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When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims



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When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims

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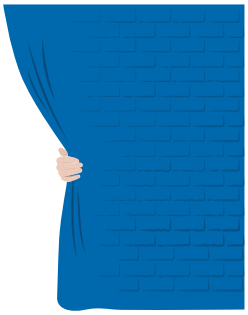

INTRODUCTION

What is the problem?

Civil rights plaintiffs often complain that (1) police cannot be trusted to testify truthfully against another officer's wrongdoing; (2) police cover for each other; (3) police retaliate against officers who do not follow this code; and (4) Internal Affairs investigations are a part of the cover-up. As attorneys who represent local government and our law enforcement officers, we should care about this for at least two reasons.

First, the claim that police follow a code of silence prejudices the factfinder. That can affect the outcome of a case by overpowering credible evidence that would tend to show an officer's conduct was legal and reasonable. A jury that believes police follow a code of silence will be more likely to return an adverse judgment based on suspicions rather than on evidence.

Second, outside of court, such a claim will prejudice society. The more people believe that police are not trustworthy, the harder it will be to defend our officers, regardless of what the evidence shows. A generalized distrust of police also feeds the movement to abolish qualified immunity.

Many of us will have to defend police officers and municipalities against allegations that our police follow a code of silence. Lawyers can take specific steps to challenge the admissibility of those claims and to undermine the impact of such testimony if it goes to a jury. This article is intended as a preliminary guide for that defense.

1. Recognizing the so-called "Code of Silence"

Many courts have discussed claims that police follow a Code of Silence—generally not concluding that police do so, but simply admitting evidence. Researching caselaw (and media coverage) on this issue should encompass alternative terms for this alleged phenomenon: Blue Wall of Silence; Blue Code of Silence; Blue Shield; Blue Wall; Blue Curtain; and Blue Veil. Some representative cases are discussed below.

A. *Thomas v. City of New Orleans*

In *Thomas v. City of New Orleans*, former New Orleans Police Department police officer Randolph Thomas alleged discriminatory employment practices leading to wrongful discharge, claiming that there was "a widespread and invidious 'blue curtain' within NOPD, creating a code of silence to shield those who abide by the code and punish those who violate it."[1] Thomas elicited testimony of a former NOPD police chief, who acknowledged that there had been a "blue curtain" of silence in NOPD, *and* that it existed in most major police departments. The court's reasoning shows why this is significant:

> If the jury believed the testimony of expert and Police Department witnesses that a "blue curtain" existed within the New Orleans Police Department, they reasonably could have concluded from the evidence showing the unjustified conduct of Caesar in the arrest and the various meetings and actions of defendants which followed, that Thomas was the target of sanctions imposed by such a "blue curtain" conspiracy.[2]

The Code of Silence claim is pervasive; if a jury believes it, that will operate as an evidentiary force multiplier interpreting other evidence in plaintiff's favor.

B. *Barry v. New York City Police Dept.*

In *Barry v. New York City Police Dept.*, a police sergeant alleged retaliation in violation of First Amendment rights after exposing police misconduct within her unit.[3] The district court observed that "blue wall of silence" testimony can be critical to municipal liability, calling it the "central hook" in this case:

> Plaintiff's central hook for establishing municipal liability rests on her claim that the actions taken against her

> were a manifestation of the NYPD's unofficial policy or custom known as the "blue wall of silence." * * * According to plaintiff, the "blue wall of silence" discourages officers from reporting other officers' mistakes and subjects officers who speak out about police misconduct to retaliation.[4]

The court explained that municipalities can be liable under *Monell*[5] without an explicit policy if "a plaintiff can show that practices are so persistent, widespread, and permanent that they constitute a custom or usage with the force of law."[6] If a plaintiff presents Code of Silence evidence along with evidence of policy-making officials' acquiescence, that combination can lead to municipal liability.

C. Baron v. Suffolk County Sheriffs Dept.

In *Baron v. Suffolk County Sheriffs Dept.*, a former corrections officer alleged First Amendment violations by retaliatory harassment for breaching a Code of Silence by reporting a fellow officer's misconduct (playing cards with inmates).[7] Baron's attorney introduced testimony from Deputy Superintendent Feeney confirming the Code of Silence and potential consequences to an officer who violates it.[8] The First Circuit reasoned that, despite the fact that "other Department employees denied at trial the existence of a code of silence[,]" Feeney's acknowledgment gave "additional weight" to Baron's testimony and could help the jury find for plaintiff.[9]

