

April 2016

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Recommended Citation

Ryals, Steve (2016) "Problems Concerning Litigating Custom and Practice Cases," *Touro Law Review*: Vol. 16: No. 3, Article 9.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol16/iss3/9>

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Ryals Litigating Custom and Practice

PROBLEMS CONCERNING LITIGATING CUSTOM AND PRACTICE CASES

Steve Ryals *

JUDGE PRATT:

The next speaker is Steve Ryals, who is a practicing attorney from St. Louis. He is going to give us some practical insights into the problems of litigating custom and practice cases. I think this is Steve's third year here, if I am not mistaken. Now, Steve Ryals, I hope we have not stolen all of your thunder here. Please provide us with some insights on really litigating one of these cases.

MR. RYALS:

I think about municipal liability/custom and practice cases,¹ and I'm reminded of a story about a golfer who plays for years at the same course, and there is a particular hole where there is water in front of the hole. As long as he has been playing this course, every time he steps up to hit his drive, he hits the ball in the water. No matter what he does, no matter what club he chooses, no matter how he changes his swing, he always hits the ball in the water. So out of frustration, he goes to a sports psychologist and gets hypnotized. The sports psychologist tells him, when you step up to the hole, you are going to have success because a little voice is going to go off in your head and will help you. So he steps up to the hole and the voice starts saying to him, "Keep your head still, keep your balance, swing easy, you are good enough, you can do it, think of Jack Nicklaus' swing, swing easy, you can do it." So the guy is feeling really good and positive. He reaches into his bag to get a ball and the little voice says, "not a new one, stupid."

* B.A. University of Missouri-St. Louis, 1981; J.D. University of Missouri-Kansas City, 1984. Mr. Ryals is a partner in the firm of Ryals & Soffer, in St. Louis, Missouri. He practices in many areas of law, concentrating on Civil Rights litigation, Section 1983 litigation, police misconduct, and employment discrimination. Mr. Ryals has also published extensively in these areas.

¹ Local government may be sued based on policy and custom when the execution of a government policy or custom, whether made by its lawmakers or by those whose acts represent official policy, inflict injury. 81 A.L.R. Fed. 549 (1987). Colleen R. Courtade, J.D., *What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit Under 42 U.S.C.A. § 1983 – Modern Cases*, 81 A.L.R. Fed. 549 (1987).

When I think about bringing custom and practice cases, a little voice goes off in my head that says, “Not a custom practice and case, stupid.” As Judge Pratt points out, there is hostility toward these cases from the judiciary, from juries, from the defense, certainly, in defending them, and these cases are very difficult, and that’s an understatement.

I think it’s important to remember what they are not. With all respect to Professor Blum, it’s easy if you don’t do this kind of work all the time and study the law as thoroughly as a professor does to get confused. I study the law constantly because this is what I do, and I’m still confused. What I suggest to you is, just remember, first, if you are looking at a situation where you have a single act by a policymaker, don’t think about custom and practice. Second, if you have a promulgated policy, don’t think about custom and practice, and third, if you have an area of policing where the need for training or supervision or discipline is obvious, you may not need to think about custom and practice. So, for example, if your client is hit in the head with a baton and you find there is no policy in the department that says don’t hit people in the head, you may not need to focus on custom and practice. The city may be liable without a showing of custom and practice. You may want to explore it for other reasons, but it may not be necessary for you to make your case out of custom and practice scenario, and that’s important because it’s hard to do so.

To quote from one of my favorite movies, “Cool Hand Luke,” I want to “get your mind right” about how to approach a custom and practice case.²

First of all, the examination of customs and practice requires an historical view, so you want to look at evidence department-wide or in a huge department, like New York City, you may succeed in proving that a particular unit or department or precinct within the department has this custom and practice. There is a good case from Los Angeles, *Larez v. Los Angeles*, that involved a specialized unit that went in and kicked doors on drug raids. It was called the crash unit and that particular unit had problems, so you may not have to show custom department-wide.

