



## Horse of a Different Color

By Christopher Boyle

**C**alled upon to defend such a client, a wise defense attorney will learn the basics of law enforcement, participate in and encourage training, communicate with his or her client like no other, and provide the best defense possible.

# The Law Enforcement Client

While the profession we have chosen allows, if not demands, that we develop the ability to converse with a wide variety of demographics, across educational, professional and socio-economic lines, at times, we are faced

with the “horse of a different color,” a client so different in experience and responsibility, that we share little in common and face an uphill battle from the start. The law enforcement client is the quintessential horse of a different color, but given their frequent encounters with the U.S. Constitution, one with whom you may have frequent contact as a defense attorney, or as a criminal or a plaintiff’s attorney for that matter. You may find that the author of this article is himself a horse of a different color, perhaps choosing one end of the horse over the other in describing his presentation of the content. Unfortunately, in his 16-year law enforcement career before joining a defense litigation firm, he has been called a lot worse. That said, his perspective as a sued police officer and representing similarly situated officers as an attorney does provide the benefit of firsthand experience. There is a certain predictability that comes from law enforcement officers, a predictability that can be used for their benefit,

and yours. While law enforcement officers are trained to deal with the “likes of us” in the legal profession, recognizing the distinction between fact and fiction of what makes them different from your other clients, what they demand as clients and what you can do to improve the attorney-client relationship, can go a long way.

### **Fact and Fiction: What Makes Law Enforcement Different?**

A hundred years ago, when I pushed a patrol car around the streets of Philadelphia, I had a very wise police commissioner who said, “Law enforcement is the only job in the world where, on any given day, you could be asked to save a life, take a life, or give your life. You could say that this makes it unique.” Indeed, you could. The business of law enforcement is truly one of life and death. While other professionals believe that the same holds true, taking our friends in the medical field as a perfect example, it is slightly different when it is your own life



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or death that you are dealing with. To use a different example, it's like the chicken and the sow who are both asked to put something toward breakfast. The chicken contributes eggs, and the sow contributes bacon and has made a sacrifice. This is the fundamental difference between your law enforcement clients and those in other fields, but it certainly isn't the only one.

**Understanding** and not judging why a police officer develops a hardened shell when it comes to certain matters that the rest of the world sheds a justifiable tear about will help you represent one.

I tried in the past to explain why police officers are the way that they are. Then I had a client who put it in perhaps the best way that I have ever heard. In an issue completely unrelated to the underlying claims, a plaintiff's attorney took umbrage to my client, who had referred to the attorney in a rather unflattering way during a deposition. The attorney sought to use at trial my client's reference to counsel's similarity to the opening of the digestive track at the opposite end of the one that he was using to speak. When asked during the second day of his deposition if he had referred to plaintiff's counsel in this manner, my client answered quite honestly that he wasn't certain but that it was certainly possible. When asked why, he replied with words to the effect, "I used to speak in a perfect Christian manner, then the boss put me into a cesspool of drug dealers, rapists, and killers, and my vernacular paid the price." Understanding and not judging why a police officer develops a hardened shell when it comes to certain matters that the rest of the world sheds a justifiable tear about will help you represent one. This is

a defense mechanism that develops over years of dealing with the worst in human beings. Few people meet a police officer on his or her best day, and the officer has to deal with a steady diet of murder and mayhem. If officers succumb to the steady diet, Fourth Amendment claims of excessive force would far outnumber the lawyers able to handle them. Understand that your officer's gallows humor is a necessary tool of the profession, and be ready for its natural corollary: the need to test your limits. Most officers will want to know how much you know, and the fastest way to establish this is often to test your knowledge with a simple question, or, if this isn't an officer's first lawsuit, a little white lie. An officer may ask you point blank for your experience, or say something that is completely inconsistent with his or her training. For instance, police officers will often refer to rubber nightsticks, felt-lined handcuffs, or rubber bullets. None are tools of contemporary law enforcement, which is something that you should know going in.

