *Conversion factor in breath testing devices – VC*
- § 23610(b)
- Can vary between people based on physical differences, sickness, etc.
- Does it come in?



Partition Ratio



VC § 23152(b)

- *No. Not relevant.*
- *Case law focused on plain reading of subdivision (b), which provides:*
- *"It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.*
- *"For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath."*



Partition Ratio

VC § 23152(a)

- *Maybe. It depends on whether you argue a legal presumption of impairment under § 23610(a)(3), which provides:*
- *"If there was at that time 0.08 percent or more, by weight, of alcohol in the person's blood, it shall be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense. we hold that evidence about partition ratio variability is relevant in generic DUI cases to rebut the presumption of intoxication in section 23610.*

Partition Ratio

VC § 23152(a)

- *D can argue partition ratio to rebut the legal presumption:*
- *"[W]e hold that evidence about partition ratio variability is relevant in generic DUI cases to rebut the presumption of intoxication in section 23610."*
- *People v. McNeal (2009) 46 Cal.4th 1183, 1200*

Partition Ratio



VC § 23610(a)(3)



- *Do you want partition ratio arguments?*
- *Probably not. May want to concede pre-trial.*
- *Expert will likely opine anyone at breath BAC of 0.08% or higher is UI.*
- *Not legal presumption, but powerful opinion.*

Blood Case?



VC § 23610(a)(3)

- *Presumption is fair game without any partition ratio issue. Use it.*
- *Additionally, you have the expert opinion.*
- *Remember, this is just for the "(a)" count.*

Many Presumptions



- For VC § 23152, **subdivision (a)**, there is the 0.08% BAC = impairment presumption under VC § 23610(a)(3);
- For VC § 23152, **subdivision (b)**, there is "a rebuttable presumption" that D was 0.08% BAC at drive time if D was 0.08% "at the time of the performance of a chemical test within three hours after the driving" under VC § 23152(b).
- Because it is under subdivision (b), doesn't matter if breath or blood.

Expert Cross-Examination: Legally Improper Opinions



- Reliability of breath testing machines generally;
- *People v. Vangelder* (2013) 58 Cal.4th 1, 34;
- Misusing Title 17 requirements.
 - E.g., Title 17 requirement that third sample be taken if evidentiary breath samples are not within 0.02% BAC of each other, to argue unreliable within 0.02% BAC;
 - Arguing the PAS is unreliable because it did not follow Title 17 (which applies to chemical test);
- Claiming Title 17 controls admissibility (weight v. admis.)

Expert Cross-Examination: Opinions Not Scientifically Accepted



- *Forward-grade extrapolation*
- *As opposed to retrograde extrapolation.*
- *Retrograde extrapolation relies on standard average elimination rate;*
- *Forward-grade extrapolation relies on absorption rate;*
- *Absorption rate varies dramatically by individual and circumstances.*



