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Defending Police Officers in Civil Lawsuits

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Introduction

The purpose of this presentation is to address civil litigation issues that are specific or unique to defending police officers when they are sued civilly. The presentation will focus both on legal issues and case law, as well as practical issues that, while may be valuable in all litigation scenarios, are particularly significant in terms of defending police officers when they are sued. Many of these considerations are based on the years of experience of the presenter in avoiding practice pit falls both pre-lawsuit and post-lawsuit. At times, there can be a disconnect between the focus and needs of a police department in conducting a criminal investigation or an internal investigation, and the subsequent civil litigation in which the police department had minimal involvement because the defense of the police officers is by the municipal attorney's office. A recurring theme in this presentation is the benefits of adding an additional element to the considerations of actions by police officers, anticipating a possible civil lawsuit and how to provide a more effective defense on behalf of the jurisdiction.

Pre-litigation Considerations

A number of considerations and practices may be implemented as standard training procedures and practical law enforcement procedures that will help a jurisdiction in either avoiding litigation, or providing more effective defenses should civil litigation occur.

Officer Discretion

Depending on the typical jury pool in your jurisdiction, you may be better served by training officers to be more judicious in exercising discretion as to whether an arrest is truly necessary. If you are in a jurisdiction where potential jurors may be less tolerant of police action, lawsuits and subsequent liability may be minimized by training officers to attempt alternative approaches to arrests.

A common example is an arrest for a drunk and disorderly individual whose actions are technically in violation of the law, but are not so egregious as to absolutely require arrest. A typical situation is bar closing time in an area with a large number of bars and restaurants. The police may be attempting to move people in one particular direction, but the patron who has had a few too many might decide he wants to go the other way to take a shorter route to his car. Another scenario would be the individual who is not moving along because he is waiting for a friend, but is clearly intoxicated yet not creating any immediate threat. While a failure to obey orders to move may technically constitute an arrestable offense, the question the officer should ask himself is 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 an individual will ultimately result in a release without charge eight hours later, well after the crowds have been cleared and the individual has sobered up. The situation will be treated as "abated by arrest," resulting in the release of the arrestee. However, if you are in a jurisdiction where Plaintiffs tend to be particularly litigious and/or juries are not particularly favorable to the police, the "abated by arrest" release may only empower the individual to sue police.

Another common scenario where problems arise is arrests for disorderly conduct. Absent the most extreme circumstances, our advice is to teach officers that disorderly conduct giving rise to an arrest should not be based on disorderly

conduct in response to the interaction with the officer. For example, if there is a call in a residential neighborhood for an individual on the street who is yelling and screaming, waking up the neighborhood, that disorderly conduct is independent of the individual's interaction with the police officer. Conversely, if an officer is interacting with an individual in whatever form, and the individual becomes upset with the officer and becomes loud and unruly, that disorderly conduct is the result of the interaction with the officer, and it is best to employ officer discretion to avoid an arrest. For example, an officer stops an individual for running a stop sign and is going to give him a ticket. The officer approaches the car and the driver becomes irate and loud, protesting his innocence. The officer gives the individual the ticket, who continues to scream and protest, drawing the attention of another person waiting for a bus on the corner. The officer who decides to arrest the driver for disorderly conduct, pulling him from the car and escalating the situation, may only be inviting subsequent litigation. Conversely, the officer who simply walks away from the individual who is yelling, gets in his car and drives away, will leave individual with no one left to yell at.

Trespassing scenarios also present situations where officers may be better off exercising discretion not to arrest. An individual sitting on steps in front of a boarded up building with a no trespassing sign posted on the building, but otherwise committing no crime, may be better left alone. Juveniles who have entered a vacant building and are doing nothing more than playing in the building, are probably better left with a warning to leave the building, rather than attempting to take them into custody for trespassing.

Endless other examples exist. Consider training officers to attempt to avoid arrests that can be dealt with in more creative ways.

Smart Phones

With the advent of cell phones and particularly smart phones, oftentimes incidents will be recorded by a Plaintiff or a witness (this may also be true as a result of dashboard cameras, surveillance cameras, security cameras, etc.). In my lectures to police officers I advise them that they should always assume that everything they are doing is being filmed or otherwise recorded. Particularly, seizing an individual's cell phone will inevitably raise an issue that the officer had

something to hide. Absent a very clear articulable ability to explain why that recording device is necessary as evidence in the case, our advice is not to seize such a device. Furthermore, if you have seized a cell phone, you should know that the Supreme Court has recently ruled that the entry into the phone's internal database and subsequent search thereof requires a warrant. *Riley v. California*, 134 S.Ct. 2473 (2014).

