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Section 1983: Experts

Defending against Expert Claims of a Blue Wall of Silence

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Defending against Expert Claims
of a
Blue Wall of Silence:

Limiting, countering, and excluding claims
that the police follow a Code of Silence

I. 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 this cover-up process.

As attorneys who represent local government and our law enforcement officers, we should care about this for at least two primary reasons. First, the claim that police follow a code of silence prejudices the factfinder. That can affect the outcome of a case, overpowering evidence of what happened.

Second, outside of court, such a claim will prejudice society. The more people believe that police are not trustworthy, the harder they will be for us to defend. A generalized distrust will also feed into the nationwide movement to abolish qualified immunity.

For purposes of researching caselaw on the so-called "code of silence," it helps to know that it also goes by several other names, including these:

Blue Wall of Silence
Blue Code of Silence
Blue Shield
Blue Wall
Blue Curtain
Blue Veil
Code of Silence

Courts have used each of these names to describe this alleged phenomenon.

II. Recognizing the "Code of Silence"

Many courts have recognized the claims that police follow a code of silence. Typically, that recognition is not in the form of a finding or a holding, but simply an acknowledgment that the plaintiff has presented evidence of a code of silence.

A. *Thomas v. City of New Orleans*

In *Thomas v. City of New Orleans*, former NOPD police officer Randolph Thomas alleged discriminatory employment practices leading to wrongful

discharge, claiming that there was "a widespread and invidious 'blue curtain' withing the New Orleans police force, creating a code of silence to shield those who abide by the code and punish those who violate it." 687 F.2d 80, 82-83 (5th Cir. 1982). Thomas elicited the testimony of a former NOPD police chief, who acknowledged that there was a "blue curtain" of silence in the NOPD when he was chief, and that it was in most major police departments.

The significance of code of silence testimony is shown in the following reasoning:

> 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.

Id. at 83. If the jury believes that there is a code of silence at work in a police department, that belief can potentiate other evidence. It can provide a context for interpretating other evidence favorably to the plaintiff, thus operating as a 'force-multiplier' of sorts to other evidence.

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

In *Barry v. New York City Police Dept.*, a police sergeant brought a claim under 42 U.S.C. § 1983 alleging retaliation in violation of her First Amendment rights after exposing police misconduct within her unit. No. 01 Civ.10627 CBM, 2004 WL 758299 at *11 (S.D.N.Y. April 7, 2004). The district court observed that testimony of a "blue wall of silence" can be critical to municipal liability. The court referred to it as the "central hook" in this case. Note the opinion's use of the italicized sub-heading:

> *1. Liability Based on Custom of Retaliation*
>
> 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.

Id. The court continued to explain that municipalities can be liable (i.e., satisfy the *Monell* factors) without having 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." *Id*. (citing *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 871 (2d Cir.1992)). Municipal liability under Section 1983 can arise from evidence of policy-making officials' acquiescence in a widespread code of silence about retaliation.

C. *Baron v. Suffolk County Sheriffs Dept.*

In *Baron v. Suffolk County Sheriffs Dept.*, a former corrections officer sued under § 1983 for First Amendment violation by retaliatory harassment for breaching code of silence in reporting a fellow officer's misconduct (playing cards with inmates). 402 F.3d 225, 229 (1st Cir. 2005). In that case, Baron's attorney introduced testimony from Deputy Superintendent Feeney confirming the existence of a code of silence and that there could be consequences to an officer who violates it. *Id*. at 237-38. 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 of a code of silence gave "additional weight" to Baron's testimony and could help the jury find for the plaintiff. *Id*. at 238.

D. *Valentin v. New York City*

The district court's opinion in *Valentin v. New York City* illustrates the impact of code of silence testimony on municipal liability. No. 94 CV 3911(CLP), 1997 WL 33323099 at *1 (E.D.N.Y. Sept. 9, 1997). A former officer with the New York City Housing Authority brought a Section 1983 case alleging sexual harassment and discrimination, hostile work environment, and retaliation in violation of the First and Fourteenth Amendments. *Id*.

Valentin proffered the expert testimony of Dr. Stephen Leinen to opine on "retaliation against officers who violate the 'code of silence[,]'" and defendants moved in limine to exclude that testimony. 1997 WL 33323099 at *13. Following extensive discussion of the expert's qualifications and the Federal Rules of Evidence, the district court concluded:

> Dr. Leinen's testimony on the "code of silence," if believed by the jury, would be sufficient to support an inference that there is a policy or a practice of retaliating against officers who press complaints against their fellow officers. Dr. Leinen's testimony would also be relevant in demonstrating that this policy or practice was the proximate cause of plaintiff's injury.
>
> * * *
>
> 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.