D. Valentin v. New York City

Valentin v. New York City illustrates the impact that Code of Silence testimony can have on municipal liability.[10] A former officer with New York City Housing Authority alleged sexual harassment and discrimination, hostile work environment, and retaliation in violation of the First and Fourteenth Amendments.[11] Valentin proffered expert testimony of Dr. Stephen Leinen to opine on "retaliation against officers who violate the 'code of silence[,]'" which defendants moved *in limine* to exclude.[12] Following extensive discussion of Leinen's qualifications and the Federal Rules of Evidence, the court concluded that Code of Silence testimony could support an inference of such a practice, which would be relevant in showing causation and satisfying *Monell*:

> Plaintiff has presented sufficient evidence, if believed, to suggest that retaliatory acts were taken against her in response to her complaints about the sexual harassment she experienced in her unit. To the extent that Dr. Leinen's testimony proposes to explain the phenomenon of the "code of silence" and its operation in this context, this Court finds that the testimony is relevant and will be helpful to the jury. Moreover, this type of evidence is particularly relevant to plaintiff's *Monell* claims of custom and usage against the municipality.[13]

2. Federal Rules of Evidence Governing Expert Testimony

Code of Silence testimony can be offered by both lay witnesses and expert witnesses. An effective challenge to those claims requires a solid knowledge of several critical Federal Rules of Evidence, eight of which are presented here.

A. Rule 702 should be a primary focus for a defense challenge to an expert's opinion on Code of Silence. It sketches the parameters of expert testimony, how the witness can qualify as an expert, and some requirements for admissibility.

Rule 702. Testimony by Expert Witnesses[14]

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Because the testimony must meet all conditions (a) through (d), defense counsel has several potential grounds for challenging proposed expert testimony.

B. Rule 703. If the proposed testimony satisfies Rule 702, the expert is allowed a great deal of leeway under Rule 703:

Rule 703. Bases of an Expert's Opinion Testimony[15]

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the



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Blue Wall *cont'd from page 7*

particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

One problem that can arise from Rule 703 is that it arguably would allow the expert to base Code of Silence testimony on "facts or data" in the form of unreliable studies or surveys, such as the Trautman report examined below.[16] Even if only a relatively small number of experts rely on Trautman's report (or any given study), that might be enough for some judges to find the reliance to be reasonable (because it's a narrow field and experts use the same materials).

The defense counsel should challenge the reasonableness of such reliance by exposing the unreliability of the study, survey, facts, or data. An unreliable foundation cannot give rise to a reliable opinion. No number of experts will make the unreliable reliable. This problem should not arise if the court follows Rule 702, which sets requirements for expert testimony.

Defense can also challenge what counts as "facts or data" as opposed to conclusions or extrapolations drawn from alleged "facts or data." If a study asserts that a Code of Silence operates in most major police forces, that is a conclusion the study's author drew from data. Yet that conclusion itself might be treated as an underlying fact, like this: *given the fact that the Code of Silence is widespread among police departments, we can opine not only that it exists here but that it was a cause of plaintiff's injury*.

C. Rule 705 also provides experts a great deal of leeway, but enables defense counsel to expose weaknesses in underlying data:

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion[17]

> Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

D. Rules 401 and 402 might seem to be so commonly understood that we need not refer to them, but it can be helpful to go back to these foundational criteria. Even if the judge initially overrules a relevance objection, defense counsel should renew that objection after exposing the unreliability of proposed testimony.

Rule 401. Test for Relevant Evidence[18]

> Evidence is relevant if:
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
> (b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence[19]

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.
>
> Irrelevant evidence is not admissible.

E. Rule 403. If the judge overrules relevance objections, defense counsel should be ready to argue Rule 403 to exclude Code of Silence testimony.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons[20]

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Counsel should be prepared to explain how Code of Silence testimony would create unfair prejudice, confuse the issues, or mislead the jury. Indirect help comes from *Thomas*, *Baron*, and *Valentin*. Counsel should not cite those cases for excluding the testimony, because each allowed it. But those cases can help counsel understand the problem of admitting the testimony: it supercharges other evidence, which provides some footing for arguing that it misleads the jury.

The defense can also challenge what counts as "facts or data" as opposed to conclusions or extrapolations drawn from alleged "facts or data." If a study asserts that a Code of Silence operates in most major police forces, that is a conclusion the study's author drew from data.

F. Rule 406 presents a danger for defense counsel wanting to exclude Code of Silence testimony:

Rule 406. Habit; Routine Practice[21]

> Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Evidence that a Code of Silence is *this* Department's routine practice is admissible to show that *this* Department engaged in the Code of Silence in *this* case. But defense counsel should challenge any testimony of an alleged Code of Silence in the "culture of policing" nationwide or in "virtually all major departments" as not falling within Rule 406.