Records Retention

Retention of documents and other physical records can be important in defending civil lawsuits. Oftentimes police departments will keep documents and other records as long as they are needed to pursue possible criminal charges (or until a decision is made not to proceed with criminal charges), as well as decision making regarding any possible internal investigation and possible internal affairs prosecution. However, these decisions may often be made well before the relevant statute of limitations has run for a civil lawsuit. As such, departments should think in terms of not only internal investigations and criminal investigations, but civil lawsuits in which the department may no longer be the primary litigation entity.

Typical examples of retention of documents and other recordings are emergency telephone calls, radio recordings from officers to dispatch, and recordings of in-car cameras. Clearly, any significant incident that is recorded in one form or another, should result in the recordings being maintained after the relevant limitations period has expired. Simply keeping documents or recordings until such time that a determination has been made that there will be no criminal prosecution, or the criminal prosecution is concluded, or there will no internal affairs prosecution, or that prosecution has been concluded, may not necessarily result in document or recording retention that goes beyond the relevant limitations period for a civil suit being filed.

A far more difficult logistical consideration is the retention of documents, and in particular recorded audio, video and/or audio-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 encounter. The routine traffic stop in which an officer gives a verbal warning, may then become a civil lawsuit in which the Plaintiff is alleging the officer removed him from the vehicle and conducted an illegal strip search. While an in-

car camera recording may have established that the allegations are totally fabricated, inevitably that recording will not have been maintained because in reality the incident was uneventful. Related to this consideration is the fact that a Plaintiff may wait several years to file a lawsuit on such an uneventful encounter, resulting in the Defendant police officer virtually having no recollection of the encounter because it was so uneventful. The result is an officer who cannot even give an account of the incident (not surprisingly so) versus a Plaintiff who has a very clear "recollection" of "an egregious violation of his personal dignity." While in the pre-digital age the prospect of retaining a massive amount of documentation would have been unimaginable, downloading and retaining such mundane documentation may prove crucial in such cases.

Coordination between Police Departments and the local jurisdiction

It is important that the police departments coordinate with the relevant local jurisdiction regarding the jurisdiction's policy regarding retention of records and documents. A particularly common issue arises when the jurisdiction has surveillance cameras placed strategically throughout that jurisdiction, whether stationary, controlled by movement, or controlled by a live observer. Oftentimes that jurisdiction will have a policy of keeping such recordings for a limited period of time (for example, 90 days). However, if the statutory deadline for notifying a jurisdiction of an intent to file a lawsuit is 180 days, obviously important evidence and documentation could be destroyed prior to the jurisdiction even being placed on notice that a lawsuit is contemplated. It is essential for police departments to coordinate with the relevant jurisdiction in which they operate to ensure that documentation and records are maintained in order to protect the police department against lawsuits. Significantly, if such records are destroyed, a Plaintiff may argue that, had those records been maintained, they could have supported the Plaintiff's version of the event

Internal Documentation

As onerous as it may sound, document everything. Some of the most difficult cases are routine encounters in which officers take no action, exercising their discretion, and in which a subsequent civil lawsuit appears three years later (or whatever your relevant statute of limitations period is). Again, this may seem overly onerous, but it may prove invaluable when a Plaintiff who was merely questioned by an officer about some innocuous encounter may wait until the last minute before the expiration of the statute of limitations to file a lawsuit, hoping that the officers will have no recollection of the incident. The fact that an officer has no recollection of a routine "stop-and-talk" three years later (or even more, depending on how long it is before the officer is served with the lawsuit) is not at all surprising. As such, documenting such innocuous encounters may jog an officer's memory when he or she is sued years later. Even more significant is whether your agency has a policy or procedure of generating some sort of citizen contact form any time an officer is involved in any contact with a citizen, even if it is nothing more than "stop-and-talk." Oftentimes officers will not document such an encounter because it was uneventful, but if the Plaintiff now attempts to expand that non-event into something of great significance in a civil lawsuit, and your officer has not documented it pursuant to policy, it may appear to a jury that the officer was trying to hide something.

A specific situation in which documentation can become crucial is a domestic incident. Many jurisdictions have a policy of documenting any domestic incident, regardless of the circumstances, the injuries or lack thereof, and a victim's decision not to pursue an accusation. 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. However, should that change of heart once again change, or should there be a subsequent domestic incident, the complainant may now complain that the initial incident was not documented properly. Because of the particularly sensitive nature of domestic complaints, my recommendation is that anything that is remotely considered a domestic incident be documented.