Now, as for the fiction of law enforcement, neither the "blue wall of silence" nor the "officer's code of corruption" exist. Law enforcement officers hate child molesters and abusers the most, followed by drug dealers and dirty cops. As a group, police officers will not cover for the illegal acts of other police officers, and any internal affairs investigator will tell you that if it were not for honest officers reporting dishonest ones, many dishonest acts would never come to light. That said, law enforcement is an insular culture of necessity, and officers will not go out of their way to report honest mistakes made in good faith any more than teachers, plumbers, or lawyers. What's the difference? The difference is that an officer's honest mistake may result in real harm to an innocent person and will certainly receive years more scrutiny than that of a plumber. While a contractor may not have a problem assigning blame to a subcontractor, a police officer will be loath to assign blame to another police officer. He or she will expect that other officer to accept blame, but he or she won't want to be the one to demand it.

Law enforcement officers' endeavors face constant scrutiny. They live under a microscope of political, media, and criminal oversight, and an action taken in a split sec-

ond can result in years of litigation. You, the civil defense attorney, believe coming into this situation, that you can be an officer's savior, his or her knight in shining armor. What you have to realize, however, is that you represent one more layer of scrutiny and, until you prove yourself worthy of the task, just another "suit" with a load of questions, and perhaps precious little insight into how law enforcement works, how officers are trained, and what law enforcement officers demand.

### **What Do Law Enforcement Officers Demand?**

Law enforcement officers demand honesty. They will tolerate a small measure of ignorance of their training or procedures, but dishonesty, they cannot abide. If you identify a problem, let an officer know, and don't sugar coat it. An officer would rather hear it from you directly than learn about it later in an adverse ruling.

Law enforcement officers demand a face to face meeting. It is perhaps the smallest of efforts that you can put forth but the one that has the highest payoff in starting the attorney-client relationship off on the right foot. One of my favorite lines to say when I meet a new client is to say that I want him or her to be "able to pick me out of a lineup." Officers deserve at least that.

Law enforcement officers demand the best defense available. They want to know what is going on, and why, so communication is of paramount importance. They work 24-hours a day, seven days a week and have missed more kids' birthdays and holidays than they can count. You can guess that they probably don't need to hear that the lawn guy got grass in your pool, or that your Mercedes is in the shop. They will give you their best if you do the same.

### **What Can I Do To Improve the Relationship?**

You can learn, train, communicate, and whenever possible, win.

### **Learn**

Learn what your officer learns. Read the things that he or she reads, and watch the things that he or she watches. He or she doesn't read crime novels, though he or she will sometimes write one. He or she doesn't watch "cop shows" unless they are really,

and I mean really, true to life—think NYPD Blue or Hill Street Blues. His or her training is of paramount importance to him or her, and he or she will expect that you know what it entails. This doesn't mean that you have to go through the Police Academy, but it certainly does mean that you should familiarize yourself with the state-mandated training. Know what topics the training covers so that you can get a copy if you need it. It wouldn't hurt to make a friend in the state office responsible for training. You may need to sit on a curriculum committee, or do a two-hour presentation down the line, but that will both cement the relationship and add to your resume.

There are certain things about law enforcement training that you think you know, perhaps from a healthy dose of television. Please allow me to dispel just a few myths that will help you and your client get along better.

- The Crime Scene Unit does not respond to missing pets, a slashed tire, or tree limbs that hang over your property. All of these tasks fall within the capabilities of a trained police officer. Officers do not call for a police boat until they have reason to think that something is in the water, and they don't seek DNA when dealing with a stolen houseplant. They could, but that would be an incredible waste of resources. Having such resources available does not create a higher burden to use them.
- Police officers do not shoot armed people in the hands to knock the guns out. Clint Eastwood might do it, but Officer Boyle was trained to shoot "center mass," meaning the largest part of the offender visible, usually the center of the chest.
- Police officers are trained not to use Tasers on people armed with guns. An individual armed with a gun is a "deadly force threat." An officer is trained to respond to deadly force with deadly force. A Taser is "less than deadly force" and would, therefore, not be appropriate.
- Your officer is not Bruce Lee, Jet Li, Jean-Claude van Damme, or the Terminator. He or she is trained to fight to overcome resistance and to take an offender into custody. He or she cannot jump seven feet in the air and knock out a bad guy with a single kick to the face. He or she has the added problem

that when he or she arrived, he or she brought a gun along, meaning that the fight now involves a gun, and that's a dangerous thing. If the gun gets loose, he or she could be killed with it because the gun does not care who fires it. There is no such thing as a fair fight, and your client's only objective should be to win. If he or she has chosen this force option over another, he or she isn't stuck with the decision and can (and must) use greater or lesser force based on the circumstances.