1997 WL 33323099 at *22-23.

III. Federal Rules of Evidence Governing Expert Testimony

The following rules are critical to challenging Code of Silence testimony.

Rule 702. Testimony by Expert Witnesses

> 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.

Rule 702 should be a primary focus for bringing a defense challenge to an expert's opinion on Code of Silence.

Rule 703. Bases of an Expert's Opinion Testimony

> 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 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.

Rule 703 offers experts a great deal of leeway, as does Rule 705:

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

> 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.

Even though Rules 401 and 402 might seem to be so commonly understood that we needn't refer to them, it can be helpful to go back to these foundational criteria.

Rule 401. Test for Relevant Evidence

> 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

> 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.

Defense counsel should be ready to argue Rule 403 as a basis for excluding Code of Silence testimony.

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

> 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.

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

Rule 406. Habit; Routine Practice

> 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.

Be aware that under Rule 406, evidence that a Code of Silence is *this* Department's routine practice is admissible to show that *this* Department did engage in the Code of Silence in *this* case. 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 this Rule.

Also beware that even if you persuade the court to exclude expert opinion on Code of Silence, Rule 701 provides this alternate means of introducing Code of Silence opinion testimony.

Rule 701. Opinion Testimony by Lay Witnesses

> 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.

IV. One Expert's Testimony – *Zamora v. City of Houston*

In a 2012 case alleging retaliation against a police officer for filing a discrimination complaint, the plaintiff introduced expert opinion that there was a Code of Silence in the Houston Police Department. *Zamora v. City of Houston*, No. 4:07-CV-04510 in the United States District Court for the Southern District of Texas (2012)

The plaintiff's expert testified that he was "[v]ery familiar with the phenomenon known as 'the code of silence[,]'" and that he had "reviewed research on it, seen it in operation, dealt with it over the years." (Transcript on file with author.) The beginning of his description might be viewed as favorable:

> A 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.[1]

Stating that officers must depend on each other for their safety on the streets sounds fine. So far, so good. But it 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.[2]

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.[3]

At this point, some questions should come to mind: To whom should they report the misconduct? Presumably, they would report it to their superior officers or to some specified office within the department. And what type of misconduct does this encompass? What things might it be permissible to overlook? What things should never be overlooked? These questions provide some fertile ground for exploring principles and ethics of organizational cohesion and camaraderie.

This expert next cited investigations over the past century where the code of silence had been recognized. These were:

- The 1931 Wickersham Commission, which was nationwide in scope, during Prohibition, largely focused on organized crime in Chicago;
- The 1991 Christopher Commission investigating the Los Angeles Police Department;
- The 1992 St. Clair Commission investigating the Boston Police Department; and

[1] Transcript on file with author.
[2] Transcript on file with author.
[3] Transcript on file with author.

- The 1992 Kolts Commission investigating the Los Angeles County Sheriff's Department.

He also referred to a report based on research conducted in 2000 by the National Institute of Ethics, which consisted of a survey of 3,714 (actually 2,132) officers and recruits from 42 states.

V. Research shows?

Defense counsel should examine the research that this expert relied upon for his Code of Silence opinion. Here are some quick overviews of that research and suggested grounds for arguing that the opinion should be excluded.

A. 1931 Wickersham Commission Nationwide/Prohibition/Organized Crime/Chicago

This was an examination into the nationwide explosion of organized crime during Prohibition throughout the 1920s, focusing largely on organized crime in Chicago. President Hoover appointed 11-member Wickersham Commission "to enforce Prohibition and curb organized crime[.]" The Commission was headed by former attorney general George W. Wickersham.

Officially "National Commission on Law Observance and Enforcement" the Wickersham Commission produced 14 Reports on these subjects:

- Prohibition;
- Enforcement of the Prohibition Laws of the United States;
- Criminal Statistics;
- Prosecution;
- Enforcement of the Deportation Laws of the United States;
- The Child Offender in the Federal System of Justice and the Federal Courts;
- Criminal Procedure;
- Penal Institutions, Probation, and Parole;
- Crime and the Foreign Born;
- The Cost of Crime;
- The Causes of Crime (two volumes);
- The Police *Report on Lawlessness in Law Enforcement*; and
- The controversial Mooney-Billings case, report submitted to commission but not officially published.[4]

The Wickersham Commission was primarily about the impact of Prohibition on crime and whether to recommend that Prohibition be continued or

[4] The Mooney-Billings case was about the conviction of two men, Warren Billings (life sentence, released in 1939) and Tom Mooney (death sentence, released in 1939), for a 1916 bombing at a march in San Francisco.

repealed.[5] As these report titles suggest, the Wickersham Commission covered a wide range of issues and problem areas. It was not primarily an investigation into the Code of Silence, although it did mention it in one of the reports.