² Dave Kehr, *Cool Hand Luke*, Chicago Reader, <http://onfilm.chireader.com/MovieCaps/. . / 02177 COOL HAND LUKE>. An anti-establishment drama set in a prison camp. *Id.*

Remember when you are talking about misconduct it must be of a constitutional dimension. Harassment or non-constitutional problems are nice icing, but you want to look for a pattern or custom and practice of constitutional misconduct over time, and as Professor Blum pointed out, it's hard to say how much time or how much of a quantity of prior misconduct you have to find. My approach is the more, the better. Obviously, if you have too much, the judge will tell you and you will curtail your presentation. Remember it's knowledge - what municipal policymakers know or should know, and fail to correct.

Your mantra in all *Monell* cases,³ but especially if you're going to bring a custom and practice case, is causation. If you take one of these cases, write the word causation on Post-It notes and stick it all over your walls, because if you forget that what you're trying to show is that what they did or didn't do caused the deprivation, you're going to lose. You always have to be thinking about how am I going to show that nexus between the municipal failure to act to correct a deviant custom and practice, and the deprivations.

Also, remember the "mental state" required of the municipality is deliberate indifference, which Justice Souter, in *Bryan County*,⁴ says is tantamount to intent.⁵ I think it ought to be nearly malpractice per se to claim a state actor was "negligent" and thereby violated Section 1983. It's so unpersuasive and will reveal you as someone who is uninitiated if you use the term negligence in the Section 1983 pleading. So it's deliberate indifference. Remember that.

As for the evidence of the misconduct, keep this in mind, too - you are trying to show notice of a custom and practice. The same evidence shows the custom and practice and the notice, and what I'm going to do eventually, when I get past this introductory material, is talk about a case I prosecuted and give you sort of a war story of sorts to demonstrate how we went about trying to prove a custom and practice case. Another thing to keep in mind is, just because you want to make a custom and practice case, doesn't mean you are going to have the evidence to make it, which is sort of obvious, I know. Your proof is going to be driven by

³ *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

⁴ 117 S. Ct. 1382 (1997).

⁵ *Id.* at 1395.

what you get in discovery. In my materials, I have given you what I think is a pretty thorough list of the kind of things you want to ask for. As Professor Blum pointed out, there are cases that say things that happen after the event are just as probative, maybe more probative, as things that happened before. Unless you are in front of one of our district judges who, when he was told that the *Henry v. County of Shasta* case allowed the admission of post-event evidence, his response was, “The Ninth Circuit. Ha.”

If I was going to - if you have only an hour to educate yourself on custom and practice cases, I wouldn't go to Supreme Court opinions. What I would do instead is glean the Supreme Court precedent from the circuit opinions in your circuit, but I can recommend to you a handful of cases that I think are really important for anybody who is thinking about bringing one of these cases. The cites are all in my material: *Beck v. Pittsburgh*,⁶ *Vann v. City of New York*,⁷ *Spell v. McDaniel*,⁸ *Snyder v. Trepagnier*,⁹ and *Gold v. City of Miami*,¹⁰ those are five of them. The first three were successful cases; the last two were unsuccessful cases. See what is going on in your circuit.

Those five cases basically illustrate what I'm going to talk about now, which is the case that I prosecuted. I'm going to not reveal the city, but it was a rather large department. Let me tell you what happened in my case: My client, it happened in 1992, and my client, I'll call him Jackson after my youngest son, had a traffic run-in with a police officer, who I'll call Mitchell, after my older son. I gave the bad guy the name of Mitchell because right before I came to New York, I had a disagreement with my son about picking up his room or something, and his way of getting to me was to say, “Okay, fine. When I grow up, I'm going to be a police officer.” So he gets to be a police officer now. By the way, I told him, “Fine, when you grow up and be a police officer, I'll sue you, too.”

So Mitchell and Jackson are side by side at an intersection. What happens is that the light changes and they start to proceed. Up

⁶ 89 F.3d 966 (3rd Cir. 1996).

⁷ 72 F.3d 1040 (2nd Cir. 1995).

⁸ 824 F.2d 1380 (4th Cir. 1987).

⁹ 142 F.3d 791 (5th Cir. 1998).

