Evidence Collection for Civil Litigation

Collecting evidence now could save you a lot of trouble later.

By Kimberly Colwell

There are many steps agencies can take to ensure better collection and preservation of evidence in case of civil suits. Most precautions can be taken proactively and with little upfront cost, providing substantial savings in the long run through reduced risk in civil litigation.

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South San Francisco PD evidence room shelving organization.
Every day lawsuits are won and lost based on the quality of the evidence presented at trial. Most law enforcement agencies are well trained in the collection and preservation of evidence in the criminal arena. However, many of these same agencies never fully contemplate the ramifications of civil suits.

Evidence crucial to civil police litigation is often lost, destroyed, sold or never collected in the first place. With the very real potential for plaintiffs’ verdicts supported by large awards of attorneys’ fees in federal civil rights cases, law enforcement agencies can follow a few simple procedures to reduce risk in civil litigation.

Initial collection of physical evidence occurs at the crime scene. Good record-keeping during collection starts the agency off on the right foot. After the crime scene is secure, photograph all relevant evidence in its original location, taking close-up photos when appropriate. Make sure there are numerous overview orientation photos of the entire area.

This may not seem crucial at the time. However, orienting witnesses and a jury to a location, especially a large outdoor setting, can help explain how things looked and where things happened at the time of the incident. If the incident occurs at night, take more overview photographs during daylight as soon as practicable after the incident. Another good step is to copy satellite views from Google Earth.

An important reason for taking detailed photographs of the surrounding area is that often a trial in a civil suit will not take place until two to five years after the occurrence. Sometimes these trials transpire even later if the plaintiff was incarcerated, thereby suspending the statute of limitations on a civil rights claim. By that time, things in the area may have dramatically changed.

For example, buildings may go up in what was an empty field, bushes and trees grow or are removed, or carpet and furnishings are different. Thus, sight lines and visibility are altered from the original crime scene. Most importantly, memories fade, and even the most experienced officer may no longer remember how things looked or where he was situated in relation to the plaintiff and physical objects or structures at the time of the incident.

Imagine being asked in the spotlight of the courtroom where the fence was in relation to the plaintiff and other officers during an incident that occurred five years earlier and for which you had no premonition that you would be sued. A good photograph takes the guesswork out of this potential pitfall and is useful to the civil defense attorney in preparing the officers for trial, questioning witnesses and even cross-examining the plaintiff. The photographs will also include much information not described in the written crime report — information that may not be important in the criminal case but which may portend the outcome in the civil litigation.

**Preservation of Photographs**

Crucial to the collection of photographs is booking them into evidence. First, an evidence log of the number of photographs taken should be created. This log must note the starting and ending photograph designation by number, letter or other code separately identifying it from any other sequence of photographs.

Next, all of the photographs should be burned to a disk or downloaded to a computer. Do not delete any photographs from the original set. Make sure all originals are maintained. You can always copy what you need later, and then eliminate the bad or blurred photos. By maintaining all photos in sequence, you can never be accused of intentionally deleting a photo or spoliation of evidence. Book a complete copy into evidence to be sure nothing is lost if the main system crashes.

One reason for care in cataloging the photographs is that years later, people may not remember how many photographs were actually taken. For example, assume Officer Jones is injured by the plaintiff. Those injuries must be documented. If the evidence log reads only “Photos of Officer Jones’ injuries,” without the number of shots taken there may be confusion later.

With the advent of digital photography, it is a simple step for the photographer to quickly double check that an accurate image has been captured. If not, take another picture.
Shots taken in low light should be quickly checked for clarity. Close-ups, especially of injuries or when a flash is used, should be looked at to confirm the image is usable. For example, an officer is bitten by a suspect during a struggle. A close-up flash photograph is taken at the hospital. Make sure the injury is evident in the image and that it isn’t blown out by a flash being used at close range. A close-up flash can actually eliminate instead of illuminate the injury. You don’t want to discover this months or years later when it’s impossible to retake the photo.

**Video Footage**

Videos are ubiquitous. Almost every phone comes equipped with a video camera these days, and people use them. If you have a major incident, once the scene is stabilized, have one of the initial officers on scene canvass the area for witnesses and for video evidence. Don’t just ask if the person saw the event; ask if they recorded it or saw anyone else recording it. The old adage that a picture is worth a thousand words was never more relevant.

Once video footage is located, copy it or, if you can, get a copy of the flash card or memory device. While the copying is being done, you can always give the person who owns the camera a new memory card to keep them happy.

