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Police Misconduct - A Plaintiff's Point of View

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~~Brewington-Police Misconduct~~
**POLICE MISCONDUCT- A PLAINTIFF'S
POINT OF VIEW**

*Fred Brewington**

JUDGE PRATT:

For the police misconduct from the plaintiff's point of view we have a one-two punch for you. The left jab is Fred Brewington, who will go first, and the right cross is John Williams.

MR. BREWINGTON:

They say in the art of boxing that the jab is the most under-used punch. While Barry Scheck covered one aspect of criminal prosecution - the criminal prosecution of the police officer - I think it is extremely important from the plaintiff's point of view to be aware of criminal prosecution that will take place, and has taken place, with regard to one's client. It is something which is extremely important and to which not enough plaintiff's attorneys pay attention, particularly in terms of making it part of the knowledge or scope of information that is available to assist your client.

Attorneys who want to practice in the Section 1983 area of civil rights law should learn the criminal practice. First, the attorney will know what to ask for and when he needs to ask for it. Second, it will help the attorney safeguard the history of his case. If, indeed, there is a case where an under-supplied and over-worked legal aid attorney is representing a client and there may very well be an adjournment in contemplation of dismissal (hereinafter "ACOD"),¹ that legal aid attorney should try to get the case dismissed because it may somehow impact upon the case later on.²

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¹ See N.Y. CRIM. PROC. LAW § 170.55 (2) (Consol. 1999). This section provides in pertinent part: "An adjournment in contemplation of a dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice." *Id.*

² With regard to civil claims an "ACOD" will not be considered a favorable termination of the underlying criminal case, and that cause of action may be unavailable to the civil plaintiff.

To that end, it is important to be prepared to handle criminal cases. It may not be glamorous, it may not be something that one initially wants to do, but it may be something which turns out to be extremely important in the outcome of one's Section 1983 civil case. Additionally, an attorney can increase the discoverable information he obtains in his civil case by encouraging production or making certain things happen in the actual criminal prosecution.³ So I would encourage plaintiffs' attorneys in that regard.

There was one area that Barry touched upon which I would like to emphasize. There may be a criminal prosecution of the police officer or a presentation of a case to the grand jury after the district attorney has done an investigation. If there is a no true bill that comes back, or the grand jury does not indict, there is a wealth of information just waiting for the attorney when he requests the district attorney's file.

Many people will say that the attorney should not get the district attorney's file because it is covered by section 50-a of the Public Officers Law in New York, which deals with the right of privacy of public officials or that information regarding public authorities should not be disclosed.⁴ There have been rulings both in the

³ See generally, FED. R. CIV. P. 33(a). This section provides in pertinent part:

"Without leave of court or written stipulation, any party may serve upon any other party written interrogatories..." *Id.*, FED. R. CIV. P. 34(a). This section provides in pertinent part: "Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requester's behalf, to inspect and copy, any designated document..., or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served..." *Id.*, FED. R. CIV. P. 36(a). This section provides in pertinent part: "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." *Id.*

⁴ N.Y. CIV. RIGHTS LAW §50-a (McKinney 1992). While this section generally provides for the confidentiality and precludes the inspection of personnel records of police officers, firefighters and corrections officers, its last

Eastern District and the Southern District⁵ which afford discovery. I believe that an attorney will find most judges now requiring, upon the attorney's request, that the district attorney turn over all of his files in a criminal investigation. This requirement is particularly acute if the files are subpoenaed. Because of the fact that there is a possible violation of federal constitutional rights,⁶ the issue may very well take supremacy over any state laws that deal with administrative protections which are claimed to exist.⁷ I have done it successfully in a number of cases and I would encourage an attorney not to take lightly what may be in those files.

We currently have a case in Nassau County where we sought and obtained the entire district attorney's file. It was a shooting of a young man in Elmont. It turned out that the district attorney did a detailed investigation in the area. Additionally, he went back ten or eleven years reviewing all of the individuals that this particular police officer had contact with, arrested, beaten and at whom he

subsection specifically excludes district attorneys, assistant district attorneys, *et al.* from these protections. *Id.*

⁵ See *Rivera v. Lennon*, 1988 U.S. Dist. LEXIS 13730, at *2 (E.D.N.Y. November 23, 1988) (holding that Fed. R. Evid. 501 does not necessarily permit the state privilege in a civil rights case); *King v. Conde*, 121 F.R.D. 180, 188-89 (E.D.N.Y. 1988) (holding that police must make a substantial showing by timely invoking the privilege to each discovery request, and an explanation how the disclosure would harm specific interests in order to balance the privacy privilege against the federal civil rights question). See also, *Sheppard v. Phoenix*, 1998 U.S. Dist. LEXIS 10576, at *26 (S.D.N.Y. July 16, 1998) (finding that N.Y. CIVIL RIGHTS LAW §50-a does not prohibit disclosure of personnel records for discovery in civil rights cases for individual law enforcement officers).

