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ADVISING CRIMINAL DEFENDANTS ON CIVIL CLAIMS FOR POLICE MISCONDUCT

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1. Introduction.

With increasing frequency, criminal defense attorneys are being asked by clients for advice on potential civil claims for money damages arising from alleged police misconduct. This paper provides an overview from the perspective of a plaintiff's police misconduct attorney, highlighting the two most important concerns for the criminal practitioner – protecting the statute of limitations and avoiding dispositions in criminal cases that bar subsequent civil actions.

2. The Substantive Law

(a) The Federal Civil Rights Act.

Most police misconduct cases allege a violation of the Federal Civil Rights Act, 42 U.S.C. § 1983. The elements are: (1) A "person" acting under color of *state* law, (2) causing another person to be deprived of a federally guaranteed right. The prevailing plaintiff is entitled to a full panoply of compensatory damages, punitive damages against the individual defendants (but not public entities, which are immune from punitives), and attorneys' fees pursuant to 42 U.S.C. § 1988.

The statute of limitations for such claims is very favorable. Federal law incorporates the state personal injury statute of limitations, including all its tolling provisions. In California, there is a two-year statute, which is tolled while criminal charges arising from the underlying incident are pending. There is no requirement for any administrative claim.

A § 1983 claim can be filed in state or federal court. There are only two reasons not to allege a § 1983 violation. First, if the claim is against federal agents, rather than state or local officers, the "color of state law" element is missing. Instead, the claim must be alleged directly under the Constitution pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The rules for a *Bivens* claim are the same as for a § 1983 action, except for attorneys' fees. Second, a § 1983 claim alleged in state court subjects the case to removal to federal court.

There is no vicarious liability under § 1983, a rule that frequently trips up inexperienced practitioners. Each potentially liable officer must be named as a defendant and sued. The individual defendants are entitled to assert qualified immunity, which bars claims not based on clearly established law. To establish liability against the entity, the constitutional deprivation must have resulted from a policy, practice or custom. *See Monell v. New York Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

3. The California Civil Rights Act.

Cal. Civ. Code § 52.1 is the California analogue of § 1983. It is sometimes referred to as "The Bane Act," or "The Unruh Act." Shortly after it was enacted, however, it was rendered almost useless for police misconduct actions by the California Court of Appeal decision in *Boccato v. City of Hermosa Beach,* 29 Cal.App.4th 1797, 35 Cal.Rptr.2d 28 (1994), which construed § 52.1 to cover only claims of racial animus. Subsequently, however, the state legislature declared *Boccato* not to be the law. It is now undisputed that § 52.1 covers violations of federal and state rights under color of state law, regardless of animus. *Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 11 Cal. Rptr. 3d 692 (2004).

There are several advantages to § 52.1. First, entities are subject to vicarious liability under Cal. Gov't Code § 815.2(a). Second, qualified immunity should not apply. Third, there is a provision for statutory damages of $4,000. Fourth, a case based on § 52.1 is not subject to removal to federal court.

The major disadvantage is the unfavorable statute of limitations. A government tort claim must be filed pursuant to Cal. Gov't Code § 910 within six months of the date of the incident. This time limit is *not* subject to tolling while the criminal case is pending. Accordingly, the criminal defense attorney must frequently advise on filing the tort claim, and consider the impact of a claim on the subsequent criminal proceedings.

The criminal case tolling provision applies, however, to the subsequent civil lawsuit. The statute of limitations runs six months from the denial of the § 910 claim, or the termination of the criminal case, entry of the trial court judgment. Appeals do not toll the statute of limitations.

Many practitioners allege common law torts. I find them to be generally not too helpful, and they may jeopardize an award of attorneys' fees. If there is a catastrophic injury, however, it is usually good practice to include a negligence claim. *See Grudt v. City of Los Angeles*, 2 Cal.3d 575, 583-84, 86 Cal.Rptr. 465 (1970) (pleading that a police shooting was both intentional and negligent.)

4. Evaluating Police Misconduct Cases

Litigating against the police for money damages is not like defending against criminal charges or litigating against other defendants. As you know, police are professional witnesses who benefit from judicial and jury sympathy. Public entities are generally not as willing to settle as are private businesses and insurance carriers. Plaintiffs' attorneys cannot count on shaking out a settlement offer, even for nuisance value.

No police misconduct case should be filed unless it is appropriate to try to a jury. In evaluating a potential police misconduct action, I conceptualize a triangle. Each corner has importance, but none is necessarily determinative. How the three corners fit together is what determines whether the case is worth pursuing. The

three corners are (1) Quality of the plaintiff(s), (2) Seriousness of the injury, and (3) Outrageousness of the police action.