¹⁰ 138 F.3d 886 (11th Cir. 1998).

ahead the two lanes veer into one, so one driver has to get over or give way. My client, Jackson, speeds up, Mitchell speeds up, and Jackson slows down, and Mitchell slows down, and they do this all across the intersection, and they finally get up the road a piece, and Jackson pulls up to Mitchell and says, "Young man" - my client is 63, 64 years old, he is a mature gentleman, and Mitchell is a young guy, a young cop - and Jackson says, "Young man, you know you could have caused me to have an accident back there," and the guy's off duty, you understand, Mitchell is off duty and out of uniform and in a private car, and Mitchell responds, "I'm a police officer." My client says, "Well, then you should know better." Well, my client drives away thinking that's the end of it, and he gets pulled over by some uniformed officers who were flagged down by Mitchell and, ultimately, he is charged with driving while intoxicated, and they say he refused to take the breath test, which in Missouri means they revoke your license. All that is well and good, except, it was ten o'clock in the morning and my client has not had a drink of alcohol for over 30 years, and it's worse than that. He can prove it because he has a slew of cops and former cops who are his friends and they came into Internal Affairs and told Internal Affairs, "I know Jackson. He doesn't drink. I have been with him in a tavern playing card or dominos or whatever they were playing, and he drinks juice all the time. He doesn't drink." This was a totally put-on case. So the facts of the case are you have an off-duty officer basically reacting to a private dispute by putting the case on my client.

I think it's important in these cases to develop a theme, and it may not be consistent with what you read in the appellate opinions as far as terms of art, but my theme in this case was: police officers in this department engage in misconduct toward citizens because the department does nothing to stop it. They do nothing to stop it because Internal Affairs is lame; they don't take citizens' complaints seriously, they don't properly classify them when they take them and even though they may do a formalistic investigation, they never - or rarely - sustain citizens' complaints, and in addition, this department had a problem of nepotism, which became an issue in this case because the bad guy, Mitchell, his dad was a captain in the department, and there were some comments in evidence about that that I'll tell you about. In addition, I had

evidence or I had a theme that officers in this department - I knew this from reputation and anecdotal evidence before I filed the case - were fond of throwing their weight around, whether on-duty or not, and they would frequently, in my experience, use their authority to settle private disputes like this one. That was my theme.

How did I prove it or try to prove it? I got the defendant's IAD record, I got the Internal Affairs file, and I used the testimony of commanders in the department. I asked for a Rule 30(b)(6) deposition of the IAD commander or whoever would talk about the Internal Affairs files, and they produced the commander of Internal Affairs, a lieutenant who was a really sharp guy and really hard to depose. When I went through, this particular department has from 600 to 700 odd complaints a year, and I persuaded the judge to let me look at five years worth of complaints, and he limited it to specific categories. But then I talked to the defense lawyer who said, "We can't retrieve them by those categories." I said, "Well, I'm going to have to look at them all," and finally talked him into letting me, and - this is unprecedented in my experience in this case or any other I read about - I went down to Internal Affairs, and they brought out buckets of files to look at, and I literally looked at 2,000 files. The stuff these things revealed was just phenomenal. I quit at three years. I finally said, "I surrender," and I picked 14 files that I thought were probative in this case, that went with the statistics and with the evidence I had on the guy, on Mitchell. The judge said I could use six of them, and I'll tell you about those in a minute.

Let me tell you about Mitchell, what kind of record he had. He became an officer in 1998, fully certified off probation in April of 1989 - I did say '98, I meant '88 - four months later, he had his first IAD complaint, abuse and stealing; not sustained. And 28 days later he had a car wreck, which resulted in a complaint that was sustained. In 1990, he had a complaint that he stole money and planted drugs; not sustained. In '91, he had a physical abuse and threat complaint; not sustained. Two months later in '91 he had a complaint he took money, made a guy pull his pants down, planted drugs on him; not sustained. He lost his hat, that was sustained. In 1990, I found a letter from an internal affairs - strike that - from his commander, a lieutenant, to the Internal Affairs

commander, "Officer Mitchell has a potential of becoming an excellent officer, however, at present, his overall performance is below average. I have cautioned him about his insensitivity toward citizens he comes in contact with and his lack of self control in stressful situations."¹¹ Now, what do you think IAD did with that letter? Nothing. Absolutely nothing except file it away. There was no action taken as a result of that. In 1992 he had eight complaints, eight complaints in one year. In a drug raid - this just boggles my mind to this day - he went on a drug raid with officers from another jurisdiction. An officer from another jurisdiction called Mitchell's department and complained that he saw Officer Mitchell remove an uzi submachine gun from this drug raid. Another police officer accused him of stealing a weapon from the drug raid.

