

ACCIDENT RECONSTRUCTION – “TEXAS” STYLE

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- I. Is your claim or case one that needs an accident reconstruction expert?
 - A. Factors to be examined:
 1. Severity of the injuries and/or amount in controversy;
 2. The accident facts in dispute;
 3. The opinions, if any, of the investigating officers and whether law enforcement is on your side or not;
 4. Does the other side have one?
 - B. Implications of the initial investigation (deciding whether to be aggressive):
 1. Educating your opponent and/or unearthing bad facts (including unfavorable witnesses);
 2. Is liability a real issue in the case?
 3. Discovery issues. (More on this later).
- I. Retaining an Expert

- A. Who should retain - the client or the attorney? More likely than not, if the accident facts are such that it would justify hiring an expert, then an expert would only be hired if the client believes that suit will be filed. Accordingly, the expert's work should be shielded from discovery under both the consulting expert and work product privileges, since the expert's work was done "in anticipation of litigation." To be safe, however, it is better to have the attorney retain the expert directly.
- B. If a "consulting expert," then identity, opinions, mental impressions are non-discoverable. To be a "consulting expert," work has to be done "in anticipation of litigation." TEX. R. CIV. P. 192.3(e), 192.7(d). Mental impressions/opinions of party's "consultants" would also qualify as work product pursuant to Tex. R. Civ. P. 192.5(a)(1).
- C. What is "anticipation of litigation"?
1. What is "in anticipation of litigation"? Objectively, must indicate to a reasonable person that there is a substantial chance of litigation. Subjectively, the defendant must have a good faith belief that litigation would ensue. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 203-204 (Tex. 1993).
 2. Objective factors: a) whether the claimant has made a demand, b) whether the claimant has retained an attorney or private investigator, c) whether the claimant is investigating the accident, and d) the severity of the accident. *Id.* at 204; *Phelps Dodge v. Marsh*, 733 S.W.2d 359, 360-361 (Tex. App.—El Paso 1987, orig. proceeding). Please note, however, that the fact that the claimant has hired an attorney and investigated the accident, standing alone, is not enough to make your investigation privileged. *Toyota v. Heard*, 774 S.W.2d 316, 318 (Tex. App.—Houston [14th Dist] 1989, orig. proceeding).
 3. Subjective factors: a) the investigation is not routine, b) the documents are not prepared in the normal course of business (such as accident reports completed in every accident), and c) judgment of counsel. *Boring & Tunneling Co. of America, Inc. v. Salazar*, 782 S.W.2d 284, 286 (Tex. App.—Houston [14th Dist.] 1989, orig. proceeding); *Wiley v. Williams*, 769 S.W.2d 715, 718 (Tex. App.—Austin 1989, orig. proceeding) (although hiring of an attorney or attorney supervision of investigation is not dispositive, rapid retention of counsel is an important factor); *Brown & Root U.S.A., Inc. v. Moore*, 731 S.W.2d 137, 140 (Tex. App.—Houston [14th Dist.] 1987, orig. proceeding).
 4. Bottom line: Hiring a lawyer early to oversee initial investigation is key. If the case merits an expert, it merits a lawyer.
- D. Remember, once your consultant becomes a testifier or a testifier looks at his work, every one will know *everything* he/she has been up to. (See below.)

1. Additionally, matters beyond identification, opinions/mental impressions may be discovered if party seeking discovery “has substantial need of the materials in the preparation of the party’s case and that party is unable without undue hardship to obtain the substantial equivalent of the material by any other means.” Tex. R. Civ. P. 192.
2. Question: What happens if your consulting expert makes notes/factual findings regarding the configuration of a roadway, skids, gouge marks, etc., and then the roadway is repaved? Your investigation could become that of the opposing party.

III. Discovery Relating to Expert Witnesses

- A. “A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 and through depositions and reports as permitted by this rule.” TEX. R. CIV. P. 195.1.
 1. Please throw away your old form interrogatories and requests for production.
 2. Rule 195 limits the amount and types of materials discoverable through written discovery requests (cannot obtain a list of prior depositions, etc. except through a subpoena duces tecum in conjunction with the expert’s oral deposition).
 3. Note that this rule applies only to testifying expert witnesses, so keep/modify your form interrogatory regarding consulting experts relied upon by testifying experts. See F. below.
- B. TEX. R. CIV. P. 194.2(e) provides the information required to be provided in response to requests for disclosure. See VIII below.
- C. Timing of designation of expert witnesses.
 1. For the plaintiff, 90 days before the end of the discovery period. (See Tex. R. Civ. P. 190.2-190.4 re: “discovery period.” Usually going to be 30 days before trial or a date designated in docket order.)
 2. For the defendant, 60 days before the end of the discovery period.