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.

Report Writing

Obviously, report writing is crucial to all police work. However, there are some issues that we have identified that are uniquely different between report writing in reference to a subsequent criminal case, versus report writing regarding a situation in which the writer is sued civilly. Your jurisdiction needs to consider that a juror, especially in a jurisdiction where jurors may not be particularly sympathetic to your police, or where jurors may suffer from the CSI effect[1] may view the reporting differently from your department and your officers.

Quote marks can create problems, moreso the longer the quote is. A single word in quotes is less likely to create a problem (though if your officer is unsure about a term, quotes around a single term could still create a cross examination issue). The longer the quote, the more likely an officer's testimony, or another officer's statement or testimony, also in quotes, will not match.

Furthermore, the more generic your officers' descriptions are, the greater latitude they have in subsequent litigation. An arrestee may shout an uncommon racial epithet. One Officer may recall the actual word, another may subconsciously transpose that to a more common racial epithet.

Avoid "Cut and Paste"

I cannot emphasize how many times "cut and paste" has created problems for my officers in civil lawsuits. Oftentimes there will be one reporting officer, but other officers may have given statements and have knowledge of the incident. The reporting officer may not have personal knowledge of events, but his report will be based on information provided to him by first-hand officers. As a result, his report may read as though he did have first-hand knowledge based on information from other officers, which he has done a "cut and paste" job on using computers.

First, should the reporting officer do so, he needs to articulate that the information provided is based on information from other officers. That caveat is

[1] The CSI effect is commonly described as the phenomenon where too many of your jurors have watched police shows and believe that, absent an airtight report/prosecution, the arrestee must be innocent. As such, it is significant that your officers document every relevant factor in the arrest.

easily overlooked if you have a policy of having your reporting officer do a "cut and paste" from other officers. My preference is to have each officer write up a statement of what they did or saw, and then provide a separate statement of what they were told by other officers, whose account is based on first-hand information. This may seem like a minor glitch, but I have run into numerous problems where Plaintiff's attorneys have used this situation to try to imply that police officers are gathering together, comparing notes, and doing whatever they need to do to support each other.

A particular situation in which this becomes extremely crucial is a high liability situation, particularly a police involved shooting. If you have multiple shooters involved, and you have them write identical reports, it may tend to appear in a subsequent civil lawsuit that they simply got together and compared notes. My preference is to have each officer write an account of the incident using his own words and on his own computer. The result is you will not have identical statements, you will not have identical paragraphing, and you will not have identical fonts. As such, it will be apparent that each officer has written his or her own statement.

The Intoxicated Arrestee

One of the most prevalent situations in which this occurs is when an officer arrests an individual for disorderly conduct, assault, or some other relatively minor infraction, in a circumstance where the individual is intoxicated. Inevitably when I speak with the officer, he will advise me that the arrestee was clearly intoxicated, but he omitted that from his report. When asked why he omitted this detail from his report the officer's response will be that the arrestee was not arrested for driving under the influence or drunk and disorderly. The state of intoxication is highly relevant to any arrest, and even if the intoxication is not an element of arrest, you need to ensure that your officers include that observation in their reports.

Ingestion of Drugs

Your officers need to be trained on how they will deal with an arrestee who has been charged with drug possession. If that individual has ingested the drugs, leaving no physical evidence, you need to determine how you will deal with that situation. Generally, if there is no physical evidence left behind because of the ingestion of suspected drugs, my recommendation is to let the case go.[2] More significantly, if you have a policy that requires your officer to send an individual who has ingested drugs to have his stomach pumped and the officer does not do so, this could create problems in your defense before a jury, particularly a jury which is not particularly pro-police. Absent the ingestion of an amount of drugs so significant that it may endanger the life of an arrestee, or other factors (such as ingestion of glass vials), a decision not to have a suspect's stomach pumped may nonetheless be inconsistent with the policy. In such cases, your officers need to simply cut the arrestee loose without subsequent charge or detention.

Police Involved Shootings

When an officer is involved in a shooting, whether lethal or otherwise, there will usually be a subsequent "criminal" investigation, even if the department clearly believes that the evidence known to it will justify the officer's shooting as being in self-defense or in the defense of others. Regardless of the circumstances the better policy is for the department not to compel officers involved in the shooting to give a statement immediately. In our office, any officer represented by our firm who is involved in a police involved shooting will have an on-call attorney responding to the scene. We will privately speak with the officer and obtain his version of the incident, as well as gather whatever other information we are able to in the moments and hours following the shooting. However, absent being given an order to answer questions, our office's policy is to not give a statement at that time. Rather, 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. Additionally, if there are multiple shooters and/or witnesses, it may be that one officer has jumped to an erroneous conclusion that can be corrected with follow up questioning of the officer. However, if the officer has already

[2] An exception would be if the ingestion, based on the amount of drugs or other factors may endanger the suspect's life.

given a statement prior to attempting to explain any other inconsistencies, he may be in a position where, while the homicide investigators and/or internal affairs investigators understand the inconsistency, a jury in a subsequent civil trial may not.