(a) Quality of the Plaintiff(s).

There is no question that many victims of police misconduct are people who are engaged in criminal activity or who have criminal histories and other unfortunate baggage. These are the people who have the most contact with the police. Unless there is something particularly outrageous about the police action *and* the injuries are catastrophic, however, these cases are usually not worth taking. The problem is that judges do not like them, juries will not want to "reward" a criminal even if there was clearly a deprivation of rights, and defendants are loathe to pay money in settlement on such cases.

Quality plaintiffs usually have two things going for them. First, they are likeable and "clean." Second, they did not invite police attention. Often we are presented with cases where somebody "clean" gets into an argument and ensuing altercation with the police. These cases can be very difficult because juries will blame the plaintiff for a bad attitude, and will think even worse of a plaintiff not in the class of persons police generally pick on. The best cases are usually those where a "clean" plaintiff is the victim of a police action through no action or fault of his or her own, for example a search warrant served on the wrong house or a case of mistaken identity.

(b) Seriousness of the Injury

This factor means less in police misconduct cases than it does in most personal injury litigation. Too often, an inexperienced police misconduct lawyer will take a case with a catastrophic injury – cases expensive to litigate and difficult to control because of high client expectations – only to find out that liability is tenuous and defendants will not settle. Of course, large injuries can generate large recovery, but the entitlement of prevailing plaintiffs to attorney's fees pursuant to 42 U.S.C. § 1988 and Cal. Civ. Code § 52.1(h) may make a low damages case economically feasible.

(c) Outrageousness of the Police Action

Judges and juries give police a lot of slack. Unless the injuries are catastrophic, a case is not likely to get very far unless the police misconduct is pretty off the wall. My experience with jurors is that they do not usually assign the same importance to the defense of civil rights that I do. The best cases involve clear evidence of police falsifications and abuse of authority, but plain stupidity can work as well.

Most cases are based on alleged deprivations of Fourth-Amendment rights. These claims include false arrests, excessive force and wrongful searches. The standard is "objective reasonableness" and the legal standards are relatively clear.

Prisoners past the booking stage are governed by the Fourteenth Amendment's due process clause. Prisoners serving time fall under the Eighth Amendment. In both situations the standard is higher, either "deliberate indifference" – a classic oxymoron – or "shocks the conscience." There are other claims that involve more esoteric rights. It is important at the outset to identify the constitutional right at stake, and determine whether the evidence will support liability under the applicable standard.

There are also several immunities. Prosecutors, in particular, have absolute immunity for prosecutorial decisions, although they may be exposed to liability for actions relating to investigations. Officers have immunity for perjured testimony, but not for false reports and affidavits. A full discussion of absolute and qualified immunities under federal and state law is beyond the scope of this paper.

5. The Effect of the Disposition of the Criminal Case: *Heck v. Humphreys*

Every criminal defense attorney should be familiar with *Heck v. Humphreys*, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994), which holds that a § 1983 civil rights action is barred if a judgment in favor of the plaintiff would necessarily conflict with a criminal conviction. This is a rule of federal law, not an application of state collateral estoppel or res judicata principles. Thus, a plea of no contest to a criminal charge bars a subsequent § 1983 action based on a claim of arrest without probable cause, even though there would be no collateral estoppel under state law.

The scope of *Heck* preclusion is not entirely clear, especially in connection with excessive force cases. Certain crimes, such as resisting, obstructing or delaying a police officer, Cal. Penal Code § 148, require that the officer be in the act of discharging a lawful duty. An officer using excessive force is not discharging a lawful duty. Accordingly, since excessive force is a defense to the charge, a no contest plea to a § 148 can be argued to bar an excessive force claim. On the other hand, not infrequently excessive force follows the completion of the crime, for example when police shoot or beat someone after flight. This issue is presently being considered by the Ninth Circuit Court of Appeals in its en banc rehearing of *Smith v. City of Hemet*, 356 F.3d 1138 (9th Cir. 2003).

6. Conclusion

In today's climate, the criminal defense attorney must be able to advise a client on potential civil rights lawsuits and take the necessary steps to preserve claims while trying to get the client the best possible result out of the criminal justice system. Unfortunately, the objectives sometimes conflict. For example, the filing of a government tort claim might harden a prosecutor's position during plea negotiations, or a plea agreement could resolve the criminal case favorably while barring a subsequent civil rights action.

You, the criminal defense bar, will have to advise your clients on making these difficult decisions. Hopefully, the foregoing basic outline will help.