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."[6]

This Report prompted a new generation of police leaders committed to "the police professionalization movement."

We can reasonably argue the any mention of police Code of Silence from the Wickersham Commission is too old to be relevant.

B. 1991 Christopher Commission Los Angeles Police Department

The official name of this commission was "The Special Independent Commission to Review the Structure and Operation of the Los Angeles Police Department" This commission was appointed by Mayor Tom Bradley and led by attorney Warren Christopher (future Secretary of State), prompted by the 1991 Rodney King beating.[7] Here is an excerpt from Mayor Bradley's Charge to the Commission:

> The Los Angeles Police Department is facing a crisis of confidence. * * * The time has come for a reasoned, objective, thorough and constructive examination of the structure and operation of our Police Department. How can we improve it; how can we correct its faults;

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[5] https://nleomf.org/historys-blotter-prohibition-and/

[6] This is from a 1997 overview of the Wishersham Reports, by Samuel Walker, Professor in the Department of Criminology, University of Nebraska at Omaha. (He is now an Emeritus Professor there.)
https://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamComPt1.pdf at v, x (citing Samuel Walker, Popular Justice: A History of American Criminal Justice, 2d ed., rev. (New York: Oxford University Press,1997),154-157)
https://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamComPt1.pdf

[7] https://archive.org/details/ChristopherCommissionLAPD
https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt

> how can we increase its service, its efficiency, its fairness; how can we make it a model for the next century?[8]

Findings from the Report included the Code of Silence problem:

> Perhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers' unwritten code of silence; an officer does not provide adverse information against a fellow officer. While loyalty and support are necessary qualities, they cannot justify the violation of an officer's public responsibilities to ensure compliance with the law, including LAPD regulations.[9]

The Christopher Commission 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.[10]

We can argue that, while the Christopher Commission acknowledged that the Code of Silence was a big problem in LAPD at that time, the Commission recommended serious steps to eliminate the problem. LAPD might have implemented those steps, and the problem might have been eliminated. Moreover, it was only about LAPD, and it cannot reasonably be expanded to apply to other police departments. The findings of the Code of Silence problem in LAPD in 1991 are too remote in time and too localized to be relevant.

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[8] https://archive.org/details/ChristopherCommissionLAPD at 271 (Appendix I) https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt

[9] https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt at xx.

[10] https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt at 176.

C. 1992 St. Clair Commission
Boston Police Department

This was commissioned by Boston Mayor Raymond Flynn, led by attorney James St. Clair, and produced the "Report on the Police Department Management Review Committee." This was concerned with the way Boston PD's Internal Affairs Division handled complaints and investigations. The Commission recommended reforms in BPD.[11]

We can reasonably argue that any references to Code of Silence from this Commission are too old and too localized to be relevant.

D. 1992 Kolts Commission
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 it was prompted by numerous costly settlements over excessive force.

Kolts reported that his investigation into the LA County Sheriff's Department changed his mind about tending to believe law enforcement officers, noting "the large number of brutal incidents that have been and still are occurring. Within the LASD there is deeply disturbing evidence of excessive force and lax discipline." The Commission's report provided a thorough plan for reform.[12]

From this information, we can reasonably argue that any mention of Code of Silence from this source is too old and too localized to be relevant.

E. 2000 National Institute of Ethics
Nationwide Survey

Neal Trautman, Director, produced a report based on confidential questionnaires that he sent to 3,714 officers and recruits from 42 states, in which he specifically asked questions about the Code of Silence. He received responses

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[11] 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

[12] 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
https://calisphere.org/item/726d1c9b86eb9a1594106784c4148d88/

from 1,016 recruits at 25 academies in 16 states, and he received responses from 1,116 then-current officers, for a total of 2,132 responses.[13]

Trautman reported that the 1,016 responding recruits answered:

- 79% said that a law enforcement Code of Silence exists and is fairly common throughout the nation.

[Recruits would not have a reliable basis for this assertion. This perception could easily be the result of spreading this concept throughout society in the media for decades.]

- 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.

[For recruits, this is hypothetical. And what about the other 76%?]