Furthermore, if an officer or officers are compelled to give statements, those statements may not be used against them and should not even be given to the district attorney reviewing the shooting. *See Garrity v. New Jersey*, 385 U.S. 493 (1967). Conversely, if I am given the opportunity to speak with the officer, allow him to reflect on the incident, and provide either a written or oral statement within several days after the incident, that statement would be given with an express waiver of his 5th Amendment rights, allowing the full information to go to the district attorney in order to evaluate the case. In very rare cases, I may determine that the officer should not waive his 5th Amendment rights and not give a statement.

The policy in our office is to treat all police involved shootings the same, declining to give a voluntary statement at the scene or at the station shortly after the shooting. This is true regardless of how clearly justified the shooting may be. The reason is, if you begin to pick and choose between which shootings you give immediate statements on, and which ones you decline to give an immediate statement, it may end up sending a message that you have some concern with the shooting itself.

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 that individual gets away, it may be necessary to obtain a description of the individual, license plate of his car, etc. Another example was a situation in which tactical officers were conducting a raid on a house and one of the officers had tackled and was attempting to subdue one of the residents. During that struggle another resident who had been hiding in a closet shot and killed that officer. That officer's partner in turn shot and killed the individual who had been hiding in the closet. The individual that the deceased officer was struggling with was captured. However, it was unclear to the homicide investigators as to whether the individual that the deceased officer was struggling with may have shot that officer, and in order to know what to charge that individual with (and whether he should be held on a substantially higher bond), the homicide investigators needed to know whether he could have killed the officer. I knew from speaking with the officer who shot and killed the attacker that the individual the deceased officer was dealing with had no part in killing that officer, and I was able to pass that information on to the criminal investigators.

Because our office responds to all police involved shootings involving our clients, we are in a position to act as intermediaries in providing that information. My preference is, in the event that such information is urgently needed, that it be

provided from the shooting officer through me. At the very least, if there are limited questions that need to be asked of the officer, I or an attorney from our office can be present during that very limited questioning.

Pre-trial Considerations

Once your officer has been sued, and you are now in the pretrial mode, a number of issues arise that are specific to police officers. While some of the issues discussed in this section could apply to any litigation, our experience is that they are particularly germane to lawsuits against police officers.

Initial Considerations

If your jurisdiction has a requirement that there be some pre-litigation notice be provided to some entity within your jurisdiction, an initial inquiry would be whether that notice has been provided. It is highly recommended that your jurisdiction keep a very specific database as to the notification and date of notification. Additionally, your database should not simply state the date of notification has been received, especially if a local statute requires certain elements be provided in that notification. Rather, the actual notification should be retained, whether in hard copy form or uploaded into a database, so that your attorneys may assure that the notification provided contains all of the elements required by statute.

You should meet with the Defendant Officers as soon as possible. This is for a number of reasons. First, if the lawsuit is based on a fabricated version of a "non-event," the more time that passes, the more likely it is the officer will simply not remember the encounter. Secondly, in our experience complaints against officers oftentimes fall under the category: "I was minding my own business when the officer beat me up for no reason." It is important to meet with your officer as soon as possible to get his or her side of the story. This is particularly important in reference to your drafting of interrogatories. There may some unusual or specific aspect of the case that results in your sending not only stock interrogatories, but one or more interrogatories that are particular to your case. Our recommendation is to avoid sending discovery requests until such time as you have met with the Defendant Officers.

In our initial meeting with officers, one of the important questions we ask them is about prior internal affairs investigations. Depending on your jurisdiction, any internal affairs allegation may be discoverable, only sustained allegations may be discoverable, or no allegations may be discoverable. It is important to know at the onset what the officer's departmental background may be regarding other, unrelated allegations.

It is also important to know whether the officer had any experience in other departments. It is not unusual for an officer to lateral from another department, so while he may only have a limited number of years in your department, he may be very well experienced based on his employment with other departments. In any event, it is important to ascertain why an officer may have left the department (or left law enforcement altogether), in that this may impact on the defense of the case.