Note: These deadlines can, and often are, changed by a court’s scheduling order, although many courts state in their scheduling orders that the parties must disclose the information and materials referred to in Rule 194.2(e).

- D. Pure consulting experts are not discoverable.

“The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.” TEX. R. CIV. P. 192.3(d).

- E. Discovery relating to discoverable consulting expert witnesses (non-testifying experts whose impressions and/or opinions have been reviewed by a testifying expert):
 - 1. Discovery related to these experts is not encompassed by either TEX. R. CIV. P. 194 or 195. Instead, traditional interrogatories and requests for production need to be served in order to determine the identity and opinions of discoverable consulting expert witnesses.
 - 2. The scope of discovery as it relates to testifying and discoverable consulting expert witnesses is found in TEX. R. CIV. P. 192.3(e).

Note: Although this type of expert witness is not common, it is a good idea to include the following interrogatory and request for production to the other party:

Interrogatory: With respect to consulting expert witnesses whose mental impressions have been reviewed by a testifying expert witness, please provide the information described in TEX. R. CIV. P. 192.3(e).

Request for Production: With respect to consulting expert witnesses whose mental impressions have been reviewed by a testifying expert witness, please produce the documents and tangible things which reflect the information or materials described in TEX. R. CIV. P. 192.3(e).

- F. Bottom line(s) re: your efforts to discover opposing party’s expert opinions:
 - 1. Have to depose expert to get real information.
 - 2. Proper written discovery is needed to determine: a) whom you need to depose; and b) to lay the foundation to strike/limit the opposing party’s expert testimony.

IV. What makes a good expert?

- A. Golden Rule for Accident Reconstruction Experts: Good accident reconstruction experts are _____. Bad accident reconstruction experts are really _____. (hint – same word in each blank).
- B. You are looking for one simple but elusive thing in the world of experts: _____.

An Example ...

- C. Paper trail should not be a concern.

V. Are law enforcement personnel qualified accident reconstruction experts?

- A. General Rule: No. *St. Louis Southwestern Railway Co. v. King*, 817 S.W.2d 760 (Tex. App.–Texarkana 1991, no writ); *Pyle v. Southern Pacific Transp. Co.*; 774 S.W.2d 693 (Tex. App.–Houston [1st Dist.] 1989, writ denied).
- B. The Rule-Swallowing Exception: Yes. With accident reconstruction/investigation training (as opposed to years on the job) and the application of such training in a particular accident, the officer may be qualified to give expert testimony. Generally speaking, Texas State Troopers will be qualified but city or county officers or deputies may not be qualified. Apply the following case authority to the facts at hand:
1. *DeLeon v. Louder*, 743 S.W.2d 357 (Tex. App.–Amarillo 1987, writ denied, 754 S.W.2d 158 (Tex. 1988));
 2. *Anderson v. McDonald*, 486 S.W.2d 123, 125 (Tex. Civ. App.–Austin 1972, no writ) (officer with four years of on-the-job experience, accident investigation training, and familiarity with accident site was qualified to give opinions as to causes of accident);
 3. *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex. App.–Beaumont 1997, writ denied) (trooper with accident investigation and reconstruction training and on-the-job investigation of 35-40 accidents was qualified to give opinions based upon physical evidence at the scene despite having been a trooper for less than six months; focus of trial court was clearly on the quality and quantity of the training rather than the quantity of on-the-job experience investigating accidents)
- C. Implications once qualified: Once an investigating officer has been qualified as an expert and has provided his or her opinions as to the reconstruction of the accident, the officer should be allowed to testify as to proximate cause, the ultimate issue to be decided by the jury. TEX. R. EVID. 704; *Harvey v. Stanley*, 803 S.W.2d 721 (Tex. App.–Fort Worth 1990, writ denied). In fact, there is even authority for allowing an expert witness to apportion percentage of fault in cases where multiple parties are submitted to the jury in a negligence claim. See, e.g., *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361 (Tex. 1987); *Harvey*, 803 S.W.2d at 723.
- D. What is the effect of a citation?
1. The issuance or non-issuance of a citation or ticket is not admissible. *Switzer v. Johnson*, 432 S.W.2d 164 (Tex. Civ. App.–Houston [1st Dist.] 1968, no writ).

