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PROSECUTION OF EXCESSIVE FORCE CASES: PRACTICAL CONSIDERATIONS

Stephen M. Ryals[1]

I want to discuss the practical aspects of prosecuting an excessive force case. My focus is going to be on the time period from when you first take the case up through and including summary judgment. My discussion will be purely practice oriented. The first point I want to make is that summary judgment is coming. You should make a sign for yourself that says, "summary judgment is coming"; in fact, make two of them - put one sign on one side of your office door and the second sign on the other side of your office door, so it is the first thing you see in the morning when you come in and the last thing you see when you leave at night. And then on the backside of it you write, "I told you summary judgment was coming, you *schmuck.*" When it comes, you flip it over. Summary judgment influences everything you do in an excessive force case. Excessive force cases, and § 1983[2] cases in general, are unlike any other type of lawsuit. In a typical car wreck case, you might be in the practice of taking in the case, getting the medical records, talking to the plaintiffs and to a few witnesses, filing the lawsuit and away you go and let discovery take its course. I am telling you if you take that approach in civil rights litigation, and especially in excessive force cases, you are asking for trouble. In St. Louis, we have Rule 16 scheduling

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[2] 42 U.S.C. § 1983 (2000) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

plans.[3] The summary judgment motions are due well in advance of trial so you have to have everything locked and loaded to present to the court at the summary judgment deadline.[4] Even if you practice in a jurisdiction where they still do not file summary judgment motions in excessive force cases - notwithstanding *Saucier v. Katz,*[5] - you cannot be harmed by the necessary preparations. It can hurt severely if you are not prepared because there is nothing worse than scrambling around the last week before the summary judgment deadline trying to find an expert witness or get witness affidavits. Preparation is really front-loaded if you are doing it right and if you are interested in surviving a summary judgment motion and getting to trial.

THE PRE-SUIT / INVESTIGATION PERIOD

There are two factors that influence decisions you will make along the way; one factor is whether there is a criminal case(s) pending and the other factor is whether the excessive force resulted in death.[6] So let us talk about the pre-suit period. First of all, unless you are up against a statute of limitations problem, I advocate that you take your time in this period of the litigation. I even tell my clients that it may be months before I file their lawsuit and they should be patient. Also, I frequently take months not only investigating and researching, but thinking about the case and mulling it over. Of course in the pre-suit phase of the litigation you are going to do an investigation. Again, because you are worried about surviving a summary judgment motion, rather than talking to witnesses on the phone or having your investigator go talk to them and bring back a report about what they said, you should be thinking about getting the witness' statements in summary judgment ready form, which generally means signed

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[3] W.D. MO. R. 16.1.

[4] E.D. MO. R. 7-4.05.

[5] 533 U.S. 194, 200 (2001). This case involved a police officer sued for allegedly using excessive force while making an arrest. The Supreme Court held that if the officer asserts qualified immunity, a ruling on this issue must be made early on in the proceedings. The Court explained that qualified immunity is an entitlement not to stand trial or bear the burdens of litigation. *Id.*

[6] *See, e.g.*, Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995).

affidavits.[7] In addition, there is good reason, and this is a general litigation pointer, to get signed statements. In a case that I tried, I had the experience of talking to a nurse who was very supportive of the plaintiff. I sent her a letter with a statement of what she told me and I asked her to sign it and return it to me. It is a good thing I did this because when I called her to testify at trial she had no recollection of the events, none. Luckily, the judge allowed me to put her on the stand and ask the following series of questions:

> Q: "Did you witness this event?"
> A: "Yes."
> Q: "Do you recall what happened?"
> A: "No."
> Q: "Did I send you a letter with this statement?"
> A: "I guess you did."
> Q: "Is that your signature?"
> A: "Yes."

The judge let me support her testimony with this written statement and her statement came into evidence.