Another initial consideration is whether your officer has any social media. Our advice is to have them take down all social media pending the litigation, going under the assumption that the Plaintiff or the Plaintiff's attorney may stumble upon it. This is true for a number of reasons. First, if you have a case with an identification issue (i.e. you believe the Plaintiff may have randomly picked out your Defendant Officer for whatever reason, and will not be able to identify him), you do not want to leave any images of the officer on social media to allow the Plaintiff to do a search to see what your officer looks like. Additionally, your officer may have posted pictures or statements that are overtly problematical, or which, while innocent, can be twisted in a way to be used against your officer.

The converse of this consideration is to check the social media of the Plaintiff. You might find information that could be helpful to you in your defense of the officer. Again, this should be checked immediately in that the more time that goes by, the more likely the Plaintiff or his attorney will realize that that social media should be taken down.

Legal Considerations

Do not assume that you are entirely conversant on all possible legal aspects of the claim. This is particularly true when a local ordinance may be relevant to your analysis. The more specialized and localized the particular ordinance may be, the more important is it for you to research the law earlier rather than later.

Experts

You should have a battery of experts to whom you can turn regarding the defense of police officers. Many, if not most cases, will benefit from having an expert available to testify. The most obvious expert is an expert regarding use of force. Do not assume that a jury will accept the fact that an officer who took the

Plaintiff to the ground, punched the Plaintiff, or used other implements, the most extreme of which is shooting the Plaintiff, are justified actions. In my experience, the average citizen does not realize how violent a routine arrest may be. Indeed, one of the most telling comments I have heard from one of our experts is that "it is easy to fight with someone, it is much more difficult to control them." Officers are not there to fight with people, they are there to control them.

Other areas in which you need to have an expert or experts on call are ballistics, police procedures, training, investigative techniques, and probable cause. On some occasions we have encountered situations in which an expert's testimony may be objectionable because, in rendering his opinion, he may have implied that he is assuming the testimony of the officers is true. Such an assumption is not allowable. The easy way to avoid this is to look at the facts in your case, and ask your expert a question in the form of a hypothetical which goes through the facts of your case and concludes with a question as to whether if, in the hypothetical, those facts are true, what is your expert's opinion.

Ensure that your experts are well versed in action versus reaction response time when rendering their opinion. Your experts should be able to articulate the difference between an action versus a reaction, particularly in lethal force situations. Calibre Press has generated a video, *Surviving Edged Weapons*, which gives officer reaction time as being between .5 and .75 of a second, and longer when surprised. *See also* Fackler ML and Tobin EJ, Officer Reaction Response Times in Firing a Handgun, *Wound Ballistics Review*, 2(1) 1997: 6-9, and Officer Decision Time in Firing a Handgun, *Wound Ballistics Review*, 5(2) 2001: 8-10.

You may also want to consider an expert regarding any psychological injuries claimed by the Plaintiff. Even if such claims seem superficial, we have found that oftentimes a psychological expert will be able to introduce otherwise excludable information. For example, if a Plaintiff claims he was traumatized by being held after arrest, and he has numerous occasions where he has been arrested, even if the arrests resulted in no prosecution or a dismissal of charges, your psychological expert may be able to discuss the prior incidents to show that the Plaintiff was well acquainted with the arrest and detention procedure. Likewise, incidents such as prior drug use or prior criminal charges that did not result in an admissible result, may be admissible as part of your psychological expert's evaluation of the "psychological effect" of the Plaintiff being arrested.

Interrogatories

You would be well served to have standard interrogatories in police related cases. However, do not become married to those interrogatories. Look for allegations in the Complaint from the Plaintiff or a Plaintiff's Answers to Interrogatories which will prompt specific interrogatories on your part. Additionally, because our experience is that many Plaintiff's attorneys will file complaints containing outrageous or excessively egregious allegations, we have an interrogatory that reads as follows: "If you contend that any of the factual contentions within your complaint are inaccurate or incomplete, state which factual contentions are inaccurate or incomplete and what changes or corrections should be made."

You have now locked a Plaintiff into acknowledging, under oath, that all of these allegations are true, which may result in an opportunity for an effective cross examination.

Depositions

While many of our standardized deposition questions are not particularly specific to police cases, several standard questions are worthy of inclusion in this presentation. One is to ask how the Plaintiff came to be represented by his or her attorney. We have found that oftentimes attorneys may have come to represent the Plaintiff in the civil case because they defended him in a related criminal case. Also, particularly in cases where the attorneys are not known to frequently sue police, we might find that their representation is because they are a friend or relative, and that dynamic may be useful to you in how to approach a possible settlement in the case.

