Countering defense attacks on the NHTSA manual

Stop me if you think you have heard this one before:[1]

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You just finished the direct examination of the investigating officer in a driving while intoxicated (DWI) trial. You were able to qualify her as an expert on the standardized field sobriety tests (SFSTs) researched and developed by the National Highway Traffic Safety Administration (NHTSA). During your direct, the officer walked through the SFST instructions she was taught to administer in the academy, she detailed how she gave them on the night of the arrest, and you concluded with the number of clues she observed. You pass the witness, and the very first words out of the defense attorney's mouth are something to the effect of, "Now, officer: Isn't it true that the NHSTA manual says ..."[2]

Nine times out of 10, the manual the defense attorney has in his lap is not the same as the one on which the officer trained. Sometimes, defense is reading from a PDF or notes on a laptop. Other times, he has the manual printed out in a binder or bound in a notebook. The defense does not bother to mention which version of the manual he's referring to, and he won't ask if the officer was trained on the same version or if he is referring to the instructor guide, participant guide, or even one of the "refresher" guides available online. Instead, the defense immediately (and selectively) jumps into portions of the NHTSA manual in an effort to score some quick points and pretend the value of the research and training contained in the manual supports his side of events regarding the offense.

As prosecutors, we are responsible for seeing that justice is done.[3] Part of that process is making defense counsel follow the Rules of Evidence to make sure the jury is not left with a false or misleading impression. A defense attorney's misuse of a NHTSA manual in trial creates opportunities for such a false impression if the prosecutor is not prepared. This article will briefly discuss some of the common issues that arise when the contents of a NHTSA manual become an issue during trial and how to deal with them.

Hearsay and lack-of-foundation objections

Hearsay is a proper objection when opposing counsel fails to provide the appropriate foundation for the "learned treatise" hearsay exception.[4] The foundation should be laid before defense attempts to cross-examine the officer on the contents of the manual. Texas Rule of Evidence 803(18) provides an exception to the rule against hearsay for statements contained in a treatise, periodical, or pamphlet if "the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination and the publication is established as reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice."

If the foundation to establish this rule is not laid, the defense should not be allowed to get into statements in the manual (but the judge might let him anyway). The officer is being presented as an expert witness on intoxication; she can therefore be questioned with learned treatises in the area of her expertise. If the officer says that she was not trained, is not familiar with, or does not rely on the document the defense presents, then defense counsel will arguably not have established the hearsay exception. There is room for disagreement when it comes to making this objection because a prosecutor does not want the jury to believe the State is hiding something after just having asked the officer to talk about the

manual (generally) on direct. Following the proper procedure at this phase will help ensure that the right version of the manual is used, and it will give the officer a fair shot at answering defense questions correctly.

One way to do this is by objecting and requesting to see what version of the manual defense counsel has with him in trial. If necessary, ask the court to let you take the witness on voir dire so that you both have the opportunity to examine and review the document that is being used on cross-examination. If it turns out that the defense is using the proper manual, withdraw the objection. If he isn't, ask the court to exclude references to it, or remember to remind the jury during closing that the defense attorney's questions are not evidence (especially when they are questions based off the wrong manual). The real danger you are trying to avoid is that the officer gets confused by the formatting of an unfamiliar version of the NHTSA manual. A defense attorney may try to confuse an officer with rapid-fire questioning, which leads to admissions that the officer doesn't fully understand. For example, I have seen an officer admit that potassium from too many bananas may cause HGN when under cross-examination from an outdated manual.

Even if the defense lays the proper foundation, the rule does not allow for the statements or portions read from the manual to be received as an exhibit, though the rule does allow the defense to read these portions into evidence.[5] More likely than not, defense counsel is going to cross-examine the officer only on material in the manual he believes the officer did not comply with and ignore the portions that show the officer did follow the manual's guidelines. The defense will almost certainly avoid portions establishing the validity of the SFSTs, which intends to set up a defense argument during closing that the officer's failure to comply with certain portions of the manual invalidates the SFST results and that the manual says the same.