⁶ U.S. CONST. amend. V. This section provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. [Emphasis Added]

Id.

⁷ U.S. CONST. art. VI, cl. 2. This section provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."

fired his gun. This was information that we most certainly would not have had immediate knowledge of or contact with had we not gone after those files.

There is another issue that I would like the panel to discuss. The issue is a situation when an attorney tries a criminal case and is either able to: 1) get a statement suppressed,⁸ 2) demonstrate a violation of a Fifth Amendment⁹ right thereby getting the statement suppressed and the judge ruling that the person was denied their right to counsel,¹⁰ 3) get his client acquitted, or 4) get the case dismissed outright.¹¹ The plaintiff's bar should give more consideration to section 1983 action that include Sixth Amendment claims.¹² If indeed a statement was taken and there was no counsel and no waiver of that right, that too is a constitutional violation that should be considered.¹³

Representing a client who may not be one that everybody else wants to represent is another area to consider. A client that perhaps has a criminal record, that goes to an attorney with a smudged background, or goes to an attorney and is not informed of

⁸ N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1995). This section provides in pertinent part:

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded

Id.

⁹ *See supra* note 5.

¹⁰ U.S. CONST. amend. VI. This section provides in pertinent part: "[T]he accused shall...have the Assistance of Counsel for his defence."

¹¹ N.Y. CRIM. PROC. LAW § 210.45 (Consol. 1999) (describing how to make a motion to dismiss an indictment).

¹² U.S. CONST. amend. VI. This section provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

¹³ *Id.*

his or her rights, and is in a situation where they may have a checkered past in terms of drug use, is a difficult situation to deal with.

I would like to divide this topic into three areas and will begin in terms of deciding whether to agree to representation on a case like this. If the client has a criminal record or a drug use history, opposing counsel will make sure to get every scrap of evidence and background information, as is done by the corporation counsel's office relative to this history.¹⁴ How should an attorney deal with that?

The first thing an attorney has to do is address this from the very beginning in the intake with the client.¹⁵ This is true if the attorney is representing the client in a criminal action or if it comes to him after the criminal case. It is important to address this early on because what the attorney does not know will come back to haunt him/her and all of a sudden the attorney will think it is a doberman pinscher biting him in the backside when it really is not. It is what the attorney did not get out of his client from the very beginning that hurt his case.

Why is that important? It is important because of the fact that, while these issues have nothing to do with the claims that the client was beaten, shot or wrongfully jailed by this individual, the issue is going to surface. They are going to attack the credibility of the attorney's client.¹⁶ They are going to say that it is habit.¹⁷ They are

¹⁴ See New York City Charter, Chapter 17, § 394 (describing the Corporate Counsel as "attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested . . .")

¹⁵ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-1 (1995) (requiring the attorney to represent his client competently, and to decline representation if the attorney cannot become as best informed as possible).

¹⁶ See N.Y. EVID. HAND. § 6.10 (Aspen Publishers, Inc. 2000) (noting that a witness' credibility can be attacked by a showing of a conviction of a prior offense, which illustrates the witness' attitude of placing himself above the rules of society, making such witness lack honesty).

¹⁷ FED. R. EVID. 406. This section provides in pertinent part:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

going to say that this individual had convictions and that these convictions should be introduced into the case for a reason unrelated to what happened on that dreary night when the client got rocked by a stick or a police radio or perhaps a fist.¹⁸ "I don't recall," is usually the response that is made to initial questions about such a client's past history. However, an attorney must be prepared to deal with this because it will occur. The bottom line is that the attorney should ask his client all these questions beforehand and press to see that it is fully covered.

The attorney should know the status of his particular case, that is whether it is a criminal prosecution or not. The reason is so that the attorney is the first to get that information so that he can provide some damage control.¹⁹ The attorney needs to know what to expect. The attorney should not fool himself or herself and say, "Well perhaps if we don't talk about it they won't ask about it in the deposition." They will ask about it. If the attorney could think about it, so can they. Therefore, it is really important for the attorney to get that information.

What about a client that is reluctant on intake to give the attorney information? Many attorneys may have had this come up in the intake. It is extremely important for the attorney to break that down. With regard to the plaintiff's bar, the attorney knows he is dealing in many situations with damaged goods. The attorney must remember that he is dealing with people who have had very bad contact with the government or police or their agents. These clients are reluctant to trust anybody, particularly if there has been serious psychological damage that has been rained upon them because of the incarceration. There also may have been beatings, sodomy or cavity searches, improper treatment, brutality and wrongful prosecution, with the attendant embarrassment,

Id.