G. Rule 701. Even if the court excludes Code of Silence expert opinion, Rule 701 provides this alternate means by which a plaintiff may introduce such testimony:

Rule 701. Opinion Testimony by Lay Witnesses[22]

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Counsel can challenge lay opinion testimony of Code of Silence by exploring the depth and breadth of the witness's perception, but that could backfire if the witness has observed many instances of this phenomenon. It would likely be more effective to challenge the testimony on grounds that it will not help the jury understand or determine a fact in issue.

3. Challenging the Experts and the Evidence

A. Outdated research - *Zamora v. City of Houston*

In a 2012 case alleging retaliation against a Houston police officer for filing a discrimination complaint, the plaintiff introduced expert opinion that there was a Code of Silence in the Houston Police Department.[23] Plaintiff's expert testified he was "[v]ery familiar with the phenomenon known as 'the code of silence[,]'" and had "reviewed research on it, seen it in operation, dealt with it over the years."[24] The beginning of his description might be viewed as favorable:

> Well it's very simply an unwritten rule in police organizations found primarily because policing is a paramilitary organization[,] and you have to depend on your fellow officers for backup on the streets and everything.[25]

Stating that officers must depend on each other for their safety on the streets sounds fine. So far, so good. But the expert didn't stop there:

> It's an unwritten rule that you just don't ever testify against a fellow officer. You don't report their misconduct and you don't ever go outside of your agency and report misconduct to someone else about your agency. And the research shows that the reason that is because the practice has been to ostracize officers who have done that in [sic] retaliate against them.[26]

The expert continued and turned to research that he relied on for his testimony:

> Research shows that about 50 percent of active law enforcement officers experience misconduct, they see misconduct and they don't report it. And the reason they don't report it is, I think, 75 percent of them say, they're afraid [of being] retaliated against or ostracized if they do.[27]

The "misconduct" label is very broad. If it is not clarified, the jury can easily believe that it refers to extreme cases such as physically abusing a suspect that is already in custody. Defense counsel should consider exploring the distinctions of misconduct that an officer might witness and whether officers would report more serious misconduct while overlooking less serious infractions.

The expert next cited investigations over the past century recognizing the Code of Silence:

- **The 1931 Wickersham Commission**, which was primarily about the impact of Prohibition on crime and whether to recommend that Prohibition be continued or repealed.[28] It was not primarily a Code of Silence investigation, although it mentioned it in one of 14 reports the Commission produced. The *Report on Lawlessness in Law Enforcement* has been called: ". . . one of the most important events in the history of American policing. It was the first systematic investigation of police misconduct and became a catalyst for reforms involving new forms of accountability for the police."[29] While this *Report* prompted a new generation of police leaders committed to "the police professionalization movement,"[30] any mention of police Code of Silence from the Wickersham Commission is too old to be relevant.
- **The 1991 Christopher Commission** investigating the Los Angeles Po-

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Blue Wall *cont'd from page 9*

lice Department. This Commission, appointed by Mayor Tom Bradley and led by attorney Warren Christopher (future Secretary of State), was prompted by the 1991 Rodney King beating,[31] and proposed reform:

> The Department must make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas. In doing so, it should actively and severely discipline those who violate Department policy by failing truthfully to report known instances of misconduct.
> * * *
> Further, safeguards must be established to protect officers who break the code of silence from harassment or punishment by other officers or the Department itself.[32]

While the Christopher Commission acknowledged that the Code of Silence was a big problem in LAPD at that time, LAPD was directed to implement reforms, and the problem might have been eliminated. More to the point, it was only about LAPD. The Commission's findings about LAPD in 1991 are too remote in time and too localized to be relevant.

- **The 1992 St. Clair Commission** investigating the Boston Police Department. This was commissioned by Boston Mayor Raymond Flynn, led by attorney James St. Clair, and produced the *Report of the Police Department Management Review Committee*.[33] It was concerned with the way Boston PD's Internal Affairs Division handled complaints and investigations, and it recommended reforms in BPD.[34] Any references to Code of Silence from this Commission are too old and too localized to be relevant.

