The defense "expert" with a badge may have a lot to say, but much of it should be inadmissible

How to neutralize the hostile investigating officer

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You are representing a cyclist in an auto-versus-bicycle trial. You watch as defense counsel calls the investigating officer. The officer strides confidently to the stand. All eyes are on the crisp uniform, gun and badge. You know the officer is hostile. Her one-sided traffic collision report summarily found your client at fault.

But you are not overly worried. After all, the judge granted your motions in limine. Neither the traffic collision report nor any legal opinions regarding "negligence" are coming into evidence.

However, over your objections, the examination – and your case – begins to go off the rails. The Q&A runs something like this:

Q. Are you familiar with this intersection?
A. Oh, yes, very.
Q. Would a driver approaching the intersection be able to see a cyclist in the bike lane?
A. No.
Q. If a vehicle started to merge into the bike lane, as if to make a right turn, what is the obligation of the bicyclist?
A. Oh, the bicyclist should be looking from way back to see what the vehicle is doing. If you have an experienced bike rider, which the plaintiff here likely is since he had a very nice bike, he's looking to see whether the vehicle is merging to make a right-hand turn. Once the car starts to merge over, that tells the cyclist to merge left and go around.
Q. In terms of your expertise enforcing the Vehicle Code, once the vehicle had merged 50 percent into the bike lane, is there any requirement that the driver making the turn look back to make sure nobody is trying to pass them on the right?
A. No. At that point, they've fulfilled Vehicle Code 21717, which requires them to merge safely. They've already merged.

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Sadly, the above example is taken, almost verbatim, from a real trial transcript. It is one of many such examples. In such cases, the police officer – who is neither judge, nor jury, nor engineer – becomes a sort of super expert. In one breath she may interpret the law, form unsupported accident reconstruction opinions, serve as a mouthpiece for inadmissible hearsay, deliver a closing argument and supplant the jury's role.

We trial lawyers must proactively undermine and exclude such testimony. The potential unfair prejudice to our clients is too great to ignore.

Deposing the investigating officers

It may be necessary to depose each investigating officer, including the lead investigator, the report author, and any officers who took measurements or other witnesses that gave statements. In addition to exploring percipient knowledge (including measurements, physical evidence, and statements taken at the scene), the deposition should explore potential expert testimony.

Consider covering the following areas:
• Confirm the officer does not intend to express any opinions other than those contained in the police report. This would include opinions regarding fault (aka "primary factor"), causation, vehicle code violations, accident reconstruction (i.e., times, speeds, distances, and/or point of impact), and human factors (i.e., visibility or perception/reaction time);
• For each opinion or conclusion expressed in the police report, identify all the bases, including (a) facts and witness statements relied upon, (b) law applied, (c) training and expertise, and (d) methodology;
• With respect to facts and witness statements relied upon: Confirm a lack of personal knowledge where applicable, verify which portions of the report contain verbatim witness statements versus summaries, and identify where the officer is assessing witness credibility or making assumptions;
• With respect to the law applied: identify code sections the officer failed to consider,

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and identify where the officer is relying on subjective interpretation of the vehicle code, as well as what standards are being applied (i.e., is any objective standard used to determine whether a speed is "safe" or is that just a gut feeling or retrospective analysis?);

• With respect to training and expertise: explore in detail the officer's training (or, more likely, lack thereof) in accident reconstruction, physics, engineering, biomechanical engineering, human factors, and accident investigation;

• With respect to methodology: explore any scientific standards, equations or literature relied upon, and ask whether the officer can identify the error rate or cite to studies supporting the reliability of that methodology.

Armed with this deposition testimony, you are better poised to exclude improper opinions.

Precluding officer from testifying as an expert

When evaluating admissibility of an officer's opinion, the first question to ask is whether the officer will be testifying as an expert.

If defense counsel failed to disclose the officer as a non-retained expert, the officer is limited to opining as a lay witness. (Cal. Code Civ. Proc., § 2034.300 (a).)

Obviously, even if the officer is disclosed as an expert, this does not make him one. He must qualify as an expert in the relevant field. (Cal. Evid.Code, § 720.) In almost every case, the investigating officer's expert qualifications are dubious. Armed with deposition testimony regarding the extent of the officer's training and expertise, you can make a credible argument he is unqualified to testify as an expert in any relevant field.

Once it is established that the officer may only testify as a lay witness, the officer may only offer opinions based on facts she personally observed. (Cal. Evid. Code, § 800; see also *Stickel v. San Diego Elec. Ry. Co*. (1948) 32 Cal.2d 157, 165 (opinion regarding cause of accident inadmissible where officer did not observe accident); (*Hodges v. Severns* (1962) 201 Cal.App.2d 99, 108 (it was error for the trial court to admit the investigating officer's point of impact opinion where the officer was not presented as an expert and the opinion was in part based on hearsay witness statements).)

Opinions from officer qualified as expert

If the defendant disclosed an officer as an expert witness, it is within the trial court's discretion to admit his expert opinion. (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 723.) Testimony that is otherwise admissible is not objectionable simply because it "embraces the ultimate issue to be decided by the trier of fact." (Cal. Evid. Code, § 805.)