I encourage you to go visit the scene of the incident, although it is not always possible to do that pre-suit if your client was injured in the police station or a hospital; it might be tough to get into institutional settings. But, I believe that there is no substitute for going out, smelling the smells, seeing the site, getting the spatial parameters and otherwise absorbing the environs. I have one of these rolling tape measure tools. I take measurements and draw diagrams so I can present a "to scale" plan view diagram at trial. I take a lot of photographs. If you can take your client with you to show how people moved and whatnot, it is often helpful because your perception about the spatial aspect of the case

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[7] FED. R. CIV. P. 56(e), provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . .

may be skewed if you do not get out there and look at the scene and examine it for yourself.

One of the questions that always comes up, and I have heard a lot of people give bad advice without thinking about it, is, do you contact the agency that you are suing in advance of filing suit? There are a few different contexts in which this will come up. One is, you might be inclined to make an internal affairs "IA" complaint about the misconduct, however, that is fraught with all kinds of peril. For one, if IA does not take a verbatim statement, in other words, tape record and transcribe your client's statement, the police may misreport what your client actually said. I had an incident where I took a client to internal affairs in St. Louis. I sat there and listened to him answer the investigator's questions and when we got the charge that they prepared, they added that my client was at a bar drinking. I am here to tell you that my client's alcohol consumption never came up. But, now that it is reduced to a writing in this official document, I have to explain it away. It was pretty disturbing to me. I called the investigator and he said, "well I assumed he was drinking, he was at the bar." I told him that tells me a lot about your perspective on things.

It is risky to lodge an internal affairs complaint from another standpoint; when there are criminal charges pending. If your client is charged with a crime, you do not want them to make statements, probably ever to anybody, lest they waive their Fifth Amendment privilege.[8] In addition, the police will take those statements and use them in the criminal context. Also, think about this: here is how a lot of excessive force cases play out, in my experience. The client calls you up because he or she has been charged with resisting arrest, assaulting a police officer, disorderly conduct, disturbing the peace, or all four of these charges, or a variation of them. There is either a municipal ordinance charge or state charge, usually misdemeanors, which are not terribly serious. In my experience, in some departments it is a classic pattern that the officers will use excessive force and then issue the charges to cover for their misconduct, justifying the fact that the arrestee showed up at the police station with bumps and bruises and a bloody nose and whatever else he or she may have. So now you

[8] U.S. CONST. amend. V provides in pertinent part: "nor shall [any person] be compelled in any criminal case to be a witness against himself. . . ."

have to defend the criminal charges. It is my experience, especially in a bigger police department like St. Louis, that the police department's attitude is that it is no big deal. In ninety-five percent of the cases, the defendant goes in and just pleads guilty or plea bargains. So the cases just go away. Typically, the police officer files one hundred resisting charges and gets called to court for only five of them, usually with *pro se* defendants. The police do not think there is any big deal about what they are doing; beating people and charging them for resisting arrest. If you make an IA complaint and there is a criminal case pending, IA is will notify the police officers who are the party defendants in the civil rights case. And all of a sudden, what was a no-brainer event that the police were not even going to prepare for becomes significant. They are going to come in prepared to testify in the criminal case. You lose the chance to catch the officers and the prosecutor unprepared, and hence the opportunity to develop unguarded, damning evidence. So giving notice to IA has a risk that they will notify the police who will then treat this case seriously where they otherwise might not. You can also notify the FBI if you want to file a civil rights complaint. In St. Louis, we happen to have an FBI agent who is quite dedicated to investigating police misconduct, so there is a chance that there might actually be a federal prosecution. The FBI agent is also constrained by the guidelines of the Justice Department, which lowers the probability of a federal prosecution. The important thing to note is, whether the Justice Department goes forward with the civil rights prosecution or not, if you notify the FBI, under their policies, they have to notify the police department. It will have exactly the same effect as if you notified the police department through an IA complaint.