- **The 1992 Kolts Commission** investigating the Los Angeles County Sheriff's Department. This Commission was led by Special Counsel James G. Kolts (former LA County Superior Court Judge and prosecutor) and was prompted by numerous costly settlements over excessive force.[35] The Commission's report provided a thorough plan for reform[36] noting that reform had already begun: "the Department has made some progress and is improving still."[37] As with the St. Clair Commission and the Christopher Commission, any mention of Code of Silence from this source is too old and too localized to be relevant.[38]

- The 2000 National Institute of Ethics Nationwide Survey was a survey that Neal Trautman, Director of the National Institute of Ethics, sent to 3,714 officers and recruits from 42 states. He produced a report based on responses from 1,016 recruits at 25 academies in 16 states, and he received responses from 1,116 then-current officers.39 As to recruits, he found that:

  - 79% said that a law enforcement Code of Silence exists and is fairly common throughout the nation.
  - 52% said that the fact a Code of Silence exists doesn't really bother them.
  - 24% said the Code of Silence is more justified when excessive force involves a citizen who's abusive.
  - 46% said they would not tell on another officer for having sex on duty.
  - 23% said they wouldn't tell on another cop for regularly smoking marijuana off duty.[40]

The recruits' responses are useless to show Code of Silence. Recruits would not have a reliable basis for asserting that a Code of Silence is "fairly common throughout the nation." Recruits would have no experience with what type of conduct might be covered by a Code of Silence. These statistics are vague, unreliable, irrelevant, and inadmissible.

Trautman further compiled responses from 1,116 on-the-job officers:

- 532 officers acknowledged having witnessed "misconduct by another employee, but concealed what they knew."
- Of those 532 officers, 252 reported being "pressured to keep quiet by the officer(s) who committed the misconduct and 118 felt pressure from uninvolved officers."[41]

Trautman's survey is at least 22 years old, and it relied on a sample that is minuscule when compared to the number of officers nationwide:

- 697,195 total officers nationwide as of 2019 (FBI.gov)[42]
- 2,132 questionnaires in Trautman study ≈ 0.31% (less than 1/3 of 1%)

The methodology of Trautman's survey is unreliable, the data is out of date, and nothing connects it to the specific department or officer involved in a case today. Grounds for challenging the Trautman report, or any testimony relying on it, is that it is (1) speculative, (2) irrelevant, and (3) even if relevant, more prejudicial than probative.

B. Insufficient Evidence - *Rubio v. County of Suffolk*

Not all district courts have admitted Code of Silence opinion testimony. In *Rubio v. County of Suffolk*, the plaintiff was sexually assaulted by Suffolk County Police Officer Frank Wright, who "pled guilty to four instances of acting in an unconstitutional manner" and "was sentenced to five years in prison for the violations."[43] Rubio alleged that the County was liable because it knew of Wright's pattern of sexual misconduct. Former police officer John Weeks "testified that the County had a custom

or practice of a 'blue wall of silence' whereby 'supervisory officials covered up police officers' civil and criminal violations.'"[44] The district court concluded:

> On this factual record, the Court finds that the plaintiffs failed to adduce evidence to support their claim for municipal liability . . . .
> * * *
> Similarly, the County has no official policy endorsing the practice of a "blue wall of silence" or extending courtesies between police officers.[45]

Of course, there's no such official policy. But what about custom or practice? The court addressed that next:

> Neither have plaintiffs put forward facts that support the second alternative for establishing municipal liability, i.e. the existence of a custom or practice that is so pervasive and widespread that the municipality had either actual or constructive knowledge of it.[46]

This opinion provides some guidance for challenging Code of Silence testimony, continuing:

> Moreover, even assuming that plaintiffs' allegations with respect to other civilians whose constitutional rights were violated relate to the same "custom or practice," the Court is unable to discern how a few violations by a small group of subordinate County employees with no policymaking authority amount to the "pervasive and widespread" custom or practice necessary for municipal liability.
> * * *
> Equally unpersuasive is plaintiffs' allegation that the County endorsed "a blue wall of silence." There are no facts that support the contention that "a blue wall of silence" was a practice so pervasive and widespread that the County had or should have had knowledge of it.[47]

The court granted summary judgment for the County.

C. Excluding Expert Testimony – *Hill v. City of New York*

Hill v. City of New York offers a helpful guideline for arguing that the court should exclude expert testimony of a "Blue Wall of Silence" or "Code of Silence."[48] Hill sued officers and the city claiming excessive force, and he proposed to offer expert testimony showing impact of the Code of Silence:

> The statements of both deputy sheriffs and Detectives Barrett and Rafferty are in sharp contrast to Mr. Hill's statement that the detective vehicle did in fact bump/ram his vehicle. **What might account for these contrasting statements? One strong possible explanation is the Blue Wall of Silence and Code of Silence.**[49]

Hill's proposed expert testimony would use Code of Silence to evaluate witness credibility. Note that the expert here uses two terms—Blue Wall of Silence and Code of Silence—more-or-less interchangeably, but he provided slightly different definitions.