In the context of the "learned treatise" rule, it is important to remember that a learned treatise can be used only "in conjunction with testimony by an expert witness, either on direct or cross-examination."[6] It is the prosecutor's responsibility to make sure that the jury receives every bit of material from the manual it can to combat this argument and re-affirm the reliability of the SFSTs in the case as soon as possible.[7] One way to do that after a prosecutor has used the "lack of foundation" objection to his or her benefit is through the rule of "optional completeness."

Optional completeness

If there comes a point during trial where the defense attorney is able to read a portion of the manual into evidence, the prosecutor should be able to invoke the rule of optional completeness. Texas Rule of Evidence 107 allows a prosecutor to inquire about and introduce other parts of the NHTSA manual that the jury should in fairness be able to consider along with the part offered by defense. The rule provides that if "a party introduces part of a ... writing,[8] an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other ... statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent."

A Tenth Court of Criminal Appeals case illustrates how this rule has applied to the NHTSA manual during trial. In *Wisdom v. State*, defense counsel asked the trial court if he could read a portion of the NHTSA manual to the jury and into evidence that stated the SFSTs are valid "only when the tests are administered in the prescribed, standardized manner."[9] In response, the prosecution asked under Rule 107 that several paragraphs of text before that portion also be read. This additional portion included the part where the three standardized tests were found to be highly reliable in identifying subjects whose BACs were 0.10 or more. Considered independently, the nystagmus test was 77 percent accurate, the Walk-and Turn 68 percent accurate, and the One–Leg Stand 65 percent accurate. However, Horizontal Gaze Nystagmus used in combination with Walk–and–Turn was 80 percent accurate. The Tenth Court of Appeals stated that the defense "offered only the portions of the DWI Detection Manual emphasizing that following the correct procedure was critical to the validity of the tests which left the jury with only *part of the information needed* to make a fair assessment of the officer's reliance on the test results."[10] It also stated that "the jury was entitled to know all of the relevant information regarding the validity of the tests, both as to factors that could invalidate the results as well as the reliability of the tests if done correctly."[11] The Court went on to cite the rule of optional completeness, holding that the trial court did not commit error by allow-

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ing the prosecution to read the additional part from the manual. (The Third Court of Appeals also discussed and analyzed a similar issue in *Howell v. State*.[12]) Sharing these cases with the judge will combat a defense attorney who wants to cherry-pick out of the manual.

A word of caution: Just because you *can* do something doesn't mean you should, so use the rule of optional completeness intentionally. Prosecutors want to adequately respond to defense arguments about the NHTSA manual without letting the manual become the center of the trial.[13] Knowing these rules in advance will help you decide which battles to pick in trial and avoid getting into the weeds of the NHTSA manual. Shutting down defense gimmicks can also help maintain jurors' trust and re-focus them on the defendant's behavior. Remember that the rule of optional completeness can be invoked in the middle of the defense cross-examination.[14]

Opening the door

Questions from defense that lead into the issues discussed above could also allow a prosecutor to rely on the traditional "opening the door" rule to get into evidence or testimony that would generally not be admissible. A "party opens the door to otherwise inadmissible evidence by leaving a false impression with the jury that invites the other side to respond."[15]

This rule applied to a Second Court of Appeals DWI case, *Jordy v. State*.[16] In *Jordy*, the defense cross-examined an arresting officer and elicited evidence that "the NHTSA manual showed no correlation between a certain number of clues observed on the HGN and one of the [Texas] penal code definitions of intoxication."[17] In response, the prosecution argued that this questioning "opened the door" to allow questioning on what the manual *does* say about intoxication. The Second Court of Appeals held that "it was within the trial court's discretion to allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication—an alcohol concentration greater than 0.08—specifically, that four clues correlates to a BAC of 0.10 or higher."[18]

The earlier point about adequately responding to defense arguments about the NHTSA manual without letting the manual become the center of the trial is also applicable here, and having an officer clear up false impressions by defense counsel will go a long way in reinforcing the officer's credibility.

