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PERSPECTIVE

## Guide to defending against excessive force claims

By Blake P. Loebis

An attorney just knocked out every cause of action with a motion to dismiss in a peace officer civil rights case except one excessive force claim. Good work, right? Not so fast. It is possible the attorney did more harm than good. In peace officer civil rights cases where the prevailing party is entitled to attorney fees, whether to file a motion to dismiss is just one of many early decisions an attorney must make that could be disastrous if not thought through properly.

It is critical to have a clear end-game at the beginning. Counsel for law enforcement have immediate access to relevant information from their client agency and should use that information to evaluate cases early. While an agency will sometimes decide a case must be tried on principle, every other case has a settlement value. That settlement value will be lower early in a case because of attorney fees. This seems like common sense, but all too often counsel miss the opportunity to develop an end-game at the start. Consider the following illustrations.

### Should you file a motion to dismiss?

If you have an excellent chance of dismissing a claim (such as false arrest), but you cannot get rid of all the other attorney fees claims (such as excessive force), it might be wise to wait until after settlement negotiations have failed before seeking dismissal. Motions to dismiss drive up the plaintiff's attorney fees, pushing you further apart from potential settlement.

If your early evaluation convinces you the case should settle, think twice before filing any motion prior to a settlement effort. Many cases wind up not settling, or settle for far more than they should, because defense counsel needlessly drove up the plaintiff's attorney fees with motions or discovery disputes that did not change the texture of the case.

Don't worry about a "lost opportunity" to eliminate peripheral claims through a motion. If defense counsel has good legal arguments, they will be just as solid, if not better, at summary judgment — after settlement efforts have failed.

### Should you make an early offer of compromise?

An offer to compromise under Federal Rules of Civil Procedure, Rule 68, or California Code of Civil Procedure Section 998, is one of defense counsel's most powerful tools. A well-calibrated offer can place a cap on attorney fees. Limiting fee exposure is crucial, particularly in relatively low-damages cases that do not involve severe injuries — like most cases filed against law enforcement.

But for an offer of compromise to be effective, it must be done immediately. Where attorney fees are involved, such offers should typically include an amount to cover plaintiff's fees. The longer the case goes on, the higher the fees, and the greater the offer will have to be, regardless of the merits.

An additional factor may be the desire to avoid unnecessary publicity. The longer the case progresses, the higher the risk it might generate negative publicity for the involved officers, the department or the municipality.

### Should you consider requesting a stay, or staged discovery?

If you conduct a case management conference without a clear vision of your end-game, you might regret it for the duration of the case. Many federal judges are receptive to requests to stay certain proceedings in these types of cases — even discovery — to allow for early settlement negotiations. If you do not know the strengths and weaknesses of your case well enough at the initial CMC stage, you might miss a great opportunity to limit your client's exposure and costs.

### You must understand your case before initial disclosures are due.

In federal court, initial disclosures

are typically due a short time after the complaint is served. A common misperception is that Rule 26 requires disclosure of every relevant document or potential witness. Not so. Only those documents and witnesses that may be used "to support [a party's] claims or defenses, unless the use would be solely for impeachment," must be identified.

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Failure to think through the ultimate claims and defenses will leave defense counsel guessing which documents to disclose and which to withhold. It is imperative before initial disclosures to investigate the facts and know the claims and defenses for summary judgment and trial. It may turn out after further evaluation that a document or witness undermines your defense. If defense counsel does not carefully evaluate the case and devise a clear end-game before making initial disclosures, damaging documents or witnesses may be needlessly disclosed.

### You must understand your case before filing an answer.

An answer in federal court must respond to each specific allegation. The only way to provide meaningful responses and not unnecessarily admit something is to know your case, and the path you want it to follow before answering.

Knowing a case early and devising an end-game early is easy. It just takes strategic thinking and legwork. Although not all peace officer cases are the same, there are basic steps that defense counsel can usually take to gain an early understanding of the case that will inform his or her end-game strategy:

- Meet, in person, with all of the

involved officers as soon as possible.

- Obtain all incident reports.
- Obtain the dispatch recordings, not just the computer assisted dispatch printout for the incident. Too often, the defense relies on the computer printout of the dispatch transmissions, which is not a transcript, verbatim or otherwise, of the dispatch call. If advising a public entity, make sure that they retain these tapes for over two years because that is how long, in California, that a plaintiff can wait before filing a federal lawsuit.

- Obtain all videos of the incident as early as possible. Often ATMs and security cameras at nearby businesses may have relevant video that will be destroyed if you delay.

Visit the scene and document what it looks like. There is an extensive amount of information regarding an incident (including video) that cannot be gained other than by visiting the scene. Document the scene as early as possible because scenes change, sometimes dramatically.

Most importantly, defense counsel must have enough experience with peace officer cases and enough confidence to use the information obtained to make the call, early on, whether a case should be settled, for how much, or tried — and that end goal must guide counsel's strategy from the beginning. Your client is much better served when you bill 20 hours to investigate a case and devise an end-game strategy than by 20 hours spent writing and arguing a motion.

Blake P. Loebis is a principal with Meyers Nave Riback Silver & Wilson PC.



BLAKE LOEBIS  
Meyers Nave