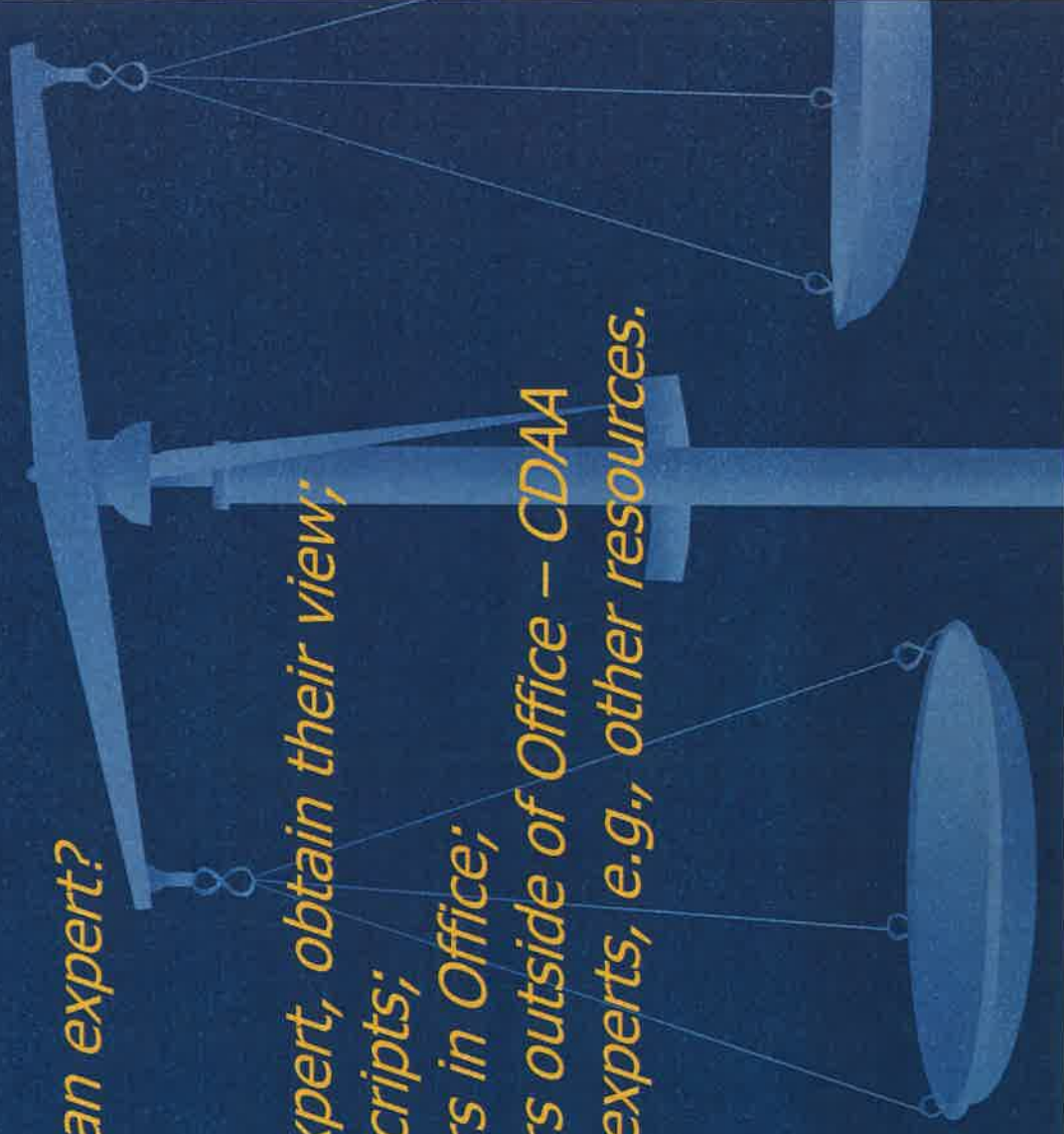
Expert Cross-Examination: Crossing the Defense Expert

“Your Honour, I call Nigel From The Pub ... expert
witness on whatever you like.”

Defense Expert Cross-Examination:

Preparation

- *Is defense calling an expert?*
- *Get opinion;*
- *Get CV;*
- *Share with your expert, obtain their view;*
- *Review prior transcripts;*
- *Reach out to others in Office;*
- *Reach out to others outside of Office – CDAA chatboards about experts, e.g., other resources.*