> Dr. Leinen defines the Blue Wall of Silence as "the reluctance of members of law enforcement to act upon the misconduct of other members" and defines the Code of Silence as "that unwritten, often unspoken, rule that prohibits members of law enforcement from reporting the misconduct of other members."[50]

The City moved to exclude such expert testimony and expert report. The court excluded the testimony and provided an extensive analysis that defense counsel will find useful today:

> **i. Analytical gap too great**
> First, the court determined that Dr.
>
> Leinen was "qualified as an expert in police misconduct and the Blue Wall of Silence generally." Then the court applied the *Daubert* factors and evaluated his methodology, reliability, and relevance to the case at hand.[51] The analysis in the following excerpts can be helpful:
>
> > [O]ther than noting that the police officers' testimony in this case is in sharp contrast to the plaintiff's, Dr. Leinen provides **no specific support for and points to no particular facts in this action explaining why the Blue Wall of Silence and Code of Silence may play a role in this particular case.**
> > * * *
> > Instead, he offers only a blanket assertion that the Blue Wall of Silence is a "normal, inevitable feature of policing" which "permeates virtually every level of policing", and that the Code of Silence is the "unwritten, often unspoken, rule that prohibits members of law enforcement from reporting the misconduct of other members."
> > * * *
> > Lacking an explanation for why the Blue Wall of Silence and Code of Silence may be present in this case, the court must conclude that there is **"simply too great an analytical gap between the data and the opinion proffered."**[52]
>
> **ii. Not connected to specific department**
> Next, the court observed that an expert's general claim that the Blue Wall of Silence is pervasive is no evidence that it is at work in a specific department:
>
> > In addition, other than his assertion that the Blue Wall of Silence and Code of Silence are a normal part of policing and law enforcement everywhere, **Dr. Leinen provides no support for his conclusion that these phenomena apply equally to the**

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> **deputy sheriffs in this case,** who are not a part of the NYPD, but rather are members of the New York City Sheriff's Office, which is a component of the Department of Finance.[53]

The court's distinction between two law enforcement agencies in the same city illustrates that it is not enough to say that all agencies are infected with the Code of Silence.

iii. Unreliable methodology
The court observed that the expert's methodology did not satisfy *Daubert*:

> Considering the Daubert factors that are relevant here, the court also notes that Dr. Leinen's **ipse dixit conclusion is not susceptible to testing in any meaningful way**, and he has provided **no evidence that his methodology for reaching his conclusion-namely, reviewing the pleadings, depositions and selected other materials unrelated to this case-is a generally accepted methodology within the sociological community** for reaching such conclusions. [54]

iv. Speculative and conjectural
The court determined that the expert's data was insufficient and his methods were unreliable:

> Under Federal Rule of Evidence 702, the court cannot conclude that this testimony is based upon sufficient facts or data, that it is the product of reliable principles and methods, or that Dr. Leinen has applied the principles and methods reliably to the facts of this case. As such, Dr. Leinen's testimony must be excluded because it is "speculative and conjectural[.]"[55]

v. Invades the province of the jury to evaluate credibility
Rather than stopping there, the court found that the proposed expert report and testimony would not help the jury but would actually usurp the jury's role:

> [B]ecause the credibility of witnesses is exclusively for the determination by the jury, the Second Circuit has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702.[56]

vi. Casts the relevance net too widely
If the expert's opinion were allowed here, it would endorse admitting Blue Wall evidence in virtually any case where an officer's testimony was questioned:

> [T]he court concludes that Dr. Leinen's opinion poses too great a risk of substituting his opinion on the credibility and motivations of the police officer witnesses for that of the jury. To allow Dr. Leinen's testimony to be admitted in this action would cast the relevance net so widely as to hold that testimony regarding the Blue Wall of Silence could be admitted in any case in which a police officer's testimony was challenged.[57]

vii. Unfair prejudice, confusion of issues, misleading the jury
Having already determined that this expert's testimony was unreliable under *Daubert* and irrelevant under Rule 702, the court also excluded it under Rule 403:

> In any case, Dr. Leinen's testimony is also properly excluded on the basis of Federal Rule of Evidence 403, which provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]"
> * * *
> The credibility of the witnesses, including the police officers, in this action are for the jury to determine, and Dr. Leinen's proposed testimony regarding the Blue Wall of Silence and Code of Silence is inappropriate here where plaintiff has provided little or no support to show that these phenomena are applicable here.[58]

Defendants' motion to exclude was granted. The court's thorough analysis essentially eliminated any potential for reversal over this evidentiary ruling. It is included here extensively so that it might provide an accessible reference for challenging Code of Silence testimony.