- People are missing from the moment they are reported missing; the "24-hour requirement" is a myth. People have the common misconception that an individual has to be gone for that 24-hour period before police can investigate.
- A police officer does not have to read everyone that he or she arrests a *Miranda* warning. *Miranda* is only applicable if an officer will question the individual. It never ceases to amaze how many plaintiffs' attorneys bring a Fourth Amendment claim for a failure to *Mirandize* when an officer did not take a statement. In the vast majority of arrests that I made, I never took a statement from an offender, owing in large part to the fact that I also had the benefit of a detective bureau that did take such statements on my arrests. The same will probably be true of the law enforcement officers whom you represent.

Take the time to read a plaintiff's complaint, and for goodness sake, don't assume that your adversary is up to speed on the law. If he or she was, we could eliminate Federal Rule of Civil Procedure 12 in federal civil rights practice. One thing that I have found that police officers appreciate is to have attorneys explain the claims made against them and a plaintiff's burdens of proof. Know what these are before you meet your client and be prepared to tell your client before he or she has to ask. Your client will want to know that everything in the complaint must be accepted as true for purposes of the motion to dismiss, and you should be the one to tell him or her. Your officer can be expected to throw you a curveball from time to time on an obscure legal concept, or a case that he or she read about with which you aren't immediately familiar, especially in the area of criminal

law. Burdens of proof and steps in litigation are not curveballs. They are fastballs down the center of the plate, and you should know the answers.

Finally, become familiar with the department's policies and the officer's personnel and training folders, and find out something about the department itself. In most lawsuits against an officer, you will be defending the individual officer or officers present, the supervision and command of the department, and the municipality itself. To evaluate a case for settlement or trial purposes, there are certain things that you will need to glean from this review.

- Will the department withstand review under *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), discussed below? While a department is not expected to have a policy on every possible situation that an officer could confront, it must have certain policies at a minimum, and those policies must be up to date. While not exhaustive, that list should include use of force and force reporting policies, a vehicular pursuit policy, a citizen complaint procedure, and a disciplinary code. You should also be aware of policies that a department may need particular to the jurisdiction. For instance, in the Third Circuit, case law suggests that a police department needs a foot pursuit policy. See *Pelzer v. City of Philadelphia*, 656 F. Supp. 2d 517 (E.D. Pa., Jan. 11, 2011).
- Has the officer been subject to a previous lawsuit, especially for similar alleged conduct? Patterns of similar constitutional violations are admissible against a department both for named officers and officers without direct connection to a lawsuit.
- Is the officer's training up to date under the state law and accepted police practices? While a state often mandates certain training, *Monell* and its progeny also stand for the proposition that when the need for more or different training is so obvious and its lack so likely to lead to a constitutional violation, a department could be found to be "deliberately indifferent" to the need and liable.
- What is going on in the department? While the average, rank and file officer in the LAPD may not have any idea what is happening in the office of the chief of



police, the same is not always true for smaller departments, which make up the majority of law enforcement entities in the country. It may well be the case that today's officer is yesterday's chief, or vice versa. It will be important to have some idea of where your client stands in such a situation without becoming part of it. Similarly, even a quick "Google" of a department may reveal a recent problem that sheds light on your case, such as if a seemingly routine car stop has resulted in a riot. Knowing that there was a police shooting on the block two weeks earlier involved in your case is something that you should know before you meet your client, and something that you can easily find out beforehand.

### Train

You may have heard the saying, "all press is good press." While that certainly isn't the case when representing law enforcement officers, a pair of similar maxims will serve you well: "All training is good training," and "Free is for me."

A fair amount of time and money goes into defending *Monell* claims against law enforcement clients. Success on a claim for failure to train is rare, but it is also in direct proportion to the amount of training that an officer receives, hence, maxim number one: "All training is good training." A police department, specifically its chief, has a limited amount of financial resources, and training can prove a costly undertaking. Hence, maxim number two: "Free is for me." An understanding of *Monell* is, of course, a necessity for a department's defense and to explaining to a chief of police how training that you can provide to the department, will decrease its exposure, as well as to what the chief of police will need to explain to those he or she answers to.