A good reason to notify the police department is to ask them to preserve crucial evidence like videotapes of the station or in the car or audiotapes. A lot of police officers now have body microphones. But again, it is a double-edged sword; if you ask the police officers to preserve crucial evidence, you are going to raise a red flag that something is coming. Also, think about this: be careful what you ask for because you might get it. I cannot tell you the number of times that my clients have told me there were tapes, that they were videotaped, that the client was a choirboy and

the police simply beat the hell out of him. Then you look at the tape and it shows a choirboy, but your client was not it - it was the officer. So you may have done your client a disservice by preserving bad evidence. At least if they destroyed the tape you could argue the negative inference. I do not know how it is where you practice, but in the city of St. Louis you get discovery after filing a lawsuit and only after you argue and brief all of the issues about nearly every single item you request. Compare that with my experience in Kansas City. I called up the lawyer for the Kansas City Police Department in a shooting case I was involved with and I said, "Dale, I would like to look at your file." He said, "come on over." We went to the police department, he made us comfortable, gave us a place to work and piled the documents and reports and photographs before us; anything we wanted to see. If we wanted copies, they would make us copies. His mindset was, if I can prevent a lawsuit from being filed because I disclose this material up front, and if the plaintiff's attorney takes a look at all the documents and determines he is not going to make his case in chief, it is a good thing for the police department to have disclosed this information up front. I had a similar experience with a case in Arkansas.

If you do not have a criminal case pending, you are not worried about what we call, in the sticks of Missouri, "laying behind the log." If you are not trying to keep a low profile, you might consider contacting the appropriate agency and say I am considering suing you and I would like to take a look at whatever documents and records you have to make my evaluation. If you do that and the agency turns you down, you may have some insulation against a possible Rule 11 sanction in the future.[9]

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[9] FED. R. CIV. P. 11 (b), provides in pertinent part:

> By presenting to the court. . .a pleading, written motion, or other paper, an attorney. . .is certifying that to the best of the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances. . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. . . (c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may. . .impose an appropriate sanction upon the

LEGAL RESEARCH

In addition to the investigation, you have to do the legal research. I encourage you to try and find a case on all fours, even though that may or may not be required where you practice after the *Saucier*[10] decision. But if you can find a case on all fours, obviously that is the best you can do. You should also note that you might have to look in the criminal or habeas corpus cases to find pronouncements of the law that might apply to your Fourth Amendment issue.[11] If you narrow your focus and search § 1983 claims only, you might be missing a court's pronouncement on the Fourth Amendment issue.

I also encourage you to look at the jury instructions before you write the pleading, at the same time you are doing the legal research. Whether it be pattern jury instructions or Martin Schwartz's and Judge Pratt's jury instruction book,[12] it is really an educational and enlightening experience just to read what the instructions will be and the author's commentary. At least photocopy them and put them in the file. They will form the basis of your broader education about the issues and you will at least have a specimen of something you can work from during the heat of trial. It is also an act of faith. Remember, summary judgment is coming so you couple a positive thought with a positive action by copying the instructions and putting them in the file on the belief you are going to get to trial. Also, it is instructive to look at the literature of policing, but it may be hard to pull out textbooks on criminal justice in the hustle and bustle of everyday practice. One reference that I found helpful is *Forces of Deviance* by Victor Kappeler.[13] Whatever books or articles you choose, put them on your nightstand and peruse. The effort will better help you to

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attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation . . . .

[10] *Saucier*, 533 U.S. at 194.

[11] U.S CONST. amend. IV provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . ."

[12] 4 MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS (3d ed. 1999).

[13] VICTOR E. KAPPELER, RICHARD D. SLUDER & GEOFFREY ALPERT, FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING (1994).

understand the case and it will also help you understand the other side's case better. It will also give you ideas for discovery and for theories of liability, especially when it comes to custom and practice issues.

