Advanced Topics in Use of Force Trials



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Section 1983: Advanced Topics in Use of Force Trials

Trying Cases with Multiple Claims and Multiple Defendants

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Preliminary Considerations



Are there conflicts that require different counsel for the various defendants?

Preliminary Considerations

A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule of Professional Conduct 1.7

Preliminary Considerations

- Review the file thoroughly.
  - Is there a conflict between the officer(s) and the municipality?
    - Indemnity
    - Conflict waivers
  - Is any officer's account of the incident so at odds with the others that an actual conflict exists?

Preliminary Considerations

. . . *One bite at a time*



Preliminary Considerations

- Move for summary judgment
- Eliminate the governmental entity if plaintiff cannot establish a custom, policy, or practice.
  - *Monell v. Dep't of Soc. Servs. v. New York*, 436 U.S. 658 (1978).
- Eliminate officers not directly involved in the use of force.

Preliminary Considerations

- Eliminate conspiracy claims where possible
  - Intra-corporate conspiracy doctrine. Employees of the same legal entity cannot conspire among themselves, for purposes of a claim of conspiracy to interfere with civil rights. *Hilliard v. Ferguson*, 30 F.3d 649, 650, 653 (5th Cir. 1994)
  - The majority of circuits who have addressed this issue have held that the intra-corporate conspiracy doctrine applies to public entities.
  - *But see Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994) (the intra-corporate conspiracy doctrine "should not be construed to permit the same corporation and its employees to engage in civil rights violations").
  - The Ninth Circuit and the District of Columbia have not resolved the question of whether the intra-corporate conspiracy doctrine bars claims against public entities.

Preliminary Considerations

- Eliminate state law claims where possible.
  - Sovereign immunity – check your state statutes.
  - For example, the Texas Tort Claims Act does not waive immunity for a claim "arising out of assault, battery, false imprisonment, or any other intentional tort. . . . " Tex. Civ. Prac. & Rem. Code § 101.057. False arrest, false imprisonment, and malicious prosecution are intentional torts for which governmental immunity is not waived. *See Humphreys v. City of Ganado*, 467 Fed. Appx. 252, 256-57.

Preliminary Considerations

- Consider interlocutory appeals for officers who have been denied qualified immunity.
  - Denial of summary judgment is an immediately appealable final decision. *See Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996) (district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of the statute conferring jurisdiction on Courts of Appeals, notwithstanding the absence of a final judgment); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985).

Trial Strategy

- Consider whether to request separate trials for different officers.
  - Is it likely that the facts may prejudice an officer with minor involvement?
  - Is the incident divisible into more than one sequence of events?

Trial Tactics

- Multiple Uses of Force
- Each Use of Force Must Be Justified
  - Multiple Taser Deployments
    - *E.g.*, *Beaver v. City of Federal Way*, 507 F.Supp.2d 1137, 1145-1147 (W.D. Washington 2007) (police officer's initial three uses of taser were objectively reasonable; final two uses of taser were not objectively reasonable; but officers were entitled to qualified immunity); *Moore v. City of Ferguson*, 2016 WL 5791461 (E.D. Missouri 2016) (officer's first use of stun gun on suspect was reasonable under the circumstances; issue of material fact as to whether officer's second, third, and fourth uses of stun gun on suspect precluded summary judgment).

Each use of force must be justified

- Each Use of Force Must Be Justified
  - Multiple Shots Fired
    - *E.g., Estate of Jaquez v. City of New York*, 104 F.Supp.3d 414 (S.D.N.Y. 2015) (where suspect repeatedly assaulted officers with a knife, police officers who initially used deadly force were entitled to qualified immunity. However, genuine issue of material fact as to whether police officer acted reasonably in firing final, fatal shot into head of emotionally disturbed individual after individual had been shot four times, was on the ground, and was surrounded by several officers, precluded summary judgment); *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014) (where officer fired 15 shots during a 10-second span of a high speed chase, officer was not required to stop shooting until the threat was ended).