A municipality can be held liable under §1983 only if a plaintiff shows that actions violating his or her civil rights implemented a policy, ordinance, or custom of the local government or an official high enough in government committed the actions so that they can fairly be said to represent a government decision. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978). A plaintiff must provide evidence that the government unit itself supported the violation of

the plaintiff's constitutional rights. *Monell* at 695.

The United States Supreme Court in *Monell*, held that a civil rights complaint against a municipality or its agency must allege (1) the existence of a custom or a policy of the municipality that is of such long standing that it has the force of law; and (2) the municipality's employees violated a plaintiff's civil rights while acting in accordance with this custom or policy. *Id.*

Municipalities do not cause constitutional deprivations merely by hiring alleged tortfeasors. Rather, the complained-of injury must be causally linked to a custom or a policy of a municipality under which an employee acted. *Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir. 1996).

A municipality or its agency may be held liable for acts that it has ordered. *Penbauer v. City of Cincinnati*, 475 U.S. 469, 480 (1986). It also may be liable by virtue of action taken by its own officials when those officials have "the final authority to establish a municipal policy with respect to the action ordered." *City of St. Louis v. Paprotnik*, 45 U.S. 112 (1988).

A plaintiff must also show a causal link between the alleged custom or policy the alleged §1983 violation, and concomitant harm. In short, "a municipality may be liable under 1983 only where its policies are the 'moving force behind the violation.'" *City of Canton v. Harris*, 489 U.S. 379, 386 (1989) (quoting *Monell*, 436 U.S. at 694).

Inadequacy of police training may serve as a basis for §1983 liability only "where the failure to train amounts to deliberate indifference to the rights of a person with whom the police come into contact." *Canton v. Harris*, 489 U.S. 378, 389 (1989). Elaborating, the Supreme Court explained, "[o]nly where a municipality's failure to train its employees in relevant respects evidences a deliberate indifference to the rights of its inhabitants may such a shortcoming be properly thought of as a policy or custom that is actionable under §1983." *Id.* The Supreme Court continued, "deliberate indifference can be shown where the need for more or different training is so obvious, and the inadequacy is so likely to result in a violation of constitutional rights, that the policy maker can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390.

In 2007, I sat on the curriculum committee of Pennsylvania's Municipal Police Officer Education and Training Commission and wrote the search and seizure lesson plan taught to all of the state's officers that year. While it was a sizeable commitment in the dreaded "non-billable hours," it has paid off tenfold in the credibility that it provides to me in speaking on training matters, especially to the chief executives in the police departments that I represent. Similarly, delivering a yearly presentation to the Pennsylvania Chiefs of Police provides the opportunity to stay current in the minds of law enforcement throughout the state, while delivering another to our largest client in the region, keeps us visible in the area where we do the bulk of our representation of law enforcement clients. Dare I say it to the chagrin of associates everywhere? I do: assign the task to an associate to learn what law enforcement wants in the area of training, and provide it. If you charge a reasonable fee for the presentation, encourage the chief to invite the region's officers. You should be willing to present to five or 500 at the same cost. Presenting a regional seminar will be a feather in a chief's cap, while exposing you to a wider law enforcement audience. It is a win-win.

### Communicate

This is the number one area where you can improve your relationship with law enforcement clients: communicate. The officer whom you represent lives in a world where communication is often one-way, chief down the line to officer. If a client has been sued before, chances are that he or she either never met the attorney representing him or her, or viewed the attorney as another level of command and not the individual responsible for carrying out his or her direction as the client. Let the officer know that you work for him or her, not the other way around. It will be a breath of fresh air, and it may take the officer a little while to get used to it. When an officer e-mails you, respond, even if to say that you have nothing new to tell him or her. A word of caution here: to a police officer who works a steady midnight tour, 3:00 a.m. is just three hours into the officer's workday, not the middle of the night as you may see it. You can expect those calls, at those hours. Let your client know that he or she

can expect a call back first thing in the morning, and let him or her know ahead of time. Police officers are accustomed to people getting back to them at a civilian's hours as long as it is understood ahead of time. Copy your client on every correspondence. Again, this is something that an officer will not necessarily be accustomed to, but something that he or she will truly appreciate. Better still, if the chief is not a named defendant, make the chief your "cc," and the officer, your recipient. Police work is a quasi-military endeavor that respects the chain of command. That said, when it is the officer's name after the "v.," he or she is entitled to the direct correspondence, and the chief will understand.