We also ask whether there have been other complaints filed by the Plaintiff against police. Additionally, two questions that may be important are whether the Plaintiff is left handed or right handed (particularly if there was some sort of fight or physical altercation) and what tattoos does the Plaintiff have and what is their significance. Should the Plaintiff have tattoos that would somehow be indicative of an anti-police predisposition, this information may be useful.

If you have an issue where the Plaintiff may have simply made up a claim or has sued the wrong police officer, you should try to schedule the Plaintiff's deposition prior to your officer's. Have your department put together a photo array including the officer, and present the photo array to the Plaintiff at his deposition to ascertain whether he can identify the officer.

We also ask a number of questions regarding any allegations of malice. It is often better to withhold these questions until the deposition, in that if you ask them in interrogatories this will give the attorney the opportunity to create responses. Typical questions are whether there have been any other prior or subsequent contacts with the Plaintiff, the Plaintiff's friends or relatives, or anyone at the scene. We also ask if there is any evidence of facts that would support an allegation regarding the standard of malice that is required by your particular jurisdiction.

Officers' actions should not be analyzed in 20/20 hindsight

Oftentimes, Plaintiffs will attempt to make an argument as to "what an officer could have done differently." Such an argument should be excluded, either by way of motion in limine, your expert's opinion, or an objection at trial. A case involving this analysis is *Graham v. Conner,* 490 U.S. 386 (1989). That case indicates that the use of force is "judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. at 396. In other words, the fact that an officer may have walked himself into a situation that he could have dealt with differently, does not change the fact that he must react based on the immediate circumstances that he is faced with when he used force. *See also Pagotto v. Stat*e, 127 Md. App. 271, 297 (1999) (citing *Graham*).

A number of other cases support this conclusion. For example, in *Tennessee v. Garner*, 471 U.S. 1 (1995) the Supreme Court held that "where an officer has probable cause to believe that the suspect poses a serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *See also McLenagan v. Karnes*, 27 F.3d 1002 (4thCir. 1994). In that case, a magistrate at a DUI checkpoint left her gun on a desk after she left the room. An individual at the checkpoint entered the room and took the gun. An officer saw an individual running and yelled "the man has got a gun" as people tried to flee the building. One of the arrestees was running from the magistrate's office in fear when Officer Karnes saw him. Thinking he was the individual with the gun, Officer Karnes shot the man. The Court held that even though Karnes did not see a gun, it would not second guess the split second decision of an officer who turns out to have been mistaken, particularly when inaction by the officer could have resulted in harm to others. *Id.* at 1007-1008. According to the Court, "at the moment of truth, Karnes acted well within the range of behavior expected of a police officer." *Id.* at 1008.

Other helpful cases on this topic are *Carter v. State*, 143 Md.App. 670, 686 (2002), *citing United States v. Arvizu,* 534 U.S. 266, 273 (2002), stating courts allow "officers to draw on their own experience and specialized training to make inferences from deductions about the cumulative information available to them that 'might well elude that untrained person.'" In *Richardson v. McGriff,* 361 Md. 437 (2000) an officer responded to a call regarding juveniles breaking into a vacant building. Officers came upon a closed closet door which they opened, and observed the Plaintiff holding an object which they thought to be a shotgun but was actually a pipe. The officers fired striking the juvenile. Against claims that the officers should have waited for additional back up and turned on the lights before sweeping the building, the Court refused to second guess the officer's decision made in that split second.

Slattery v. Rizzo, 939 F.2d 213 (4thCir. 1991) involved an officer who had made a traffic stop and, upon approaching the car, was unable to see one of the driver's hands which appeared to be closed around an object. After several orders to the driver to put his hands up, the man turned his body towards the officer, who could still not see the man's hand, and believing that the man may be holding a weapon, shot him. In actuality, the object in the man's hand was beer bottle. The appellate court remanded the case directing that summary judgment be entered in favor of the officer. *See also Ford v. Childers*, 855 F.2d 1271 (7thCir. 1988) when an officer arrived in the middle of an armed hold up, and saw a masked man in a view that was partially obstructed by a pillar. The officer ordered the individual to halt, but when the suspect continued to run the officer fired and hit the suspect. The appellate court stated "although the officer did not actually see a weapon in the suspect's hand, given the information that he possessed… and the observations he made, [the officer] reasonably concluded that the suspect was armed and dangerous" and " that a reasonable jury could only conclude that [the officer] had probable cause to believe that the suspect posed a threat of serious physical harm to himself and/or others… thus, [the officer's] actions under the circumstances were objectively reasonable." *Id.* at 1275-76. *See also Greenidge v. Ruffin,* 927 F.2d 789 (4thCir. 1991).