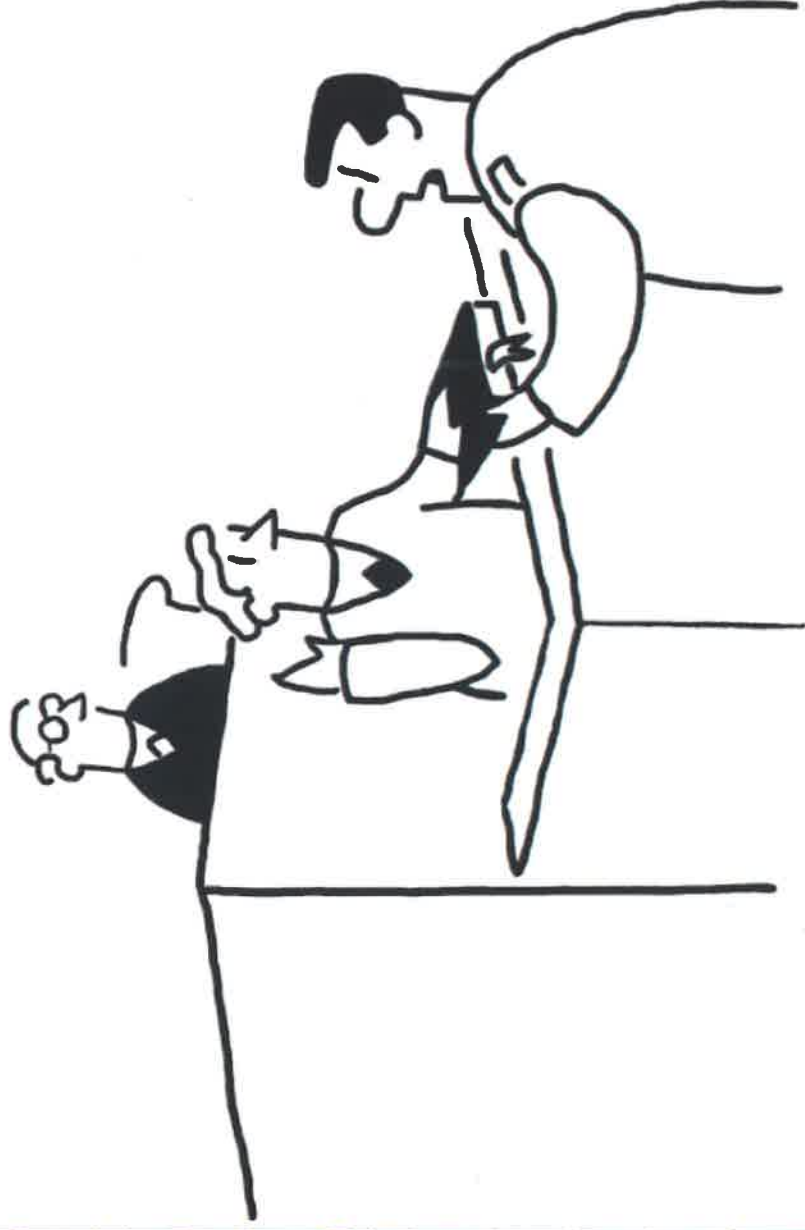


Defense Expert Cross-Examination:

Common Background Issues

- **Bias**
 - *Unlike forensic analysts, who are compensated irrespective of testimony or result, D expert is paid fee;*
- **Lack of experience**
 - *Expert often has background – even high-level background – in forensic science, but outdated*
 - *No longer testing samples, e.g.*
 - *CV very helpful for this area.*
- **Lack of knowledge of subject**
 - *Expert typically never meets defendant;*
 - *Phone consultation or merely examination of reports and discovery*

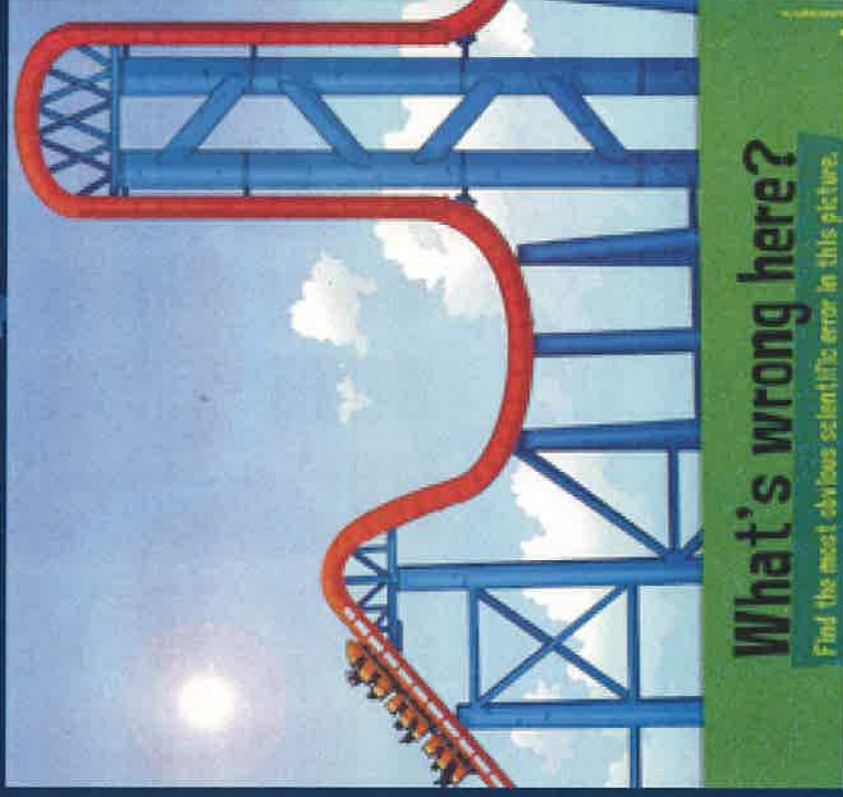
Expert Cross-Examination: The Opinion



"Do you swear to spin the truth,
the whole truth and nothing but the truth?"

Expert Cross-Examination: Challenging the Opinion

- *Different Strategies:*
 - *Get-in & get-out or challenge on science?*



Expert Cross-Examination: **Challenging the Opinion**

An example approach:

- *Establish bias;*
 - *Fee;*
 - *Marketing;*
 - *Establish lack of current experience;*
 - *No longer tests samples, maintains devices, etc.;*
 - *Establish lack of contact with defendant;*
 - *Find areas of agreement;*
 - *Possible signs of impairment;*
 - *Things established by prior employment;*
 - *Everything possible;*
 - *Pin-down opinion – especially unreliable aspects – for rebuttal from your expert.*
- Start strong, end strong. (As with all cross.)

QUESTIONS?