You should be prepared to explain the steps in civil litigation to an officer, and how long it generally takes in your particular jurisdiction. A police officer doesn't like waiting three years to get through a trial, but he or she will take it much better if you tell him or her that up front. Without such an explanation, he or she will apply the familiar to the situation and expect that civil litigation takes about the same amount of time as a criminal prosecution. Imagine the disappointment when that speedy trial date comes and goes and you are not yet through discovery. You may expect that a veteran law enforcement officer would be familiar with the process. You would be wrong. While each situation presents its own unique circumstances, I try to communicate the following to every law enforcement client, up front, before he or she has to ask.

- You are the client. An insurance company may be paying the bills, but I answer to you.
- You have a right to be kept informed, and you will be copied on everything.
- If you have a question, contact me by phone or e-mail. You are not an inconvenience. You are my client.
- If I have a question, I will contact you and expect you to get back to me at your earliest convenience. Prompt response to my questions is essential to your representation.
- The plaintiff bears the burden of proof. At this stage, everything must be accepted as true for purpose of our motion to dismiss, but that is not the case on summary judgment.

- Here are the litigation steps that you can expect: initial pleadings, written discovery, depositions, experts, motion for summary judgment, trial. We will meet again, face to face, to prepare for your deposition.
- You are represented by counsel, and I would not send anyone to speak to you without telling you first.
- There is an exposure to punitive damages.
- There are no "home runs," "slam dunks," or "open and shut cases" for the officer.
- If you want to, please go ahead and speak to an attorney from your Fraternal Order of Police or union, and give the attorney my contact information. I would be happy to talk to him or her about the case. Many officers want to know that you have no problem with this. The majority will not consult. And of the ones that do, the most that usually occurs is the other attorney will request periodic updates. This may go further than anything else you say in establishing your credibility.

#### **Win**

Well, that's simple enough. Just win every case, and you'll have no problem. Barring that, however, you should keep a few other things in mind. If you settle, and sometimes you must settle, do everything that you can to have your individual officer dismissed from the case before the court enters the Federal Rule of Civil Procedure 41 order. This is very important to an active police officer who may well face a lawsuit again and will want to be able to say that there was a settlement with the municipality, not with him or her individually. If you don't win, don't let it be because you didn't fight. Law enforcement officers are accustomed to the fact that things don't always go as planned and that juries seem as if they didn't hear the same case that you put on. That said, they are more in tune to those who phone it in than professionals in almost any other profession. They expect your best. Finally, eight of 10 law enforcement clients want to know during your first meeting what they can do at the end of litigation to go after the plaintiff and his or her attorney for defamation, fraud, or many other heartfelt but sometimes inaccurate descriptors. I have used the same

answer every time, the same answer that a wise City Solicitor gave to me when I was sued for excessive force: "If, when this all over, you wait 30 days, and then still want to sue, call me. While I don't do that kind of work, I can give you the names of a few attorneys who do. I think that you will be glad to have the plaintiff out of your life at that point, but you call me if the 30 days pass and you feel the same." I never made the call, and in eight years of civil rights defense, not one officer has made the call to me. Law enforcement officers are realists, and a realist knows that suing a plaintiff at the end of a successful defense is a losing proposition even when you win. Knowing that he or she may be sued again, an officer will go out and save a life, take a life, or give a life. This is the horse of a different color whom you represent. You are fortunate, indeed.

#### **Conclusion**

Law enforcement officers are unique clients: unique in the jobs that they do, and unique in their demands as clients. They are called upon during any given day to be prepared to save a life, give a life, or take a life. Each of these unique responsibilities comes with an attendant exposure to liability. Called upon to defend such a client, a wise defense attorney will learn the basics of law enforcement, participate in and encourage training, communicate with his or her client like no other, and provide the best defense possible. A law enforcement officer is like no other, and he or she demands an attorney willing to spend the time to understand the breed. An attorney need not have been a police officer to represent a police officer. Expand your sense of humor to include the gallows humor necessary to survive in police work while maintaining the dignity of our profession. A police officer appreciates that you can take a joke but would rather have a skilled litigator under these circumstances than someone to have a beer with. The cases that a civil rights defense attorney handles are among the most interesting imaginable, and there is never a dull moment. Understanding the makeup of those you represent will make your chosen profession itself a horse of a different color, and a true pleasure. 