D. No Policy or Custom: *Lyles v. City of Dallas*

In *Lyles v. City of Dallas*, a judge for the Northern District of Texas granted a motion to dismiss where plaintiff's complaint relied on Blue Wall of Silence claims.[59] After suffering a beating, tasing, pepper spray, and racial verbal abuse from police officers in a traffic stop, Lyles sued two officers and the city, alleging violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights:

> The Complaint also refers to a "custom and culture of not properly hiring, training, and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities." . . . This culture has created a "blue wall of silence," among DPD officers, whereby they refuse to report each other for breaking the law.[60]

The court noted that the complaint did not allege sufficient facts to show a Blue Wall of Silence:

> Even if Lyles's Complaint stated enough facts to support his argument that the chief of police is the final policymaker, Lyles does

> not include in his Complaint sufficient facts to support his argument that the chief implemented an official policy or had, or supported, an official custom, a "'blue wall of silence,' whereby officers do not report other officers for breaking the law and violating the rights of citizenry."
> * * *
> Lyles makes no attempt to show how the City's hiring, disciplining, or training practices show the establishment, implementation, or a custom of acceptance of illegal behavior by police officers.[61]

The court addressed the Complaint's reference to unspecified media accounts of "incidents committed against African-American subjects" showing "an ongoing culture of conscious indifference."

> Such claims amount to legal conclusions and conclusory statements of fact, not specific facts sufficient to support a claim that there is either a "blue wall of silence" in the DPD or that its officers are not well-trained in the proper use of force.[62]

The court concluded that the broad allegations of a Code of Silence did nothing to support a complaint that did not allege sufficient facts to state a claim for which relief could be granted.[63]

4. Undermining Code of Silence Testimony

The foregoing shows that we can attack Code of Silence opinion testimony on the following grounds:

- Inadequate data (sample not representative)
- Unreliable methodology
- No causal connection
- Irrelevant to this department in these times
- Unfair prejudice
- Confusion of issues
- Misleading the jury
- Usurping the jury's role (credibility determination)
- Poor definition (silent about what, in what situations, and to whom?)
- The data experts use is old, and Commissions all pointed to reform.
- Show that there has been reform.
- Directly controverting evidence: testimony and supporting statistics of officers reporting each other's misconduct.

Regarding the last ground listed above, it can be very helpful to present directly controverting evidence in the form of (a) testimony that there is no Code of Silence in the specific department being sued, and (b) providing data and statistics supporting that testimony. In a 2021 trial against the City of Houston,[64] the City presented as a fact witness former Houston Police Chief Charles McClelland (who had served his entire 39-year career in HPD, from 1977 – 2016 overall; chief from 2010-2016). As in the *Zamora* case cited above, plaintiff here claimed that a Code of Silence operated in HPD.

Plaintiff's cross of Chief McClelland went like this:

> Q: Isn't it true that the police engage in what is known as a "wall of silence?"
>
> A: No. I've never seen it in my career. That's something you plaintiffs' lawyers made up.[65]

Plaintiff's counsel followed up with another question to which he did not know the answer:

> Q: Isn't it rare for a police officer to file a complaint against a fellow police officer?
>
> A: No, it's not rare. In fact, it's more common than not. 70% of all complaints against our officers are from other officers.[66]

Defense counsel should offer current departmental statistics to (1) challenge plaintiff's Code of Silence testimony, and (2) bolster controverting defense testimony. Code of Silence allegations typically accompany claims that a police department so regularly engages in misconduct (e.g., false arrest or excessive force) that it is an unofficial custom or practice, which the department tries to conceal. If police were routinely abusing citizens, it would be reasonable to see a high number of public complaints. And if the police are following a Code of Silence, it would be reasonable to see few (or no) complaints by officers against other officers. Counsel should present actual statistics in their own department showing the number of police encounters with the public, the number of public complaints against the police, and the number of internal (officer) complaints against the police.

For example, Chief McClelland has stated publicly that during his tenure as chief (2010-16), Houston police officers had approximately one million encounters each year with members of the public. There were approximately 700 complaints filed each year against HPD officers during that time, and 70% of those were filed by other officers. That left 30% of the 700 complaints—approximately 210—that were filed by civilians against the police. This is doubly remarkable. First, the ratio of citizen complaints to police-citizen encounters was only 210 per million, which is 0.021%. That is to say that 99.979% of the encounters were either positive, neutral, or not negative enough to provoke a citizen to file a complaint. That doesn't square with the image of an abusive department. Second, the ratio of officer complaints against other officers was more than three times the number of complaints that civilians brought. That dispels the Code of Silence allegation.