2. A no contest plea to a citation is not admissible. TEX. R. EVID. 410(2); *Cox v. Bonham*, 683 S.W.2d 757 (Tex. Civ. App.–Corpus Christi 1984, writ ref’d n.r.e.).
 3. A guilty plea or finding of guilt by a judge or jury is admissible. *Lillie Sales, Inc. v. Rieger*, 437 S.W.2d 872 (Tex. Civ. App.–Texarkana 1969, writ ref’d n.r.e.). However, if party pleading guilty is not a party to the suit (i.e., Plaintiff only sues trucking company individually and not its driver) then plea of guilty is inadmissible against defendant employer. *Plains Transport, Inc. v. Isaacs*, 361 S.W.2d 919, 923 (Tex. Civ. App.–Amarillo 1962, writ ref’d n.r.e.).
 4. The key is to make sure that the citation is or has been handled properly. Remember, even a questionable plea on a citation could become a question for the jury. See *Rainbo Baking Company v. Stafford*, 764 S.W.2d 379 (Tex. App.–Beaumont 1989, writ denied).
- E. Watch out for the report. Remember that on an accident report an officer will more often than not list factors which contributed to the cause of an accident. Are such statements in an accident report admissible?
1. Maybe so. *McRae v. Echols*, 8 S.W.3d 797 (Tex.App.–Waco 2000, pet. denied) (Yes.); *Sciarrilla v. Osborne*, 946 S.W.2d 919 (Tex. App.–1997, writ denied); *St. Louis Southwestern Railway Co. v. King*, 817 S.W.2d 760 (Tex. App.–Texarkana 1991, no writ) (No.).
 2. Question: How does admitting an unqualified written expert opinion square with *Daubert/Robinson*, the authority regarding a police officer’s qualifications (or lack thereof) to testify, and *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966)(medical record entries reflecting medical conditions that are in dispute in a particular case are *not* admissible even when contained in otherwise admissible medical records)?
- VI. A look at some basic calculations. Remember James Carville? It’s the _____, stupid. No controversy here, just importance of accuracy.
- A. Calculations explain the information gathered from the accident scene: photographs from all angles (damaged portions of vehicles as well as undamaged), physical evidence from the scene (length and location of skid marks for both vehicles), point of impact, resting position for both vehicles, mechanical condition of both vehicles, etc. Much of this information will be contained in the accident report.
 - B. Impact speed – First things first. This can generally be determined with police report and examination of the damaged vehicles (photographs acceptable, but personal inspection preferred). From the damage to the vehicles, expert calculates change in speed (Delta V). The expert will need additional information to determine the actual speed, such as whether one of the vehicles was at rest when the impact occurred.

- C. Pre-braking speed – Slide to impact formula. With impact speed, braking distance (using skid marks), and drag factor, expert can then calculate pre-braking speed.
1. Drag factor depends on road conditions, type of road surface, grade, wet or dry, and the type of vehicle (i.e., large trucks have lower drag factors because of the difference in the tires).
 2. If there is an accident where an expert will be needed and speed is a factor, it is crucial that either the investigating officer or the expert examines the road as it is at the time of the collision. For example, if an accident occurs on a highway that is re-paved before the expert can test the drag factor of the roadway, then the expert's opinions will not be as accurate as they otherwise would be.
- D. Could the vehicle stop? – Slide to rest formula. Multiply drag factor times gravitational constant to get deceleration rate. Then the expert can calculate the pre-braking speed at which the driver could have brought the vehicle to a stop.
1. All calculations must begin with perception/reaction time (generally 0.75-1.0 second). However, this may increase to as much as 1.5 seconds at night or with an unexpected hazard.

Note: A vehicle travels about 90 feet per second at 60 m.p.h.

- E. When to fight about numbers: Generally speaking, the “numbers game” is best played when the driver of the other vehicle makes ridiculous statements, particularly as to the speed of the vehicles. The real answer re: fighting about numbers: Not nearly as much as your expert wants to, or you might think you need to.
- F. GIGO: Garbage in, garbage out. Remember, as with all opinions, if the measurements of the skid marks, calculations of the drag factor, etc., are inaccurate, then the conclusions about the speed will be as well. Bottom line: It's about the assumptions.

VII. Beyond the Basic Calculations

- A. A good accident reconstruction expert can synthesize or explain the accident in simple terms: How did the vehicle get from point A to point B? Is there an explanation other than liability?
- B. Explore the plausibility of different theories with your expert. For example, was the vehicle knocked X number of feet after the impact (indicating a high impact speed) or did the vehicle drive/roll to a rest? Your expert should be able to answer this question.