How did they classify this complaint? Did they call it stealing or violation of the constitution? No, they classified it as conduct unbecoming an officer, which is sort of the same as being rude to someone in public. So, first off, IAD is lame because they don't even get the classification right and they exacerbated that problem because they didn't sustain the complaint anyway, so apparently, the word of another officer from another department is not good enough. By the way, the allegation was corroborated by a confidential informant who told them he was aware an Uzi was taken during this raid, so they have a corroboration about this. Three months later he was charged with physical abuse, and there was an injury for corroboration; not sustained. Two months later, a traffic stop, bad attitude, threat to two subjects; not sustained. Two months after that, IAD - we are up to number ten now - verbal abuse, threat, took money; not sustained. A month after that was the Jackson incident. Two months later, physical abuse; not sustained. Two days later, false arrest for DWI and running a stop sign; not sustained. One month later - we are up to number 14 now - he is accused of improperly entering a house, improperly searching, improperly seizing property, and he was accused of doing this with a young officer. I want to tell you how this came out, because the young officer, for whatever reason, rolled over. What they said happened was, they had a stop or something, and

¹¹ Letter from Lieutenant Commander to the Internal Affairs Commander (on file with the author).

from that stop they developed probable cause sufficient to go to this house - they did not have a warrant - that's what they wrote in the report. It turns out there was no stop. It was all fabricated. They testified as such before the grand jury, and it's not clear to me why the young guy rolled, but apparently he was trying to save his job, and he said, "Look, I fell in with this guy and he is a bad guy and he led me to do these things and kept telling me he was the captain's kid and they couldn't hurt him. He kept telling me, 'the most deadly weapon I own is a pen, because I can write my way out of anything.'" This is a statement this officer gave. They finally investigated this bad guy Mitchell. Not until '93 - he had two more complaints that were not sustained, but under investigation - he resigned. They finally had him. When he resigned, they dismissed the case against my client - finally.

The files that I was allowed to admit into evidence by the court - one involved an off-duty officer who went to the Lake of the Ozarks to arrest and take in custody a juvenile who had been impersonating the officer's son. It was a totally private thing. The officer was accused of abuse on the way back - on the ride back. The complaint was not sustained. The son of the former chief of police who was working secondary employment was charged with abusing a woman in an altercation in a tavern. She had physical injuries - evidence of abuse. That complaint was not sustained. An off-duty officer on probation was alleged to have abused a citizen in a traffic stop off duty, just like in my case; not sustained. I represented the folks in the next case. It involved an off-duty officer in a car wreck with a 17-year-old kid, and after the car wreck, the officer got out with his weapon drawn, brandished it at the four people, scared the hell out of them, basically. His story was, "The collision knocked the weapon out of my pocket, that's why I had it out." That claim was not sustained. This is the best one of all: An elderly citizen had a car wreck with a clerk in the department. As a result of that, the clerk had to pay the elderly citizen damages for the wreck, and I guess the clerk told one of her officer friends, "Look, I want to get this guy back." What the officer did was, he faked having made a traffic stop of the guy and reported the elderly citizen to the Department of Revenue and made him take a driver's test, and he faked the report about this. "I

stopped him and he was confused. I let him go because it was only a block from his house,” and then he sent in this report. The documentation by the computer record of inquiries revealed that it couldn't have happened the way the officer said. The investigator recommended that they sustain the complaint. They didn't sustain it. The last one had to do with an off-duty guy working security. He got honked at by the complainant. There was corroboration that the officer abused the person, and that was not sustained either. That was the quantum of files I had.