- 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.[14]

Trautman further reported that the 1,116 responding on-the-job officers answered:

- 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."[15]

Trautman drew many conclusions from his survey. Two of the more helpful are:

> To be successful at preventing the Code of Silence, we must be able to develop cultures in which the bad officers are the ones who are alienated.

and

> A culture must be established in which an allegiance to principles is a higher priority than loyalty to people.[16]

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[13] https://aele.org/loscode2000.html
[14] https://aele.org/loscode2000.html
[15] https://aele.org/loscode2000.html
[16] https://aele.org/loscode2000.html

We can argue that 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)[17]
> 2,132 questionnaires in Trautman study ≈ 0.31% (less than 1/3 of 1%)

The methodology is unreliable, and the data is out of date. And nothing connects it to the specific department or officer involved in today's case. Nothing in the Trautman report touches on the past 22 years in your city's police department. An assumption that what happened in some other departments some decades ago is currently happening in your own department.

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.

VI. "Code of Silence" Evidence Insufficient

Not all district courts have admitted opinion testimony of Code of Silence.

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." No. 01-CV-1806 (TCP), 2007 WL 2993833 at *2, 3 (E.D.N.Y. Oct. 9, 2007). Rubio sued the county under § 1983, alleging 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.'" 2007 WL 2993833 at *3. 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.

2007 WL 2993833 at *4. Of course, there's no such official policy. But what about custom or practice? The court addressed that next:

[17] https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-74

> 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.

2007 WL 2993833 at *4. Note that if evidence shows a custom or practice, it would have to be "so pervasive and widespread that the municipality had either actual or constructive knowledge of it." *Id*.

This opinion provides some guidance that can be useful in challenging Code of Silence testimony. The court continued:

> 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.
>
> * * *
>
> Instances where courts found that a party presented sufficient evidence to permit a jury to infer that the "blue wall of silence" constitutes a custom involve specific findings describing a long-standing pattern by the police department to engage in a code of silence, together with involvement or awareness of that code of silence by individuals with policymaking authority.
>
> * * *
>
> No similar facts were adduced here to support plaintiffs' claims.

2007 WL 2993833 Id. at *4, 5, 9. The court granted summary judgment for the County.

VII. Excluding "Code of Silence" Testimony

Some district courts have provided very thorough analyses and rationale for excluding Code of Silence testimony. The two that are quoted and discussed below can provide helpful guidance for counsel challenging such testimony.

A. *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." No. 03-CV-1283 (ARR)(KAM), 2007 WL 1989261 at *1 (E.D.N.Y July 5, 2007). The plaintiff brought a § 1983 action against officers and city claiming excessive force. He proposed to offer expert testimony of the following 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.

2007 WL 1989261 at *2.

Hill's proposed expert testimony would use the claimed "code of silence" to evaluate witness credibility. Note that the expert 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."

Id. The City moved to exclude such expert testimony and expert report.

1. Analytical gap too great

First, the district 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 the expert's methodology, reliability, and relevance to the case at hand. *Id*. at *3-4. The analysis set out in the following excerpts can useful for preparing a challenge to Code of Silence testimony:

> [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."**

Id. at *4 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (bold print added).

2. Not connected to specific department

Next, the court observes that an expert's general claim that the Blue Wall of Silence is pervasive in the profession is no evidence that it is at work in a specific department. Indeed, the court distinguishes between the New York Police Department and the New York Sheriff's 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 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.

Id. at *4 (bold print added). This court's example of distinguishing 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.

3. Unreliable methodology

Next, 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.

Id. at *5 (bold print added).

4. Nothing more than expert's "say-so"

The court observes that the expert's opinion not only is very weak, but is offered to explain why officers would testify differently from a plaintiff:

> Ultimately, Dr. Leinen's opinion is comprised of no more than his "say-so" that the Blue Wall of Silence and Code of Silence explain the differences between the testimony of the particular police officers and plaintiff in this case.

Id. at *5. As in *Thomas*, above, where the testimony was admitted, this court recognizes that expert opinion that police follow a Code of Silence can be used to detract from testimony of officers.

5. Speculative and conjectural

The court then determined that this expert opinion would be inadmissible under Federal Rule of Evidence 702; because the data was insufficient and the methods were unreliable, the opinion would be "speculative and conjectural" and must be excluded:

> 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[.]"

Id. at *5 (citing *Boucher v. United States Suzuki Motor Corp*., 73 F.3d 18, 21 (2d Cir.1996)).