That said, even for an officer disclosed and qualified as an expert, there are limits. The testimony must be helpful to the jury, non-legal in nature, based on reliable material, and based on a reliable methodology.

As an expert witness, an investigating officer may give opinion testimony "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact...." (Cal. Evid. Code, § 801.) Thus the opinion must go beyond common sense. It must do more than simply apply law (for example, the vehicle code) to circumstances already understood by the jury.

Although testimony is permitted regarding "ultimate" issues, the expert must not testify regarding a legal issue. Expert testimony "on issues of law is not admissible since it is the judge's responsibility to instruct the jurors on the law." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1159.) An expert who "expounds on the law usurps the role of the trial court." (*Ibid.*) The vehicle code is no exception.

Even if the testimony is on a proper subject, it must be reliable. Keep in mind that "because I say so" testimony is not admissible. Testimony – whether expert or percipient – must have evidentiary value.

The applicable standard requires that an officer's expert opinion must not be speculative and must be based on matter of a type on which an expert in that field may reasonably rely, as well as on reasons supported by the material on which he relies. (See *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-72.) This means that the officer's methodology must be sound, and his conclusions must be supported by the record. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563-64.) Evidence that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. (*Id*. at 564.)

Even where the officer is qualified as an expert, courts have held opinions based on hearsay are inadmissible. (*Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58.) For example, "[w]here the opinion is based on what witnesses told the officer, at least where objection is made, it is error to admit it." (*Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 (citing *Stuart v. Dotts* (1949) 89 Cal.App.2d 683).) This is because, for an expert opinion to be admissible, the factual foundation cannot be "nebulous," based on conjecture, or based upon a credibility determination. (See *Waller v. Southern Cal. Gas Co.* (1959) 170 Cal.App.2d 747, 755.)

Most conclusions formed by law enforcement officers do not meet these standards. When we push on accident reconstruction and fault opinions during depositions of law enforcement officers, we usually find these opinions collapse. They are made up of building blocks that include hearsay, speculation, arbitrary judgments, and subjective interpretations of the law (i.e., the vehicle code). It is rare to find objective standards or rigorous methodology.

In te absence of a reliable methodology, the court should exclude expert opinions.

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The Police Report

Cal. Veh. Code, § 20013 expressly prohibits the admission of traffic collision reports at trial. (See *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, 270 (collecting cases).) The policy behind section 20013 is to protect against the danger that a jury may consider an accident report an "official" document and consequently give it undue weight. (*Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.)

The contents of the report are a different matter. (See *id.* (Section 20013 does not exclude the "*contents* of an accident report, but rather excludes the *report itself*.") (emphasis in original). For example, witness statements contained in the report may be admitted under an established exception to the hearsay rule or used for impeachment purposes. Regardless of admissibility, a testifying police officer may reference the report to refresh his or her recollection. And the accident diagram may be shown to the jury in order to illustrate the officer's testimony.

Officer opinions regarding fault or causation

The concern that a jury might give undue weight to "official" conclusions found in a police report is equally applicable to "official" conclusions voiced by a uniformed officer.

This is why a court should strictly apply the rules of admissibility to opinion testimony from officers. Error in this regard is likely to be prejudicial.

Nevertheless, courts are divided as to whether these opinions are admissible. For example, in *Williams v. Gurwitz* (1950) 99 Cal.App.2d 801, 803 the court held that "neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated the right of way or to state such conclusion if he had arrived at one," but in *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229, the court held "[i]t is generally established that traffic officers whose duties include investigations of automobile accidents are qualified ex-perts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations" (internal citations omitted).

When an officer opines regarding the "cause" of a collision, this is usually code for assigning fault. Insist, in deposition, that the officer define exactly what she means when she says "X caused the collision."

For example:

- When the officer says the collision was caused by the bicyclist riding on the sidewalk against traffic, does she mean the bicyclist bears primary fault for the collision? Or does she just mean the bicyclist's conduct was one of many circumstances that combined in order for the collision to happen?
- If the officer is referring to fault, what standard or methodology was used to assign fault?
- In assigning fault, is the officer looking for whether a vehicle code violation occurred? Is there also an evaluation as to whether the parties were negligent?
- In assigning fault, what facts did the officer take into account or assume?

An opinion regarding "primary factor," "cause," or fault, when reduced to its essence, usually runs afoul of the prohibition against legal opinions, the prohibition against opinions regarding matters in the jury's common experience, or both. "An opinion that [a driver] was 'most responsible' for the accident is a legal conclusion and not a proper subject for expert opinion." (*Carlton v. DMV* (1988) 203 Cal.App.3d 1428, 1432.)