¹⁸ See, Hon. Milton Mollen, *Police Violence: Causes and Cures*, Edward V. Sparer Public Interest Law Fellowship Forum, Brooklyn Law School, April 15, 1998, 7 J.L. & Pol'y 93, 100 (1998) (citing the impact on the individual and the large fiscal costs of police brutality from litigation in New York City). *Id.*

¹⁹ See MODERN TRIAL ADVOCACY – ANALYSIS AND PRACTICE, Ch. 4, § I (National Institute for Trial Advocacy 1997) (urging the bolstering of a witness' credibility on direct examination before the impending assault on his character).

humiliation and the like. Thus it is essential that the attorney build up the trust in the relationship between himself and his client.²⁰

An attorney builds up the trust in the relationship by making sure that the client understands that the attorney understands. This is very important in the relationship building between a client and attorney.²¹ If the attorney does not build that relationship in the beginning, at the end of the case, if the police officers are not castrated, hung in the village square, or not fired nor even disciplined,²² the attorney will find out how important his relationship is with his client. In situations like the one just described, the end of the case may only be about money, so it is important at this point, that the attorney have developed the trust from the beginning. Remember that the attorney has not gone through this, while the clients have. Because of what they have gone through, they need to have somebody who is telling it to them straight, someone that they trust. The attorney has to build that from the very beginning.

I think it is also important during the attorney's intake that he informs them of the limitations of what the law can and cannot do.²³ Many people have expectations that if they were incarcerated

²⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1995). This section provides in pertinent part: "Every lawyer owes a solemn duty to...observe the Code of Professional Responsibility; . . .to act so as...to inspire the confidence, respect, and trust of clients and of the public" *Id.*

²¹ *Id.*

²² See N.Y. C.P.L.R. § 7803 (McKinney 2000). This section provides in pertinent part:

The only questions that may be raised in a proceeding under this article are: 1. Whether the body or officer failed to perform a duty enjoined upon it by law; or 2. Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or 3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Id.

²³ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1995), which states in pertinent part:

for a day and were cursed at, handcuffed and humiliated them, they will not take any less than a million dollars.²⁴ This would be a tough case to win and a tough case in which to gain trust. This is particularly true if the attorney does not speak up right then and there. It is extremely important for the plaintiff's bar to do this because we have to remember that we are dealing with individuals who come to us with all types of problems and 'isms' that have occurred not because of their own choosing.

After having completed the intake and investigation, it is extremely important, even crucial when dealing with the unpopular client, to learn everything possible.²⁵ The attorney should learn everything that the client will not tell about themselves as well as what occurred at that particular instance.²⁶

Concerning the investigation, whether or not the attorney decides to take the case, the first thing in the investigation is to make some immediate move to preserve records.²⁷ It is often the case that time has passed and the client approaches the attorney six months or a year after the incident. The attorney has to try preserving 911 tapes and radio runs.²⁸ An attorney who is in one of the outer

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it . . . is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law. . . ."

Id.

²⁴ Potential damages can include: attorney's fees (*See, generally, Index to Annotations, Malicious Prosecution, Damages*, 21 A.L.R.3d 1068 (1968), compensatory damages (*See, N.Y. CONST. Art. 6, §30*), or punitive damages (*See, generally, Index to Annotations, Malicious Prosecution, Punitive Damages*, 94 A.L.R.3d 791 (1979)).

²⁵ *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1995) (opining that the attorney is duty bound to zealously investigate and advocate the facts and law of his client's case).

²⁶ *See, infra* note 32.

²⁷ *See, generally, N.Y. C.P.L.R. § 2301*, "Scope of subpoena"; § 3101, "Scope of disclosure"; § 3102, "Method of obtaining disclosure"; and § 3120, "Discovery and production of documents and things for inspection, testing, copying or photographing" (McKinney 2000).

²⁸ For instance, a radio call between investigating officer and dispatcher. *See* Fred Warren Bennett, "Federal Rule of Evidence § 803(8): The Use of Public Records in Civil and Criminal Cases", 21 Am. J. Trial Advoc. 229, 263.

counties needs to request the tapes that are maintained from car to car and from car to administrative command. The attorney has to ask for information that may exist. Nassau County and New York City have a system where their computer runs are kept and e-mail is available in the cars. This is something that the attorney has to try to get immediately as part of the investigation.

Letters to local police departments about particular police officers should be part of the investigation as well. The attorney should make a Freedom of Information Act (hereinafter "FOIL") request.²⁹ The request may get turned down, but there is a method to the madness. Recall my suggestion about trying to get a district attorney's files as well as other files. If they turn the attorney's request down, the attorney is in effect making a record that these requests have been made for when he goes to court.