EXPERT WITNESSES

Along those lines, remember summary judgment is coming. If you are going to use an expert witness, I suggest you consider hiring the expert witness now, as in right after the case comes in, rather than a month before the summary judgment response is due. You do not have to hire a nationally known person. I think you might be better served, in fact, by trying to find someone local; a retired police officer or someone at one of the universities who does criminal justice work. A lot of times you will find professors who have never done any litigation work but they would like to get involved in a case because it is exciting and interesting. They can sometimes use the data from your case for an article or their general research. Many times you will find men and women who have no experience but no baggage either, and they can be helpful in identifying issues as you begin the pleadings, and especially during the discovery stage. There is nothing more frustrating than to hire an expert later on down the road - I know this is from my own bad experience - when discovery is closed and have the expert ask, "did you get this, this and this," and you have to say "no, no and no," and you know you are not going to get it. It may or may not make a difference at the end of the day, but had the expert been on board originally, he could have told you to make sure you get specific items so he could look at them. So, experts help in a number of ways, especially if you are uninitiated into the police culture. Even if the expert goes to the scene and tells you this makes sense, this does not make sense; just in helping you sort through the factual issues, experts can be very helpful.

WHEN TO FILE SUIT?

When do you file suit, now or later? Obviously, the first concern you have is whether you have a statute of limitations

problem. If you have a statute of limitations problem, you probably have to get the civil case on file even though the criminal case is still pending. Be aware that if you file the civil case while the criminal case is pending, and if the defense lawyer is smart, the first thing he or she is going to do is notice up your client for a deposition. You may not want your client to give a deposition because of the pending criminal case. My belief is if your client refuses, ultimately the court will dismiss the case for failure to prosecute. It is a sticky wicket, as they say. But if you are up against the statute of limitations, I do not think you have any choice. Except, you are familiar with the holding in *Heck v. Humphrey*:[14] if you have been convicted and your civil case will somehow call into question that conviction, you have no cause of action under § 1983 until the criminal conviction is overturned or you are pardoned.[15] *James v. York County Police Department* held that if there is a criminal case pending and you file a civil rights case that might call into question the potential criminal conviction, the civil case is barred by *Heck*.[16] It has never been raised against me, but it is a defense you might be aware of if you decide to file suit now while the criminal case is pending. It also might save your claim if you miss the statute of limitations.

PLEADINGS

Should you file a bare notice pleading or a longer winded, specifically detailed pleading? I come down on the side of the precisely drawn, detailed, specifically detailed pleading as opposed to the bare notice pleading for a few reasons. First, I think it hedges against a 12(b)(6)[17] motion. Second, it raises the credibility of you and your client's claims in the eyes of the court and in the

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[14] 512 U.S. 477 (1994).

[15] *Id.* at 486-87.

[16] 167 F. Supp. 2d 719, 740-41 (M.D. Pa. 2001).

[17] FED. R. CIV. P. 12(b)(6), states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion. . .(6) [for] failure to state a claim upon which relief can be granted.

eyes of the defense to read this well-drafted pleading. Third, and maybe most important of all, a specifically detailed pleading can be a vehicle or the foundation for the court giving you more broad-reaching discovery than a sparsely drawn pleading.[18] Therefore, I generally come down on the side of specifically detailed pleadings.

Now, let me tell you that you have to be especially careful if you are going to follow this approach. It is not unusual for one of my pleadings to go through ten drafts. It makes me nervous to file what I described to you. I am ultra careful in making sure that all of the facts are right. I make the client read it three times. You have to be compulsive if you are going to be more detailed. And you also have to be careful. If you are too specific you might plead yourself out of court, in other words, too many facts in the pleading might reveal that you do not have a claim.[19]

DISCOVERY

"Formalism is the last refuge of scoundrels" according to the court in *Beck v. Pittsburgh*.[20] If you are going to get anywhere at all in discovery, you have got to pierce the veneer of legitimacy that most police departments are able to project. You have to dig deep, dig hard, start early and keep fighting until somebody tells you to stop. The kinds of places you are going to find truly valuable information are the internal communications of the police department, such as memos back and forth and maybe e-mails. If you subpoena the police academy, you might get the psychiatric records of the police officer, which might be revealing. The desk book, the roll call book, and whatever else the precinct or the department may have is often very revealing. Also, you should visit the police station if you have a chance. I am a real advocate for getting into the doors and walking around inside and looking at the bulletin boards and just snooping. You may be there for a deposition or to have the defense produce documents there. Never