If the police chief can testify to

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Blue Wall *cont'd from page 35*

annual statistics of police encounters with the public, public complaints against police, and police complaints against police, those statistics (assuming they are favorable) will weaken claims of an abusive and secretive department. Beyond the chief's testimony, the data itself (*recent* statistics) should be available and accessible to the public.

Argue that if a Code of Silence ever existed in a given department on a broad enough basis to support municipal liability, that was something from the past. Present evidence that instead of a Code of Silence, officers today follow its opposite—a Code of Honor.

5. The Code of Honor

Some institutions, such as the United States Military Academy at West Point, have adopted a succinct yet powerful Code of Honor: "A CADET WILL NOT LIE, CHEAT, STEAL, OR TOLERATE THOSE WHO DO."[67] This can easily be embraced by police departments nationwide.

Police departments will have a code of ethics, conveying in some form the ideas of the Code of Honor. But a code of ethics can be voluminous, easy to forget, and hard to follow. The Code of Honor is hard to forget and easy to follow.

Some police departments have adopted this Code of Honor, while others might use another succinct statement of core values. Houston Police Department has adopted a set of three core values: Honor, Integrity, and Respect, to be applied every day in every situation; these are also hard to forget and easy to follow. Recommend that your police department:

- Adopt a succinct statement that is hard to forget and easy to follow;
- Display the Code of Honor or the Core Values prominently at the academy, headquarters, and every precinct as a constant reminder;
- Promptly investigate reports of misconduct, and discipline officers where appropriate; and
- Treat alleged participation in the Code of Silence as a report of misconduct.

Showing that all these are in effect will counter any claims of a Code of Silence.

Conclusion

Defense counsel should vigorously challenge any proposed expert opinion testimony that police followed a Code of Silence. An effective challenge to such claims will help defend our law enforcement officers and promote a more favorable public perception of officer trustworthiness. ML

Notes

1. 687 F.2d 80, 82-83 (5th Cir. 1982).
2. *Id*. at 83.
3. No. 01 Civ.10627 CBM, 2004 WL 758299 at *11 (S.D.N.Y. April 7, 2004).
4. *Id*.
5. Monell v. Dep't of Social Services, 436 U.S. 658, 694-95 (1978).
6. *Barry*, 2004 WL 758299 at *11 (citing Sorlucco v. New York City Police Dept., 971 F.2d 864, 871 (2d Cir. 1992)).
7. 402 F.3d 225, 229 (1st Cir. 2005).
8. *Id*. at 237-38.
9. *Id*. at 238.
10. No. 94 CV 3911(CLP), 1997 WL 33323099 at *1 (E.D.N.Y. Sept. 9, 1997).
11. *Id*.
12. *Id*. at *13.
13. *Id*. at *22-23.
14. Fed. R. Evid. 702.
15. Fed. R. Evid. 703.
16. Neal Trautman, National Institute of Ethics: Nationwide Survey, https://aele.org/loscode2000.html.
17. Fed. R. Evid. 705.
18. Fed. R. Evid. 401.
19. Fed. R. Evid. 402.
20. Fed. R. Evid. 403.
21. Fed. R. Evid. 406.
22. Fed. R. Evid. 701.
23. Zamora v. City of Houston, No. 4:07-CV-04510 (S.D. Tex. Aug. 12, 2010).
24. Transcript on file with author.
25. Transcript on file with author.
26. Transcript on file with author.
27. Transcript on file with author.
28. https://nleomf.org/historys-blotter-prohibition-and/.
29. Samuel Walker, Ed., *Records of the Wickersham Commission on Law Observance and Enforcement, Part 1: Records of the Committee on Official Lawlessness* (Bethesda: University Publications of America, 1997) at v (bold print added)https://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf (citing Samuel Walker, *Popular Justice: A History of American Criminal Justice*, 2d ed., rev. (New York: Oxford University Press,1997),154-157). This is from a 1997 overview of the Wickersham Reports, by Samuel Walker, Professor in the Department of Criminology, University of Nebraska at Omaha. (As of this writing, he is an Emeritus Professor there.)
30. *Id*. at x.
31.https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt
32.https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt at 176.
33. https://www.documentcloud.org/documents/7041359-St-Clair-Commission-Report.html.
34. https://www.boston.com/