For example, a motion for contempt was brought against a district attorney's office. We asked for particular information about a particular arrest and all the information they had gathered. The District Attorney said, "No, we're not going to give it." Had we not set up the chain of events that we had been seeking particular information at different levels, the judge would not have been so willing or so quick to give the information that we believed existed.

The scene review part of the investigation is very important.³⁰ It is very important because when a client says that "XYZ" happened, and the attorney has no idea what the place looks like, he should take a little time and go look for himself. He should inquire about his client's family. Again, the prior criminal history is extremely important.

After completing the investigation and intake, the attorney should talk to his client again to test his or her story. The attorney should do this because he is starting to help prepare his client for

²⁹ N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 1998). This section provides in pertinent part: "The legislature...declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article." *Id.*

³⁰ See MODERN TRIAL ADVOCACY – ANALYSIS AND PRACTICE, Ch. 4, § III (National Institute for Trial Advocacy 1997) (relating the importance of setting the scene of the event during direct examination, and recommending that such story telling end on a strong factual note).

what will occur. Perhaps that is going to be a 50(h) hearing that some people turn into a full deposition.³¹ But it also lets the attorney know exactly what he is going to be facing down the road.

After the intake, investigation and evaluation of the client and his or her case, an attorney should take a look at the client, the facts, and the police officers that are involved. With regard to a point that Barry Scheck made, he spoke about decisions that have been made by prosecutors to investigate and/or prosecute police officers. How does an attorney get the district attorney's office or the federal prosecutors to take on a case to investigate a police officer?

There are different methods in different places, but one of the first things to do is build the case and present it to them. The attorney should make it easy for the prosecutor to see what he sees. Do not just send a letter and say, "This is an atrocious thing, you should investigate it."

To illustrate this point, in Nassau County there are two or three ways an attorney can have a prosecutor look at a case for prosecution against a police officer. Particularly when the client is being prosecuted by the district attorney's office, one of the things we found that we must do is to file a formal cross complaint with the district attorney's office on its own forms. By doing that the attorney requires them to look at it as opposed to taking a letter the attorney writes and tossing it in the garbage can. The attorney is doing two things: first he is asking them to take a look at the prosecution of the police officer, and second he is also making them start a file because he could always go after their file even if they decide not to prosecute.³²

After going through the intake, investigation and evaluation, the attorney should discuss the information that he has taken in with his staff and his client. Most important is for the attorney to evaluate the case,³³ not just in terms of the actions that were taken,

³¹ N.Y. GEN. MUN. LAW § 50-h. This section provides in pertinent part: "Wherever a notice of claim is filed against a city, county, town village ... the city, county, town village ... shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made" *Id.*

³² See *supra* note 3.

³³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1995). This section provides in pertinent part: "Having undertaken representation, a lawyer

but what will be accomplished by the lawsuit in the long run. Inform the client about the limitations and evaluate the damages very early in the process. The attorney should do this because he has to look at this from a practical standpoint in terms of what it will cost to litigate these cases.

As we are dealing with newly created aspects of different corporate offices within the municipalities, special pockets of litigators are being created essentially to put up more barriers to the plaintiff's bar prosecuting these cases, thereby making it more difficult for us, which also makes it more expensive. Because of the expense, it is extremely important that the attorney also know what he is looking at cost wise, and inform your clients of this as well. Many of his clients do not have the resources to litigate these cases and the attorney is taking on the expense.³⁴ In terms of expenses, we are talking about the cost of depositions and the cost of experts. If an attorney wants to deal with these cases successfully, experts are extremely important, particularly when the attorney is going to be faced with an onslaught of information coming from the other side that is going to try to tear his client down.³⁵

Where a client has some history and background, as the attorney enters the case he should start to discern what it is he has to do with regard to trial preparation in the early stages. I am talking

should use proper care to safeguard the interests of the client." *See also*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(2) (McKinney 1999). This section provides in pertinent part: "A lawyer shall not . . . handle a legal matter without preparation adequate in the circumstances." *Id.* at 46.

³⁴ *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 (1995). This section provides in pertinent part: "Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in appropriate activities designed to achieve that objective." *See also*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1995). This section provides in pertinent part: "Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims..."

³⁵ *See, generally*, N.Y. C.P.L.R. § 3101(d) (McKinney 2000). *See e.g.*, Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F.L. Rev. 675, 713-14 (1998) (discussing the importance of expert witnesses to successful civil rights litigation).

about motions in limine,³⁶ and what it is the attorney will try to keep out from the very beginning.

Why should an attorney want to do that at that particular time or start thinking about it? The answer is because he will then shape his discovery based on what it is he wants to either try to get in or keep out. Part of the thought process is to put together a game plan for the lawsuit. Do not just let it happen, make it happen.

³⁶ BLACK'S LAW DICTIONARY 1013 (6th ed. 1990). "Motion in limine is a pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury." *Id.*