When the footage is downloaded, review it. Sometimes the cell phone footage can be erratic and hard to see. If that is the case, consider getting a professional to enhance the footage. It is amazing what can be done by a good forensic specialist. Things can be slowed or brightened, and prints can be made from crucial frames. Also consider enhancing the audio as many a gem can be unearthed by sound enhancement. Good footage can make the overreaching plaintiff dismiss his case.

**Maintaining Evidence**

Another pitfall in the evidence world is allowing evidence room clerks or technicians too much discretion. All evidence collected is potentially very important. Assume again that Officer Jones was injured by the plaintiff striking him in the lower back with a dirty piece of wood. First, the officer should be photographed in full uniform immediately following the incident. The wood should be collected and photographed, and a close-up of the officer’s shirt should be taken. Then the shirt should be booked into evidence and kept there until after the time has run out for filing civil litigation or until a civil trial is over.

It is a well-known fact that evidence rooms get overcrowded. Still, the importance of maintaining evidence cannot be overemphasized. Many departments have a policy of selling firearms after a certain period. Like the shirt example, it is equally important to keep all guns until the statute of limitations has expired or until the conclusion of a civil trial. If there is any doubt, law enforcement officers can check with the attorney designated to give the department advice. Public entity attorneys can give important behind-the-scenes guidance and even training to their law enforcement clients.
Presentation of Evidence

Presentation of evidence to a jury conveys more than the actual object being offered. The way evidence comes to the court, is handled in the courtroom, and is presented to the jury tells a story about the agency. The jury in a police civil rights case spends hours, days and weeks looking around the courtroom. They notice many details that might escape the attention of the average officer or trial attorney.

If the evidence comes to court in a battered cardboard box with the label of a national athletic wear chain on it, the jury draws one conclusion. If, instead, the evidence is transported and sits in the courtroom in a clean, neatly labeled banker’s box, another conclusion is drawn. The jury notices when one of the trial attorneys or law enforcement witnesses is called upon to retrieve an item from the evidence box for testimony about the object.

Simple, plain brown paper or plastic bags sealed with a label recording the agency, date, item number, case number and other relevant information are recommended. These professional containers remove from the equation any possible negative inference a jury may draw about the quality of a department based on how it maintains its evidence. Is the way the evidence is kept relevant to the jury’s decision? Technically, no. Practically, yes. Are jurors supposed to consider such things as how the evidence is stored? No. Do the jury’s observations in the courtroom affect their opinion, even subconsciously? Absolutely.

Evidence Policies

Every law enforcement agency needs to have clear and concise policies related to the collection, maintenance and destruction of evidence. Most civil rights litigation revolves around use-of-force issues, and an agency’s attention should be directed to updating those types of policies. For the best defense against civil claims, all policies, even those seemingly unimportant evidence policies, must be periodically updated. An annual review and updating of the policy manual is well advised.

Today’s courtroom comes equipped with very modern audiovisual equipment. It is a simple task for the plaintiff’s attorney to put the chief of police, sheriff or other policy maker on the witness stand and, with the flick of a wrist, display his evidence room policy on the court’s video equipment. The courtroom immediately dims, and the policy is projected in gigantic dimensions on the wall. Then, after some initial questioning about how the department likes to stay current, the attorney zooms in to the bottom corner of the document indicating the date of the last revision. Imagine the year “1990” set forth three feet high on the wall. Again, it is all about perceptions. Annual policy updates are easy and inexpensive to implement.

In many civil cases, disputes arise regarding the way evidence was maintained, collected or destroyed. The person who is called to interpret or explain what happened is the evidence room technician. Often this position is considered unskilled and is staffed by an hourly employee or, sometimes, by a citizen volunteer. Little, if any, thought is given to training that person to testify in court. When the big day comes, and it will, the individual is nervous and feels overwhelmed. Even pretrial preparation by the trial attorney is not enough.

Basic training of evidence personnel can take place after hiring, with periodic on-the-job sessions to keep the staff members confident in their skills. More formal training can be accessed outside the office. This training will result in a more aware technician. Someone who understands the implications of evidence at trial and is more comfortable testifying about it subsequently reassures the jury regarding the quality of evidence the department has collected.

There are many more steps law enforcement agencies can take to better preserve and present evidence in civil litigation. Most precautions can be taken proactively and with little up-front cost. The substantial savings come later when all the evidence gets collected, preserved and presented to the jury in the courtroom, seemingly without effort.

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