Under California Evidence Code section 352, such opinions also carry a high risk of unfair prejudice and confusing the jury, with minimal probative value. A jury may take the officer's opinion regarding "fault" or "causation" as equivalent to a comparative fault determination in a civil trial. But the reality is that officers are applying their own idiosyncratic standard that elevates the Vehicle Code and excludes concepts like "due care" and "reasonableness." In a recent deposition, a CHP lieutenant confirmed that negligence was irrelevant to his assignment of fault. Only the vehicle code mattered:

Q. …[Y]ou can cause an accident by factors that don't amount to violations of the Vehicle Code, precise code sections. Right?
A. I would beg to differ.
. . . .
Q. …Your job in determining fault was to determine whether or not a specific Vehicle Code violation occurred?
A. Correct.

She assigned fault to the (decedent) bicyclist for riding on the "wrong" side of the road, but admitted she had no framework for evaluating comparative fault from an inattentive driver who did not violate a specific vehicle code provision.

By clarifying during the officer's deposition what standard is being applied, we can lay the foundation for the court's exclusion of all fault and causation opinions from hostile officers.

Opinions about the point of impact or "safe speed"

Courts will usually admit expert testimony from an officer regarding the point of impact or safe speed under the circumstances. But admissibility depends on the basis for the opinion.

In *Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d at 721, the court properly admitted point of impact opinion testimony from a traffic officer who had investigated accidents for seven years and who based his opinion exclusively on his personal observations. Other cases are distinguishable where the officer is relying on hearsay, or where the point of impact determination involves complex engineering computations outside the officer's expertise. (See *Hodges v. Severns* (1962) 201 Cal.App.2d at 108 (opinion regarding point of impact "is not admissible unless based on facts observed by the officer at the scene of the accident").

Similarly, in *Enos v. Montoya* (1958) 158 Cal.App.2d 394, 399, the First District

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held the trial court properly admitted testimony regarding reasonable speed around the curve where the accident occurred when the investigating officer had driven the curve "on a number of occasions under comparable conditions." The outcome should be different where an officer is speculating regarding conditions and visibility at the time of an accident, or simply offering a "because I say so" opinion based on facts known and understandable to the jury.

Questioning the officer's Vehicle Code assumptions

In our experience, many officers evaluating vehicle-versus-bicycle collisions or vehicle-versus-pedestrian collisions overlook Vehicle Code provisions that benefit the cyclist or pedestrian.

For example, some officers profess ignorance of the existence of unmarked crosswalks. An unmarked crosswalk exists between sidewalks at every intersection. (Cal. Veh. Code, § 275.) A pedestrian crossing at a corner without a marked crosswalk is thus not jaywalking. In fact, the pedestrian has the right of way and vehicles must yield.

Other officers assume that a bicyclist on a sidewalk is violating the law. But this is not the case. The California Vehicle Code explicitly states that there is no prohibition against riding on a sidewalk in the absence of a local municipal ban. (Cal. Veh. Code, §§ 21650(g) and § 21206.) Some municipalities have blanket prohibitions, some have no prohibition, and others prohibit bikes on sidewalks in downtown areas only.

Additionally, if a bicyclist was riding on a sidewalk, the law does not require that the bicyclist ride in the same direction as traffic. Cal. Vehicle Code section 21650.1 requires a bicycle operated "on a roadway, or the shoulder of a highway," to be operated in the same direction as vehicles are required to be driven. But the legal definition of "roadway" does not include sidewalks. (Cal. Veh. Code, § 530.)

Another common misconception is that bicyclists should stay off the road whenever a shoulder or bike lane is available. The law says a bicyclist riding at the speed of traffic is entitled to share the road anytime. And even a bicyclist riding slower than traffic is entitled to ride on the right-hand edge of the road, and to take over the center of the lane when the lane is too narrow for passing, or when safety otherwise requires. (Cal. Veh. Code § 21202.)

The list goes on. We cannot rely on the vehicle code provisions commonly cited in traffic collision reports. We must know the code, especially the portions benefiting pedestrians and cyclists.

The hostile officer damages enhancement

Often, in cases where we represent pedestrians or bicyclists, we observe a law enforcement bias against our clients (especially against the cyclists).

You've seen it before, too. A defendant driver, fueled by righteous indignation that a bicyclist is merging into the lane of travel, accelerates into an unsafe pass and runs him down. The bicyclist shatters half the bones in his body. As the cyclist is loaded onto a stretcher, the officer takes down a self-serving statement from the defendant. When the cyclist gets home from the hospital insult piles on injury. He finds a ticket waiting for him, citing him for an unsafe merge.

Our first impulse may be to exclude evidence of the citation. But this also eliminates evidence of one aspect of damages: the added anxiety and frustration caused by an erroneous finding of fault against the innocent victim of a collision.

Whenever your client is found at fault in a collision, the hostile investigating officer is a dangerous witness for the defense. However, careful planning for the officer's deposition can lay the groundwork to exclude or neutralize much of her potentially damaging testimony at trial. What the witnesses told the officer, how the officer believes the accident occurred, and who the officer found to be at fault are all fair game for exclusion.

Finally, evaluate whether the evidence is ultimately more helpful or hurtful depending on the facts of your case. Sometimes, letting your client testify about the emotional impact of being wrongfully found "at fault" is the most compelling testimony of all.

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