Each use of force must be justified

- Multiple Strikes
  - *E.g., Lopez v. City of Imperial*, 2015 WL 4077635 (S.D. Calif. 2015) (multiple baton strikes from multiple officers); *Young v. County of Los Angeles*, 655 F.3d 1156 (2011).
  - *But see Watson v. Edelen*, 76 F.Supp.3d 1332 (N.D. Fla. 2015) (in § 1983 excessive force cases in which a collective use of force is alleged, the court need not analyze separately the force administered by each officer to determine which of the blows or other acts, if any, constituted the use of excessive force).

- Integral participation theory
  - *E.g., Garlick v. County of Kern*, 167 F.Supp.3d 117 (E.D. Calif. 2016) (officers were subject to liability pursuant to integral participation theory, even though they were not present when deputies initially engaged suspect, where they arrived at scene in response to call for backup and assisted in handcuffing and hog-tying suspect, and deputies allegedly delivered impact blows and applied body-weight pressure on suspect after he was restrained).

Trial Tactics

- Develop a timeline for each officer's involvement, and determine each officer's role in the incident
  - Check incident reports and other documents for times of arrival
  - Did the officer arrive after the start of the incident?
    - If so, what information was available to the officer?
  - Was the officer actually involved in the incident, or does his or her name simply appear in the report?
  - Is a supervisor a named defendant? Was the supervisor actually involved in the incident?
  - Will the plaintiff make a claim for failure to intervene?

Trial Tactics

- Data sources for your timeline
  - Taser printouts
  - MDT logs
  - AVL logs
  - Incident Reports
  - 911 call(s)
  - Body cameras
- Be aware that the data sources are likely not synchronized

Trial Tactics

- Have your officers explain how things work
  - How AVL data is collected and mapped
  - How to read MDT logs
  - What a taser readout shows
  - How a taser works
  - Defensive tactics
    - Maintaining a barrier between an armed suspect and the officer
    - Why the officer does not approach a suspect under NMI
  - Use visual aids if the court permits
    - E.g., taser wires

Trial Tactics

- Use your timeline to
  - Establish that an officer was not present when force was used
  - Establish that an officer standing by had no time to act to prevent incident
    - *Sanchez v. City of Chicago*, 700 F.3d 919 (7th Cir. 2012). *See also Garlick v. Kern*, 167 F.Supp.3d 1117 (E.D. Calif. 2016).
    - If you find that Plaintiff has proved by a preponderance of the evidence that Defendant Officer Smith *knew that Defendant Officer Jones was using force* against Plaintiff that was objectively unreasonable in light of the facts and circumstances, that she had a *reasonable opportunity to prevent* Officer Jones from using excessive force against Plaintiff, and that she did not act to prevent the use of excessive force, . . . [Fifth Circuit Pattern Jury Charges]
  - Establish that active officer had to make split second decisions in rapidly evolving situation

Experts

- Expert Testimony – Defendants
  - Make sure the expert addresses each Defendant's potential liability
- Expert Testimony – Plaintiff
  - Expert must satisfy *Daubert* standards for reliability
    - Testifying about areas outside their expertise (for example, bullet trajectories, forensic pathology, lack of familiarity with training requirements, lack of experience in mental health training)
    - Speculation

Trial Tactics

- Other evidence to support your officers
  - Training in de-escalation techniques
  - Dealing with the mentally ill
  - Other jobs – Mental Health Unit
  - Military History
  - Awards
- Uniforms or civilian clothes?

Trial Tactics

- Voir Dire
  - Have you ever called the Police Department for help? Did you have a good or a bad experience?
  - Are any of you members of any organization that protests police conduct?
  - Police officers are sometimes involved in matters and lawsuits that receive media attention. Have you heard or seen any media reports about this case?
  - Do you have any close friends or family members who were mistreated by someone in law enforcement?
  - Does anyone believe that if a person is injured in an encounter with the police, it must be the fault of the police?