6. Invades the province of the jury to evaluate credibility

The court then found that the proposed expert report and testimony, designed to explain conflicts in witness testimony, would not be helpful to the jury but would usurp the jury's role in evaluating witness credibility:

> [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.

Id. at *6 (quotation marks and citations omitted)

7. Casts the relevance net too widely

> [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.

Id. at *6.

8. Unfair prejudice, confusion of issues, misleading the jury

Having already determined that this expert's testimony must be excluded as unreliable under *Daubert* and irrelevant under Rule 702, the court didn't stop there, but went on to conclude that it would also be excluded 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 . . . ." Even assuming that Dr. Leinen's testimony regarding the Blue Wall of Silence and Code of Silence were relevant to this action, **the court does not believe that any benefit his testimony would provide to the trier of fact would be 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.

2007 WL 1989261 at *6. The court granted defendants' motion to exclude.

The district court's thorough analysis in excluding the expert's testimony on these several grounds essentially eliminates any potential for a reversal over this evidentiary ruling. It is included here extensively so that it might provide an accessible reference guide for challenging Code of Silence experts.

B. *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 the plaintiff's complaint relied on claims of a Blue Wall of Silence. 3:11-CV-0428-P, 2011 WL 13154073 (N.D. Tex. Sep. 16, 2011). After suffering a beating, tasing, pepper spray, and racial verbal abuse from police officers in a traffic stop, Lyles brought § 1983 action against two officers and City of Dallas, alleging violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

> 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.

Id. at *1-2. 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.

Id. at * 3. 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.

Id. at * 4 (citing *Ashcroft v. Iqbal*, 556 U.S. 678 (2009)). 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: "Thus, Lyles's Complaint fails to state facts sufficient to support a Section 1983 claim in accordance with Rule 8(a)(2) and *Iqbal*." *Id*. at * 4 (citations omitted).

VIII. Undermining the "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 the Commissions all pointed the way 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,[18] 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, the plaintiff here claimed that a Code of Silence operated in HPD. Plaintiff's cross of Chief McClelland went like this:[19]

> 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.

Plaintiff's counsel followed up with a question to which he did not know the answer:[20]

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[18] *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.

[19] This is from the author's memory, not from a transcript. Houston prevailed, and there was no appeal.

[20] This exchange is from the author's notes taken contemporaneously.

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.

Juries will determine the credibility of all witnesses, whether they are lay witnesses or expert witnesses, whether they are testifying to facts or offering an opinion. It will be very helpful if the testimony can be supported by documentation. In this context, that would consist of statistics showing the numbers of complaints filed by officers against officers, compared with the number of complaints from citizens against officers.

If the local government counsel can obtain *recent* statistics to support a statement like this one that the vast majority of complaints against officers are filed by other officers, that will strengthen the testimony and help undermine the plaintiff's claims of a code of silence in this department at the relevant time.

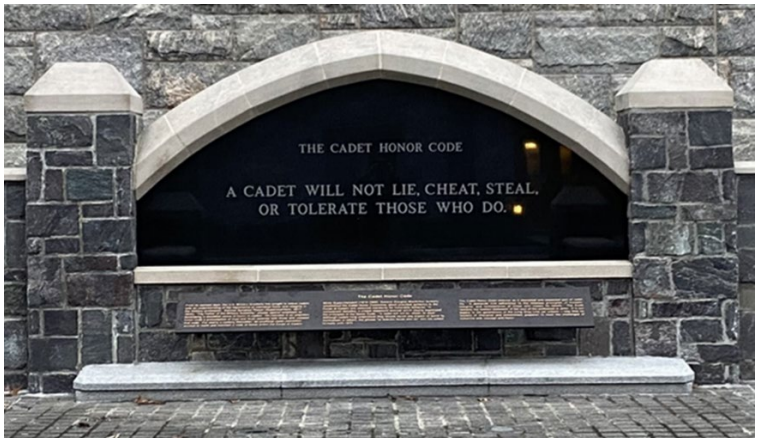
Emphasize that if the Code of Silence ever existed on any widespread basis that could serve as grounds for municipal liability, that it a thing of the past.

The code our officers follow today is a Code of Honor, and it is directly opposed to a Code of Silence.

