

PRACTICE TIPS

Keeping Police Out of Civil Lawsuits

By Michael Marshall

(Excerpted from the author's more comprehensive paper for the IMLA 2014 Annual Conference in Baltimore, to be presented September 13, 2014)

Municipalities should consider a number of factors to reduce the likelihood that their police departments will become involved in civil litigation–and will allow a more effective defense if litigation arises.

1. Officer Discretion. You are well-served to train officers to be judicious in deciding whether an arrest is truly necessary.

Intoxication: A common example is an arrest for a drunk and disorderly individual whose actions technically violate the law, but are not so egregious as to absolutely require arrest. A typical situation is closing time in an area with a large number of bars and restaurants. The police may attempt to move people in one direction, but a patron who has had a few too many might decide he wants to go another way. While this failure to obey orders may technically constitute an arrestable offense, the officer should ask himself whether he can simply continue to direct the flow of pedestrian traffic while keeping an eye on the recalcitrant individual. In some jurisdictions, an arrest of such a person will ultimately result in a release without charge. In a jurisdiction where Plaintiffs tend to be particularly litigious and/or juries are not hospitable to law enforcement, the "abated by arrest" release may only empower the individual to sue police.

Disorderly Conduct: Absent the most extreme circumstances, our advice is to teach officers that an arrest for disorderly conduct should not arise in response to the interaction with the officer. For example, an officer tickets an individual for running a stop sign; the driver loudly protests, drawing the attention of others. If the officer arrests the motorist for disorderly conduct, pulling him from the car and escalating the situation, he may only be inviting litigation. Conversely, the officer who simply walks away from the angered driver, gets in his car and drives off will leave the individual with no one to yell at.

Trespassing: Officers may also be better off exercising discretion in trespass scenarios. An individual sitting on steps of a boarded up building where a "no trespassing" sign is posted, but otherwise commits no crime, may be better left alone. Juveniles doing nothing more than playing in a vacant building are probably better left with a warning to leave the premises, rather than becoming the subject of an attempted arrest for trespassing.

2. Smart Phones: With the advent of smart phones, incidents may be recorded by a Plaintiff or a witness (this may also be true with dashboard cameras or surveillance videos). In my lectures to police I advise that they should always assume that everything they do is being filmed or recorded. Seizing an individual's cell phone will inevitably raise an issue that the officer had something to hide. Absent a very articulate explanation why that device is necessary as evidence, our advice is not to seize a phone. (Furthermore, the Supreme Court has recently ruled that searching the phone's internal database requires a warrant. *Riley v. California,* 134 S.Ct. 2473 (2014)).

3. Records Retention: Police departments typically keep documents and other records as long as they are needed for criminal charges or possible internal investigations. However, departments should think in terms of much longer timelines for potential civil lawsuits. A particularly difficult consideration is the retention of audio and/or video records of encounters between police and the citizenry which are non-eventful. In this presenter's experience, it is not unusual for a routine encounter between a police officer and a citizen, in which no further police action is taken, to result in the citizen making a complaint against an officer, oftentimes totally fabricating allegations relating to the interaction. A Plaintiff may wait several years to file a lawsuit, resulting in the Defendant police officer having virtually no recollection of the encounter because it was so uneventful.

4. Coordination With the Local Jurisdiction: It is important that police coordinate with local jurisdictions regarding retention of records and documents. A common issue arises when the jurisdiction uses surveillance cameras. Oftentimes that jurisdiction will keep such recordings for a limited period of time (for example, 90 days). However, if the statutory deadline for notifying a jurisdiction of intent to file a lawsuit is 180 days, critical evidence could be destroyed prior to the jurisdiction even being placed on notice of the litigation. And if such records are destroyed, a Plaintiff may argue that they could have supported the Plaintiff's version of the event.

5. Internal Documentation. As onerous as it may sound, document everything. Some of the most difficult cases are routine encounters in which a civil lawsuit arises years later. If the Plaintiff attempts to expand a non-event into something of great significance in a civil suit, and your officer has not documented it pursuant to policy, it may appear to a jury that the officer is trying to hide something.

Domestic Relations. Domestic incidents are particularly sensitive, because the complainant may have a change of heart after calling the police, in order to protect his or her spouse. My recommendation is that anything that is remotely considered a domestic incident be documented.

Intoxication. Often an arrest for disorderly conduct or other relatively minor infraction involves an individual who is intoxicated. Officers often advise me that although the arrestee was clearly intoxicated, they omitted that fact from the report because the arrest was not for DUI or for drunk and disorderly. The state of intoxication is highly relevant to

Continued on page 30

any arrest, and even if the intoxication is not an element of arrest, you need to ensure that your officers include that observation.

Maxim. In short, one thing that I have told my officers over the years is the following: **No one has ever been punished for writing too many reports.**

6. Avoid "Cut and Paste." The reporting officer may not have personal knowledge of events, and may base the write-up on information from other officers, using a "cut and paste" job. I prefer to have each officer write up a statement of what he/she did or saw, with a separate statement of what he/she was told by other officers. This may seem minor, but I have run into problems where Plaintiff's attorneys imply that police are comparing notes and doing whatever is needed to support each other.

7. Ingestion of Drugs. If an arrestee has ingested the drugs, leaving no physical evidence, my general recommendation is to let the case go, unless the suspect's life has been endangered. However, if your policy requires the officer to send the arrestee to have his stomach pumped and the officer does not do so, this could create problems before a jury.

8. Police Involved in Shootings. The better policy is for the department not to compel officers involved in the shooting to give a statement immediately. We have found it best to allow the officer time to reflect on the incident and decompress after a highly stressful event before giving a statement--regardless of how clearly justified the shooting may be. The reason is, if you to pick and choose between which shootings you give immediate statements on, it may end up sending a message that you have some concern with a particular shooting. (A caveat to the foregoing is the need to provide immediate information. For example, if an officer shoots at an individual, whether he hits him or not, and the individual gets away, it may be necessary to obtain a description of the individual, license plate of his car and so on).

(Once litigation begins, another set of considerations arises, requiring additional strategies and best practices. These are addressed in the author's 2014 IMLA Conference presentation). **ML**



Michael Marshall is partner with Schlachman, Belsky & Weiner. He represents police officers throughout Maryland. He has argued extensively in state and federal appellate courts on police officers' rights and frequently lectures on police issues. He is a graduate of the University of Oklahoma and the University of Maryland School of Law.

IMLA
CAREERS
www.imla.org

