

Mediating Civil Rights Cases Against Police Officers

Scott Young

From March 31, 2014 through March 31, 2015, there were 35,312 civil rights cases filed in federal district courts across the United States.¹ These cases range from claims for constitutional violations to discrimination in voting, employment, housing, disabilities, and education. They also include cases for police misconduct, such as unreasonable search and seizure, excessive force, and deadly force. Like all other cases in federal court, civil rights lawsuits against the police are typically resolved prior to trial. Often, they are resolved through mediation. Mediation provides parties with an opportunity to resolve disputes early, reduce costs, and avoid the risk of trial. However, mediating police misconduct cases differs from mediating other cases in several critical respects. This article discusses these differences and how they can be used in mediation to steer both plaintiffs and defendants toward settlement.

GENERAL FACTORS THAT INFLUENCE MEDIATING CIVIL RIGHTS CLAIMS AGAINST POLICE OFFICERS AND MUNICIPALITIES.

Mediating §1983 civil rights claims against police officers and municipalities is different than mediating common law negligence claims. Civil rights claims against the police concern allegations of wrongs by government, rather than private entities and individuals, and they hinge upon allegations of deliberate violations of statutes and the Constitution, rather than negligence. This changes the goals and expectations of the parties. A better understanding of this unique dynamic is essential to successfully mediating these claims.

The Nature of the Claim

Unlike other claims, plaintiffs in § 1983 civil rights claims assert that governmental actors and entities violated federal statutes or the Constitution. This changes the relationship between the parties significantly from a contract dispute or negligence claim. Plaintiffs often feel more hurt because they view police officers as public servants who should be protecting them, not injuring them. Because of this, civil rights plaintiffs can be more emotionally attached to the claim than other plaintiffs. Often, plaintiffs in civil rights claims desire not only money, but vindication of their rights. While this component of civil rights mediations is less tangible than the dollar amount, it can be just as important to reaching a resolution.

Police officers, too, are more emotionally attached to these claims than a typical defendant because of the gravity of the allegation against them. A civil rights violation rests on an accusation that a police officer deliberately violated the Constitution, the very document the officer took an oath to uphold. They often find the allegation of deliberate misconduct insulting. Successful mediation of such claims requires skilled navigation of the emotions of both the plaintiffs and the defendants.

Venue

Venue often determines the victor. This is true in all cases, including § 1983 civil rights cases. In any case, the composition of the prospective jury is critical. This famously played out in 1994 in the O.J. Simpson trial when the prosecution chose to file criminal charges in downtown Los Angeles, rather than in Santa Monica. William Hodgman, one of the prosecutors, was interviewed by Frontline for its 2005 program *The OJ Verdict*, and he stated, “We could have very well filed the case in Santa Monica. And if we could have done something differently to avoid all the grief that flowed thereafter, it would have been smarter for our office to have filed the case in Santa Monica.”² Just as the venue impacted the verdict in the Simpson trial, venue impacts civil rights cases against police officers. Venues that are traditionally pro law enforcement can drive the value of the case down, while venues where people feel disenfranchised and distrust law enforcement will drive the value of the case up.

Cultural Climate

Jurors are selected from the community, and that community consumes news and participates in traditional and social media at an unprecedented level. The use of force by police has come under significant scrutiny in the last few years with incidents in Ferguson, Missouri, New York City, South Carolina and other locales occupying the front page of newspapers and prime time television across the nation. These incidents and the related media coverage have led to increased distrust in police. The New York Times noted that police cameras “have become ingrained in the nation’s consciousness ... they have begun to alter public views of police use of force and race relations, experts and police officials say.”³ They also note that “[i]n a Gallup national survey conducted in June, 52 percent of people said they had “a great deal” or “quite a lot” of confidence in the police, down from 57 percent two years earlier, and 64 percent in 2004. In 2007, 37 percent of Americans had high confidence that their local police would treat blacks and whites equally, the Pew Research Center found, but last year that was down to 30 percent.”⁴ This shifting perception reflects the community of potential jurors and, consequently, must be considered in any mediation.