IX. Code of Honor

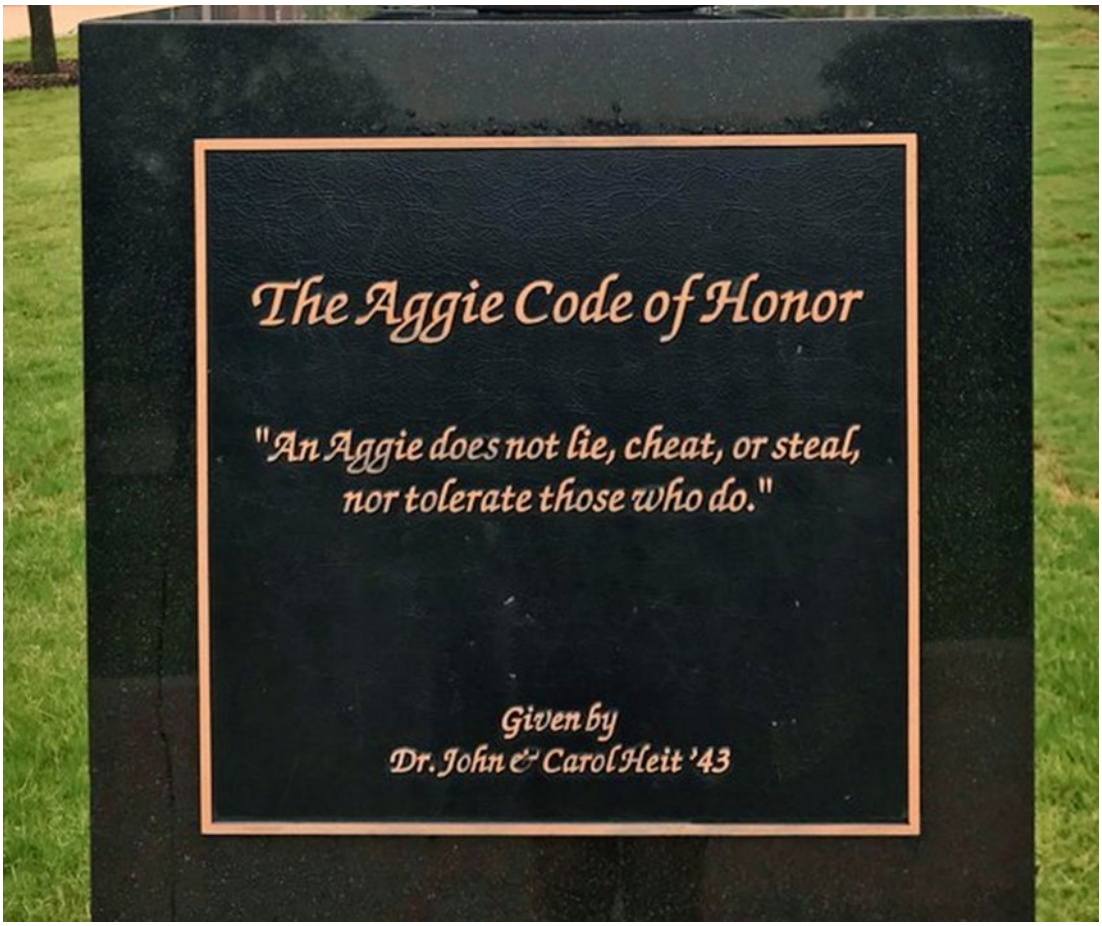
Some institutions have adopted a succinct yet powerful code of honor:

West Point Cadet Honor Code



**A CADET WILL NOT LIE, CHEAT, STEAL,
OR TOLERATE THOSE WHO DO.**

The Aggie Code of Honor
Texas A&M University



TAMU AGGIE CODE OF HONOR:

AN AGGIE DOES NOT LIE, CHEAT, OR STEAL,
OR TOLERATE THOSE WHO DO.

Does your police department have a code of honor? It most certainly has a code of ethics, which would, in some form, convey the ideas of the above code of honor. But a code of ethics can be easy to forget and hard to follow. The code of honor that both West Point and Texas A&M have adopted is hard to forget and, at least in theory, easy to follow.

Recommend that your police department do the following:

- Adopt a succinct statement like those from West Point or Texas A&M;

- Display the Code of Honor prominently at the academy, police HQ, and every precinct so that officers are constantly reminded of this expectation;

- Promptly investigate reports of misconduct; 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 help to undermine any expert's testimony of a Code of Silence.

X. Conclusion

Defense counsel should vigorously challenge any proposed expert opinion testimony that the police conducted themselves in accordance with a widespread Code of Silence or Blue Wall of Silence. This paper offers numerous grounds upon which to assert that challenge. A more effective challenge to Code of Silence testimony will help in defending our law enforcement officers and in combatting the general public perception of officer trustworthiness.

—END