Scope of Employment

Whether an action is within the scope of employment may, from time to time, become an issue. The following is based on Maryland law, but you may shepardize these cases, or use headnotes, to research whether the law in your jurisdiction is similar. Generally, under Maryland law an action may be outside the scope of employment if it is based on some personal goal, or otherwise departs from furthering the employer's objectives. *See Sawyer v. Humphries*, 322 Md. 247, 256-257 (1991). *See also, Houghton v. Forrest*, 412 Md. 578 (2010). Additionally, simply because the actions of your officer violate the law, that does not necessarily mean that they were outside the scope of their employment. *Larsen v. Chinwuba*, 377 Md. 92, 102 (2003). The *Larsen* Court noted:

> Very seldom will an employer specifically authorize an employee to violate a statute, and such authorization is not required for scope of employment purposes. Instead, the key is whether the employee's tortious act was incident to the performance of the duties entrusted to him.

Similarly, *Sawyer* noted that an act may still be "authorized" and in the scope of employment "even though in opposition to his express and positive orders." *Sawyer*, 322 Md. at 255. See also Mechem on Agency, § 36; Huffcut on Agency, § 5; American Law Institute, Restatement, Agency, § 228, Comment (b).

Two other Maryland cases, *Drug Fair of Maryland v. Smith*, 263 Md. 341 (1971), and *Baltimore and Ohio R.CO. v. Strube*, 111 Md. 119 (1909), indicate that while there may be a series of actions, some of which are in the scope of employment and others arguably not so, as long as they are linked temporally, they will be considered within the scope of employment; additionally, the cases indicate that an individual may be acting within the scope of employment even if his action was malicious.

Motions in Limine

Consider standard motions in limine to be filed based on common, recurring issues. One motion in limine that we routinely file is a motion to prevent a witness, whether it be a party, fact witness, or expert, from testifying that the officer could have done something differently leading up to the incident. The

basis for such a motion would be the analysis contained in the preceding section discussing the fact that officers' decisions should not be based on 20/20 hindsight.

A second motion in limine that we routinely file is to preclude any reference to insurance or the lack thereof. Oftentimes, individuals who are involved in altercations with police officers may not have health insurance. Our experience has been, that if that individual has not followed up on medical treatment, they may blame this on the lack of insurance (as opposed to the fact that their injuries are fabricated). In addition, even if you are faced with a situation where the Plaintiff suing the police officer has substantial actual injuries, we have found that in some cases, the Plaintiff's testimony that he had no insurance may lead a jury to award at least damages in the amount of the medical bills, not because they believe the Plaintiff is entitled to any money or that the officers did anything wrong, but because they want to ensure that the unpaid medical care providers are compensated.

Jury Instructions

If you practice in a jurisdiction where you have standardized jury instructions that are approved by the court, the bar association, or any other entity, do not overlook the need for crafting instructions that are specific to police. Defending police officers does not always fit into the standard paradigms of defending individuals in basic tort cases. Rather, the unique nature of police work will warrant jury instructions that may go beyond the standard jury instructions that have been approved in your jurisdiction.

Some examples of non-routine jury instructions are provided herein. [3]

We will oftentimes include a jury instruction based on *Graham v. Conner* analysis, discussed previously. It is important for jurors to understand that an officer's conduct should not be judged by hindsight, but should be viewed in light of how a reasonably prudent officer would respond with the same difficult emergency situation. *And see Richardson v. McGriff,* 3616 Md. 437, 453 (2000) (quoting *Boyer v. State,* 323 Md. 558, 589 (1991)).

Another jury instruction related to the use of force is from *McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4thCir. 1994), indicating that there is no "inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing-particularly where…such a warning may have easily cost the officer

[3] In this presentation I have provided references to Maryland cases. You should check your jurisdictions to see if you have similar cases, and/or shepardize or check West headnotes on these Maryland cases to research cases in your own jurisdiction.

his life." This case also states, based on the circumstances, it is not necessarily required for an officer to see a gun before using deadly force.