[18] Nat'l Cong. for Puerto Rican Rights v. City of New York, 194 F.R.D. 88; 2000 U.S. Dist. LEXIS 4448 (S.D.N.Y. 2000).

[19] *See,* Lanigan v. Village of East Hazel Crest, 110 F.3d 467, 474 (7th Cir. 1997) ("Lanigan's fact-specific complaint does not assert a violation of any constitutional right. . . .[he] has pleaded himself out of court. . . .").

[20] 89 F.3d 966, 974 (3d Cir. 1996).

give up the chance to get inside the police department and just look around. Here is a great example: The guy that just beat the hell out of your client may be the officer of the month for four months in a row. It may say something about the orientation of the police department that they think this officer is a great guy.

DEPOSITIONS

A couple of items about depositions. It occurs to me that telling practicing lawyers how to conduct depositions may fall on deaf ears, but in my experience the friendlier you are the better the deposition goes. I just try to be as nice, respectful and courteous as I possibly can. When the police officers are mad at me and are being mean to me, I try to be even nicer. I try to ask questions out of sequence; and frequently the first questions out of my mouth will be did you beat my client on the head, why did you do it, and then just start jumping around and asking questions about different points in the event. If you can get the officer off of the script of the police report, a lot of times you will get good information. Also, probe in great detail outside of the confines of the police report. Do not let the officer just stick to the police report because then you are sunk. Take a transcript of any tapes you may have, audio, body microphone tapes, or radio transmission tapes, as well as the actual tape, and the officer can listen to it and correct any mistakes in your transcript. If it is accurate, he can validate that fact. Via the deposition testimony, you will have that bit of evidence at trial or on summary judgment. If you are going to ask the police officer to demonstrate how he beat your client, you want to videotape it so you memorialize this demonstration. That is particularly important when the officer's reported account about how your client was injured, such as "sustained three linear lacerations to head when fell to the ground" or "the subject was attempting to strike me and I blocked his blows with my baton. . . .One such attempt to block deflected off of subject's arm and struck his head," does not seem to make sense.

Earlier I alluded to the fact that a death case presents special problems. Proving that the force used was excessive can be especially challenging when you do not have a live witness to rebut what might be – are likely to be – self-serving accounts by

the police. Although you might be aided by judicial sensitivity, like that expressed in *Scott v. Henrich*,[21] you have to create or identify inferences from direct evidence, and more frequently inconsistencies between physical facts and police accounts or between police accounts themselves. In death cases, it is particularly important to be sensitive to the fact that the proof will likely be presented for the first time in response to a summary judgment motion. The lawyer who is in the practice of saving points for trial, as opposed to making them at deposition, may never get the opportunity to make the points at all.

CONCLUSION

In closing, I want to give you two cites, morsels of information that might serve you because they discuss a lot of issues and they might give you ideas for your *in limine* motions in the future. As it pertains to motions *in limine*, the Northern District of Illinois seems to deal with *in limine* motions frequently in reported opinions. Take a look at *Regalado v. City of Chicago*,[22] and *Finley v. Lindsey*.[23] One final thought: summary judgment is coming.

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[21] 39 F.3d 912, 915 (9th Cir. 1994)

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts.

(citing Hopkins v. Andayam, 958 F.2d 881, 885-88 (9th Cir. 1992)).

[22] 1998 U.S. Dist. LEXIS 20528 (N.D. Ill. Dec. 30, 1998).

[23] 1999 U.S. Dist. LEXIS 12261 (N.D. Ill. Aug. 5, 1999).