I had a problem: how am I going to get all of this into evidence? I put the files in three binders, it stacked this tall (indicating approximately 30 inches). One way to do that is you can use the rule 1006 summary, which I think is persuasively useless. What I did instead was, I called the commander of Internal Affairs, and I started going through with him and highlighted the points basically as I told them to you. My idea was, over a couple of days period of time, because I figured the judge and jury are going to give you about this much rope before they get bored listening to you tell them how bad the cops are, and so over about a day and a half, I had the officer pick on the high points, and I got him to admit that this complaint, the one about the elderly citizen, should have been sustained, but it wasn't. “Can you explain why?” “No, I can't.” I got him to admit a lot of things. I think this is important if you are going to call commanders: You can ask them questions, but it doesn't matter what they say in response. For example, in the *Gentile v. County of Suffolk* case,¹² the judge wrote “lack of discipline encourages misconduct,”¹³ and you just ask the commander, “Do you agree with that statement, ‘lack of discipline encourages misconduct?’”¹⁴ If he says, “No, I don't agree with that,” then he looks silly, if the jury is with you. If he says, “Yes,” then you have made an element of your proof. I asked the commander, “If somebody files a lawsuit, do you start an investigation?” The answer was, “No.” This is from their manual. Can you read that? This is from the complaint and disciplinary procedures, “the scope of this rule, the provision of this rule shall apply to complaints from the following sources: Those made in

¹² 129 F.R.D. 435 (E.D.N.Y. 1990).

¹³ *Id.*

¹⁴ *Id.*

lawsuits or during the course of litigation.” So he admitted they weren’t following their own policy. My time is about up, so I’m trying to rush through a few of these things.

Fundamentally, what I’m trying to get at in a shorthand way is that I tried to get to usher in all of this evidence that I have described to you by using the commander. Here is one of their statistics sheets. This is a year’s worth of their statistics, and what I did was, I had these blown up, and I asked the commander, “Under each of these categories, who makes these complaints?” You can see there is physical abuse, verbal abuse, improper attitude, on down. All of those are made by citizens. I denote that with a “C.” The other ones, violation of department procedure and the others below that are made by police officers or commanders. Look at the difference in the rate of sustained verses not sustained. You have virtually no chance if you are a citizen of having your complaint sustained. The excessive force complaints in this particular year - 105 excessive force complaints; five of them were sustained. On the other hand, 120 of the 128 complaints by department members were sustained, complaints such as losing your hat. Every year was like this, so I was able to show that statistically, citizen complaints are ineffective at getting redress. Very quickly, I also called the chief of police, the mayor, who used to be the chief of police, and I called what they call the inspector of police. The reason I did that was because, when I asked the commander of Internal Affairs about a performance evaluation unit, which is a unit where they did advanced monitoring of officers with a lot of complaints, he said, “I don’t know anything about it. Ask the inspector of police.” So I did. “What about the performance evaluation unit?” “I don’t know anything about it. Ask the chief.” So I asked the chief, “What about the performance evaluation unit?” “I don’t know anything about it. Ask this guy.” The point is, the chain of command had no knowledge and, apparently, this unit was operating under no rules or guidance, no criteria, and they may be identifying officers who are problem officers who should have been targeted for a special training or special supervision, but nobody knew about these officers because they were all secret files, verbally kept; there was no written record. What they would do in this unit is, if somebody had a problem, they would bring them in and counsel them. I asked the

Internal Affairs commander, “Can you refer somebody over there?” He said, “No.”

I’ve got to tell you, when you do a custom and practice case, you make the case on little tidbits like what I have described, there is some more of that, I just don’t have time to cover it. I want to part with a quote that I love. It has to do with discovery in these cases, and it’s a quote from Dr. Martin Luther King in the case of *Wiggins v. Berg* out of the Northern District of Illinois.¹⁵ “Like a boil that can never be cured as long as it’s covered up, but must be opened with all its pus pouring ugliness to the natural medicines of air and light, injustice must likewise be exposed with all of the tension that its exposing creates to the light of human conscience and the air of national opinion before it can be cured,”¹⁶ and I’ll tell you what, as a plaintiff’s lawyer, when I think about that sentiment, I tell the little voice in my head to shut up.

JUDGE PRATT:

Steve, thank you very much. You have given us a great insight to a creative and imaginative approach to a case where your underlying data was primarily written documents.

¹⁵ 173 F.R.D. 226 (N.D.Ill 1997).

¹⁶ *Id.* at 230.

