

PRESENTED AT

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THE POLICE OFFICER: BEST FRIEND OR WORST ENEMY?

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I. INTRODUCTION

In a car wreck case, the police officer can be your best friend or your worst enemy. His testimony generally carries great weight with the jury, and his report is what is most often relied upon by plaintiffs' attorneys, risk managers, and insurance adjusters in determining whether to proceed to litigation.

Should the court scrutinize a police officer who attempts to render opinions regarding accident reconstruction issues and the cause of the wreck in the same manner that it would scrutinize any other expert under *Daubert/Robinson*? Or, is the police officer a special kind of hybrid fact and expert witness who essentially testifies regarding his factual observations at the scene of a wreck?

Can the jury hear about the citation that the police officer issued to one driver? Can the jury find a driver to be negligent per se for violating the Penal Code, the Transportation Code or another statute?

Unfortunately, the reported cases give contradictory and inconsistent answers to many of these questions. Nevertheless, a thorough understanding of the reported cases may give the trial attorney the ability to maximize the impact any helpful testimony provided by the police officer and the ability to minimize the impact of any harmful testimony provided by the officer.

II. GENERAL REQUIREMENTS FOR OPINION TESTIMONY

The Texas Rules of Evidence contain a number of key rules concerning the scope of expert opinion testimony and the admissibility of the underlying facts and data relied upon by experts. The Federal counterparts to these Texas rules are *almost* identical, but there are differences.

Rule 701 of the Texas Rules of Evidence, "Opinion Testimony by Lay Witnesses,"

provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Tex. R. Evid. 701.

Rule 702, "Testimony by Experts," provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Tex. R. Evid. 702.

Rule 703, "Bases of Opinion Testimony by Experts," provides:

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Tex. R. Evid. 703.

Rule 704, "Opinion on Ultimate Issue," provides:

An opinion is not objectionable just because it embraces an ultimate issue.

Tex. R. Evid. 704. *See also Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987).

There was a good deal of confusion and inconsistency within the reported cases on the issues of whether the jury should be allowed to hear the underlying facts or data relied upon by the expert if the facts or data would otherwise be inadmissible. Amendments to Rule 705 in 1998 attempted to resolve the confusion by the inclusion of an explicit Rule 403-type balancing test.

Rule 705, "Disclosure of Facts or Data Underlying Expert Opinion," now provides:

(a) Stating an Opinion Without Disclosing the Underlying Facts or Data. Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to

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