- C. Explain “bad” facts, i.e., if skid marks only appear to come from one set of wheels, does this indicate brake failure in the other set? The expert should be able to use the slide to rest/impact calculations with the appropriate drag factor to determine this.
 - D. “Dart out” cases. By using published acceleration rates or by testing, the expert can determine where the vehicle was/should have been at the point of impact. How long does it take the vehicle to accelerate to point A?
 - E. An expert is a critical fact witness. It is crucial to list any testifying experts as persons with knowledge of relevant facts if those experts have obtained any information as a result of inspecting the vehicles involved in the accident and/or the scene of the accident. TEX. R. CIV. P. 192(c).
 - F. Your expert can assist you with the opposing party (locking in facts in a deposition) and the opposing party’s expert.
 - G. The expert can also clear up errors in police reports, which are usually present.
 - H. Experts with knowledge of mechanical/trucking/vehicle issues (in other words, not a pure reconstructionist) can prove invaluable.
 - I. Even your high-tech should generally be low-tech, especially defendants. (An example – low tech video recreation).
- VIII. Keep your eye on the ball, and in litigation the ball is discovery. The key is to properly investigate the claim but understand the implications in the context of litigation.
- A. If it is in writing, assume that the opposing attorney, opposing expert, and eventually the jury will read it.
 - B. TEX. R. CIV. P. 194.2(f) provides the information required to be disclosed to opposing counsel:
 - (f). for any testifying expert:
 - (1) The expert’s name, address, and telephone number;
 - (2) The subject matter on which the expert will testify;
 - (3) The general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
 - (4) If the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - (A) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert’s testimony; and
 - (B) The expert’s current resume and bibliography.

Remember: Think as if these disclosures will eventually be read to the jury and disclose accordingly.

- C. Subpoena Duces Tecum: In addition, a party can obtain additional discoverable documentation through a subpoena duces tecum served in conjunction with the expert's oral deposition. However, the subpoena has to be served at least 30 days in advance of the deposition per TEX. R. CIV. P. 199.2(b)(5).
- D. Photos are always discoverable. TEX. R. CIV. P. 192.5 (c)(4). The only good picture is a _____ picture. The same principle now applies for witness statements, too. TEX. R. CIV. P. 192.3(h).
- E. Invoices of an expert.
 - 1. Can be a gold mine, especially with dates.

Example: The responses to the requests for disclosure, including the expert's opinions, were filed on February 1 but the invoices show that the expert was not provided with any documents until February 15. Evidence such as this can be used to show that the expert is doing nothing more than tailoring his or her testimony to fit with the previous disclosures.

- 2. Remember how the entries will sound to jurors not familiar with the litigation process.
 - 3. These must be requested through a subpoena duces tecum. TEX. R. CIV. P. 195.1.
 - F. What about converting a consultant into a testifier or changing testifying expert witnesses? This will probably lead to additional discovery. Remember, your previous discovery responses are fair game to be read to the jury at trial, or perhaps even worse yet to have your poor, unsuspecting client quizzed about. Remember also that the fiction of "de-designating" will not shield the expert from discovery. *See Castellanos v. Littlejohn*, 945 S.W.2d 236, 239-240 (Tex. App. 1997–San Antonio, orig. proceeding).
 - G. Reports: Reports are not required to be written and produced unless ordered by the Court. TEX. R. CIV. P. 195.5. Generally speaking, it is not a good idea to have your expert complete a written report to be produced. If, however, you are the plaintiff, then failure to do so may require you to produce your expert for deposition before the defendant is required to designate. TEX. R. CIV. P. 195.3 (a)(1).
- IX. Key questions the expert needs to be prepared to answer at deposition or trial.
- A. When were you first consulted or retained? See VIII.(E.) above.
 - B. What have you been told about the case and by whom?

- C. What have you reviewed in preparation for your deposition? When did you review it? Who decided what you would review?
- D. When were you first designated in this case? Again, appreciate the implications of designating an expert before he or she has all of the facts necessary to render an opinion.
- E. Have you ever taken a position contrary to the one you are taking in this suit?
- F. Did the plaintiff/defendant (your party) do anything wrong? Be careful of double standards and make sure your expert will concede the obvious.
- G. What are your assumptions? Where do they come from? A thorough examination of the opposing expert will reveal the answer to this question even if the question is not answered.
- H. Can I please see your file? Is that all? Where is the rest of it? Why isn't it here? Whose idea not to give me the good stuff, yours or the guy sweating next to you? You get the picture.

X. Daubert, "Magic Words," and Questions

- A. The *Daubert/Robinson* line of cases are applicable to accident reconstruction testimony, but, should your expert be prepared and not try to change the known facts of a case or suspend the laws of physics, you should always survive such a challenge. See *Waring v. Wommack*, 945 S.W.2d 889 (Tex. App.–Austin 1997, no writ) (*Robinson* challenge failed as testimony was based upon mechanical engineering education, accident reconstruction training, tests performed, and the laws of physics). In *Waring*, the expert's assumptions and conclusions were challenged, but the court found that a *Robinson* challenge should be directed at the methodology and principles rather than at the conclusions.
- B. If you want to have your expert say "magic words" such as negligent, gross negligence, etc., make sure you provide him/her with the proper legal definition; otherwise, such testimony is inadmissible. *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 777 (Tex. App.–Corpus Christi 1999, no writ).
- C. Additional questions and comments? rutledge@drs-llp.com