Weight vs. admissibility

Another common defense tactic in a driving while intoxicated trial is requesting a last-minute, pre-trial motion to suppress the results of the defendant's performance on the horizontal gaze nystagmus (HGN) test. The defense argument will be that the HGN results are inadmissible and should be suppressed because the officer's administration of the HGN test was more than a "slight deviation" from the instructions in the NHTSA manual. The defense often relies on is *McRae v. State*.[19] In *McRae*, the First Court of Appeals suppressed the defendant's HGN test results because the officer did not administer all three parts of the test, made only one pass on each eye instead of two, and admitted that other portions of his administration of the test were not "valid."[20]

In the context of a motion to suppress, the rules of evidence do not apply (except for privilege), and both sides should have significant leeway in directing and crossing the arresting officer while referencing or asking about the instructions in the NHTSA manual.[21] On one hand, the hearing will give the defense attorney free discovery and a preview of what the officer will say on direct in the presence of the jury. On the other, it will give prosecutors a roadmap of what the defense will ask the officer on cross.

In this hearing, the State must elicit testimony from the officer on her training and experience in giving the HGN instructions, whether those were the instructions she gave during her investigation, and whether she administered the HGN test in compliance with the manual. (Let's hope this will all be confirmed by the dash-cam footage too.) Afterward, the prosecutor will have to argue that any variations go to the weight of the evidence and not the admissibility. The following are good starting points to reference in the motion to suppress:

- *Plouff v. State*[22] (stating that slight "variations in the administration of the HGN test do not render the evidence inadmissible or unreliable but may affect the weight to be given the testimony");
- *Gomez v. State*[23]; and
- *Winstead v. State*[24] (stating that slight "variations from the NHTSA's testing protocol do not

render HGN test results inadmissible but may affect the weight to be given the testimony").

In this setting, refer to judicially noticed definitions of terms in the manual (such as "nystagmus" and "horizontal gaze nystagmus") instead of letting the defense define them.[25]

Prepping the officer

One of the best ways to deal with the problems that can occur during a trial involving the NHTSA manual is meeting with the officer beforehand and explaining how these issues may come up. If this meeting involves only advising the officer to tell the truth, you're off to a good start—but you need to also give her an idea of what's going to happen in court. Remind the officer that she should never agree to the contents of a writing until she has had a chance to review that writing. She should also understand that it is OK to say no or that she doesn't agree with something. This is true even if the defense attorney's tone is dripping with disdain because the officer won't agree that the cold air surrounding the defendant's eyes was rapidly heated by the officer's flashlight and therefore caused HGN.[26] A prosecutor who regularly handles DWIs (a.k.a., "any prosecutor") should also prepare himself by becoming intimately familiar with the contents of the SFST manual. It is available for download at www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst-curricula-and-powerpoints-for-download.pdf. When trial is approaching, it is always a good idea to email the officer this link or a copy of the manual and ask him to review it, a request made more effective if you hand him a copy as you ask.

A pre-trial meeting is also a good time to ask the officer to review her own training record. If she has had a chance to do this prior to trial, then she can announce with confidence that she was trained in the academy, recently took a refresher course, and has instructed others on how to administer the tests. The more confidence the officer displays in her abilities, the more confidence the jury will have in her conclusions.

In summary

In an ideal driving while intoxicated trial, discussion and reference to the NHTSA *DWI Detection Manual* is limited to its general authority and reliability, the instructions for the SFSTs, and the purpose of the tests. The rest of the case should be tried within the confines of the officer's credibility in administering those tests and identifying the clues based on the defendant's performance. But as we all know, trials would not be trials if things ran as smoothly as that. Having a firm grasp of the rules discussed above and a plan for how to control things is necessary in your next DWI trial so that you can keep the jury focused on the issues that matter, rather than conducting a "trial within a trial" on what's in the NHTSA manual. ❇

Endnotes

[1] See The Smiths, *Stop Me If You Think You've Heard This One Before,* (Rough Trade Records 1987).