news/local-news/2021/07/29/report-findings-patrick-rose-boston-police/; http://masspolicereform.org/1992/01/st-clair-commission-findings/; http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo47.htm; https://www.hrw.org/legacy/reports98/police/uspo46.htm.
35. James G. Kolts, *The Los Angeles County Sheriff's Department: A Report by Special Counsel James G. Kolts & Staff, July 1992* (Los Angeles County 1992) at 1 https://www.scribd.com/document/546295655/Kolts-Report ("*Kolts Report*"); also at https://calisphere.org/item/726d1c9b86eb9a1594106784c4148d88/ and https://digitallibrary.usc.edu/asset-management/2A3BF1OA5DG_U; *see also* Jennifer Rowland, *"Report Condemns Sheriff's Department for use of force,"* (UPI Archives July 20, 1992) https://www.upi.com/Archives/1992/07/20/Report-condemns-Sheriffs-Department-for-use-of-force/7735711604800/.
36. *Id*., at 4-5; *see also* https://www.latimes.com/archives/la-xpm-2001-dec-24-me-17708-story.html; https://www.latimes.com/archives/la-xpm-1992-07-21-me-4107-story.html.
37. *Kolts Report* at 3.
38. While the Wickersham Commission was unlike the Kolts, St. Clair, or Christopher Commissions in that it was not localized—while it had a significant focus on Chicago, it was nationwide in scope—it was far older than any of them. None of those four commissions should serve as a basis for showing that Code of Silence testimony is relevant to a specific agency, office, or department today.
39. https://aele.org/loscode2000.html.
40. *Id*.
41. *Id*.
42. https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-74.
43. No. 01-CV-1806 (TCP), 2007 WL 2993833 at *2, 3 (E.D.N.Y. Oct. 9, 2007).
44. *Id*. at *3.
45. *Id*. at *4.
46. *Id*.
47. 2007 WL 2993833 Id. at *4, 5, 9.
48. No. 03-CV-1283 (ARR)(KAM), 2007 WL 1989261 at *1 (E.D.N.Y July 5, 2007).
49. 2007 WL 1989261 at *2 (bold print added).
50. *Id*.
51. *Id*. at *3-4.
52. *Id*. at *4 (quoting General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) (bold print added).
53. *Id*. at *4 (bold print added).
54. *Id*. at *5 (bold print added).
55. *Id*. at *5 (citing Boucher v. United States Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir.1996)).
56. *Id*. at *6 (quotation marks and citations omitted)
57. *Id*. at *6.
58. *Id*. at *8.
59. 3:11-CV-0428-P, 2011 WL 13154073 (N.D. Tex. Sep. 16, 2011).
60. *Id*. at *1-2.
61. *Id*. at * 3.
62. *Id*. at * 4 (citing Ashcroft v. Iqbal, 556 U.S. 678 (2009)).
63. *Id*. at * 4 (citations omitted).
64. Trimmer-Davis v. City of Houston, No. 2010-11410 in the 295th District Court of Harris County, Texas, which, after having been on file for 11 years, with multiple interlocutory appellate proceedings, finally went to trial in 2021.
65. This is from the author's memory, not from a transcript. Houston prevailed, and there was no appeal.
66. This exchange is from the author's notes taken contemporaneously.
67 https://www.westpoint.edu/military/simon-center-for-the-professional-military-ethic/honor

Dress Code *cont'd from page 28*

engaged in state action. For example, when the state has coerced, or has provided "significant encouragement" to, a private actor, or if there is "pervasive entwinement of public institutions and public officials" with a private entity, that entity's conduct is considered state action. A state also will be held responsible for a private actor's decision when the state's engagement or encouragement is so significant that "the choice must in law be deemed to be that of the State."

The plaintiffs argued that CDS was a state actor because the operation of schools designated as "public" under North Carolina law is an exclusively public function that the state had delegated in part to charter school operators to fulfill the state's constitutional duty to provide free, universal elementary and secondary schooling. In response, CDS argued that because the state of North Carolina was not involved in CDS' decision to implement the skirts requirement, there was no "coercion" or "pervasive entwinement" by the state with the challenged conduct. Furthermore, because no North Carolina student was required to attend CDS, the state had not delegated to charter schools its responsibility to educate North Carolina students. In addition, CDS cited the fact that the Supreme Court has never held that the provision of elementary and secondary education is exclusively a state function. In sum, CDS was merely a private actor providing a service under its charter contract with the state.

The Fourth Circuit majority (Senior Judge Keenan and nine others) disagreed. To fulfill its duty to provide an education to state residents, the North Carolina legislature authorized the creation of public charter schools

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