It is important to include a jury instruction regarding the privilege of a police officer to commit a battery in the making of a lawful arrest as long as the use of force is reasonable. "The use of reasonable force to effectuate an arrest defeats a battery or an assault claim. In other words, contact incident to an arrest cannot form the basis of a claim for battery. Indeed, officers are privileged to commit a battery pursuant to a lawful arrest, subject to the excessive force limitation…." *French v. Hines*, 182 Md.App. 201, 265-266 (2008) (quoting Sonjalarsen & Thomas Muskes, 6 AC.J.S. *Assault* § 35) (2008 Supp.). If a jury only hears the basic assault or battery instruction they may assume that the actions of an officer were intentional and unwanted or offensive to the Plaintiff. However, it is important to make sure the jury understands that a police officer is in a situation that an average citizen is not, giving him the privilege to commit a battery using reasonable force, when warranted.

In Maryland, the law is that even if a Plaintiff has a legal excuse to resist arrest, the Plaintiff may not use more force than is reasonably necessary in the situation. *Jones v. State*, 4 Md.App. 616, 621-622 (1968). Check your jurisdiction to determine if you have similar law.

In reference to arrests for drug transactions, jurors may not be well educated as to what constitutes probable cause for furthering investigation as to whether a drug transaction has occurred. You should check your jurisdiction for the applicable law regarding probable cause. In Maryland, *Williams v. State*, 188 Md.App. 78, 93 (2009) *cert. denied*, 411 Md. 742 (2009), indicated "probable cause may be found even if a trained, experienced police officer, is not able to see whether the object of transfer was contraband."

A related jury instruction we use is as follows:

> Experience and special knowledge of police officers may be considered in determining probable cause. Indeed, considerable credit can be given to the expertise of law enforcement officers conducting investigations into illegal drug activity.

Williams, 188 Md.App. at 92. You should check your jurisdiction for similar holdings.

Similarly, you should have a jury instruction regarding flight as an element in determining an officer's reasonable suspicion and/or probable cause. The instruction we use is as follows:

> [N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—

> wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id.* at 125.

Another jury instruction that we use, also from *McLenagan*, is as follows:

> An area's general characteristics, while perhaps relevant in determining the existence of probable cause, become much less so in the face of a credible warning… that an imminent danger exists.

Our experience has been, particularly in jurisdictions which are not particularly friendly to police officers, that Plaintiffs may sue without articulating any out of pocket expenses or physical injuries hoping that a jury will be upset with the actions taken by the police officer. As such, you should ensure that you include your jurisdiction's instruction on nominal damages regarding an action without injury.

You should research the law in your jurisdiction regarding malicious prosecution. Rarely will that exist in the context of standard jury instructions, or if it does, it will not be specific to police officers. As such, research what constitutes malicious prosecution by police against private citizens and craft your jury instruction accordingly.

Limitations on Liability

In Maryland, there are two distinct actions when an individual has been killed. One is the survival action, awarding that individual for whatever conscious pain and suffering he may have endured prior to dying. A second is a wrongful death action, awarding various classes of relatives and/or dependents of the deceased damages for the loss of income, companionship, consortium, etc. Also in Maryland, the Local Government Tort Claims Act provides a cap on damages of $200,000.00 per claim and $500,000.00 per incident.

A question that was not answered until recently is what constitutes a claim. Specifically, are the claims of the decedent for conscious pain and suffering prior to death considered a separate claim from those for the various losses under the wrongful death statute. In *Leake v. Johnson*, 204 Md.App. 387 (2012), the intermediate appellate court held that these constituted a single claim which was limited by the $200,000.00 cap. Furthermore, the court held that the

derivative claims of the various relatives of the decedent were not separate claims, but were also subject to the $200,000.00 cap, resulting in a total cap of $200,000.00.

You should check your jurisdiction to ascertain whether you have similar applicable case law (or if the case law is different). If you do not, you will find that the analysis in *Leake* contains helpful analysis that you could use in making the argument for a limited cap.

Settlement Agreements

Oftentimes jurisdictions will include a provision in the settlement agreement not to make public comment on the settlement agreement. First, it is doubtful whether such a provision is constitutional. Settlements by your jurisdiction regarding actions by police officers are clearly a matter of public concern, and, as such, any discussions by the Plaintiff may be protected by the First Amendment.

Beyond these considerations, there are tax consequences involved in a provision to refrain from comment in the event that you have included a liquated damages clause in the settlement agreement. The IRS has treated such liquated damage provisions as taxable, whereas awards for physical injury are not taxable.

In *Amos v. Commissioner of Internal Revenue Service*, 86 T.C.M. (CCH) 663, T.C.M (RIA) 2003-329, the United States Tax Court held that a liquidated damage provision indicated that a portion of the settlement which was not for physical injury, but as for consideration for an agreement that the Plaintiff would not discuss the case, was deemed to be taxable.