[2] This question comes in many similar forms like "Doesn't the manual say …"; "Aren't you trained to know that …"; and "Don't you know that the manual …," to name a few.

[3] It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. Tex. Code Crim. Proc. Art. 2.01.

[4] Tex. R. Evid. 803(18), "Statements in Learned Treatises, Periodicals, or Pamphlets" (stating that a "statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit."). To read about a case discussing the NHTSA manual and 803(18) see *Amberson v. State*, 552 S.W.3d 321, 330 (Tex. App.–Corpus Christi 2018, pet. ref'd).

[5] *Id.*

[6] *Zwack v. State*, 757 S.W. 2d 66, 67-69 (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd).

[7] Remember that the State is allowed to "refresh" the witness's memory if necessary under Tex. R. Evid. 612.

[8] Under Texas Rule of Evidence 801(a), a statement "means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression."

One of the best ways to deal with the problems that can occur during trial involving the NHTSA manual is meeting with the officer prior to trial and explaining how these issues may come up. If this meeting involves only advising the officer to tell the truth, you're off to a good start–but you need to also give her an idea of what's going to happen at trial.

[9] 39 S.W.3d 320, 321 (Tex. App.–Waco 2001, no pet.).

[10] *Id*. at 323 (emphasis added).

[11] *Id*.

[12] *Howell v. State*, 03-03-00158-CR, 2006 WL 2450920, at *2 (Tex. App.–Austin Aug. 25, 2006, no pet.).

[13] Be cautious about admitting a learned treatise into evidence. The Tenth Court of Appeals described the risks that come along with admitting a learned treatise into evidence: "disallowing the admission of the treatise itself prevent[s] a jury from rifling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance." *Godsey v. State*, 989 S.W.2d 482, 492 (Tex. App.–Waco 1999, pet. ref'd) (internal citations and quotations omitted).

[14] Tex. R. Evid. 106 (stating that if "a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part–or any other writing or recorded statement–that in fairness ought to be considered *at the same time*) (emphasis added)).

[15] *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005).

[16] 413 S.W.3d 227 (Tex. App.–Fort Worth 2013, no pet.).

[17] *Id*. at 232.

[18] *Id*.; see also *Sedeno v. State*, 14-07-00327-CR, 2008 WL 5104169, at *4 (Tex. App.–Houston [14th Dist.] Nov. 25, 2008, no pet.) (stating that after the officer "testified he did not know the accuracy rate of the HGN test, the trial court refused to allow [the] appellant to delve into the specific statistics provided by the NHTSA manual. During the conference outside the jury's presence, the trial judge expressed her concern about opening the door for the percentages of all the tests, how different studies result in different statistics, and how she was unsure whether the NHTSA edition [the] appellant had was the same edition [the officer] used in training. After reviewing the record, we conclude the trial court was concerned with the effective presentation of the evidence, confusion of the issues, and undue delay, so it restricted [the] appellant's cross-examination into the specific statistics. Thus, we cannot say the trial court abused its discretion in excluding evidence from the NHTSA manual that the HGN test was only 77 percent accurate in predicting intoxication").

[19] 152 S.W.3d 739, 743–44 (Tex.App.–Houston [1st Dist.] 2004, pet. ref'd).

[20] *Id*.

[21] For additional guidance on the applicable rules in a motion to suppress, see "I Object to His Objection," by Brian Foley, *The Texas Prosecutor* journal, September-October 2013, Volume 43, No. 5.

[22] 192 S.W.3d 213, 219 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

[23] 01-17-00245-CR, 2018 WL 3431737, at *4 (Tex. App.–Houston [1st Dist.] July 17, 2018, no pet.).

[24] 11-13-00053-CR, 2014 WL 4536379, at *5 (Tex. App.–Eastland Sept. 11, 2014, no pet.).

[25] *Plouff v. State*, 192 S.W.3d 213, 218 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

[26] As you may have guessed by now, this scenario is made up.