The Stress of Litigation

Justice Learned Hand once stated, “as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.”⁵ Few experiences are as stressful as participating in litigation. As one psychotherapist described it:

It is a truism that we live in a litigious society, especially we Americans. So many individuals are involved in civil lawsuits that it may be a rare psychotherapist who has not had the experience of treating a current or former litigant. Despite our awareness that lawsuits are an everyday phenomenon, few psychotherapists or litigants are truly prepared for the forces of aggression that are released and sanctioned by our judicial system. Although it may be that we have exchanged swords and cudgels for subpoenas and depositions, an aura of combat continues to hover over the judicial process, and combat produces casualties.⁶

Recently, researchers at DePaul University studied the psychological impact of litigation and found that litigants often suffered symptoms found in those diagnosed with PTSD.⁷ “Research suggested the groups with pending suits were significantly more depressed than the nonlitigant group.”⁸ “The study showed ... that those with suits still pending experienced more distress than those who settled.”⁹ “Our earlier study showed that ongoing litigation was a strong predictor of PTSD at one year.”¹⁰

This is not limited to Plaintiffs, but applies to defendants as well. As one commentator has noted:

The experience of being sued is unexpected, overwhelming, and difficult to process. And, it often cascades into a reaction known as malpractice litigation stress syndrome.

A study concerning the emotional repercussions of litigation reported symptoms of isolation, negative self-image (in particular feeling misunderstood, defeated, or ashamed), development or exacerbation of physical illness, and subsequent depression. The prolonged nature of the litigation fosters depression, a sense of not being in control, and the associated feeling of helplessness.

Those who have gone through litigation also describe family suffering. Spouses and children experience a deep sense of loss, devastation, and social awkwardness. The threat further plays havoc with colleague relationships.¹¹

Thus, litigation has an adverse effect on both plaintiffs and defendants, and a reasonable settlement is often better for both sides.

PRESSURE POINTS ON CIVIL RIGHTS PLAINTIFFS

In addition to the general factors discussed above, there are several pressure points that are unique to plaintiffs suing police officers that a mediator can utilize in mediation.

High Standard for Constitutional Violations

Unreasonable seizure and excessive force claims have high standards of proof. A police officer’s use of force is unconstitutional where it is not “objectively reasonable.” “The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”¹² The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, ... nor by the mistaken execution of a valid search warrant on the wrong premises.¹³ “With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”¹⁴ “As in

other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”¹⁵ “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”¹⁶

This is a very high standard. The baseball adage “tie goes to the runner” applies to police officers in civil rights lawsuits as well. Close calls go in favor of the officer and the plaintiff bears the burden of establishing that the police officer’s conduct was outrageous. Thus, much more is required of the plaintiff than in a typical tort case.

Qualified Immunity for Police Officers

The defense of qualified immunity presents a substantial hurdle to a plaintiff’s ability to recover from police officers and municipalities. It shifts the burden of proof to the plaintiff, and that burden is significant. When an officer asserts qualified immunity, the plaintiff must prove not only that the officer violated the Constitution, but that the precise constitutional right was clearly established.¹⁷ The “clearly established” prong cannot be satisfied at a high level of generality. In 2011, the Supreme Court stated, “We have repeatedly told courts ... not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.”¹⁸ The Supreme Court recently reiterated this point when it ruled that it was not clearly established that employing a new technique of deadly force violated the Constitution.¹⁹

In addition, rulings on qualified immunity are immediately appealable, to the extent they turn on an issue of law.²⁰ This means that all qualified immunity rulings on motions to dismiss are also immediately appealable because the allegations in the complaint are taken as true.

Summary judgment rulings are immediately appealable where there are no “material facts” in dispute. The availability of an immediate appeal presents two problems for plaintiffs. It gives the defendant officer(s) two chances to prevail on immunity, and even if the plaintiff ultimately prevails on the issue, they are forced to incur significant costs and delays. Moreover, in certain cases a jury verdict may succumb to qualified immunity where a savvy defendant submits special interrogatories regarding conduct to the jury and then asks the court in a post-trial motion for a directed verdict on qualified immunity grounds.

Difficulty in Proving a Municipal Custom or Policy

A municipality may not be held liable under 42 U.S.C. § 1983 merely because it employs a person who violated a plaintiff’s federally protected rights.²¹ Liability can only be imposed on the [municipality] only if a constitutional violation occurred

and the violation was caused by a government policy or custom.²² There must be a direct causal link between the policy or custom and the officer's alleged constitutional violation.²³ This is very difficult to prove. Written policies are rarely unconstitutional, leaving a plaintiff to pursue an unconstitutional custom or practice. This is not only challenging to prove, but costly. Because such customs are unwritten, a plaintiff must typically analyze a series of similar cases and depose a host of other officers.

This is expensive, time-consuming, and may not lead to evidence that is admissible under Fed. R. Evid. 403.

Offer of Judgment

An offer of judgment under Fed. R. Civ. P. 68 can pose significant problems for a plaintiff. If a defendant makes an offer of judgment early in the case, the plaintiff must obtain a verdict greater than the offer or it will not be able to recover the attorneys' fees incurred after the offer of judgment. Thus, if the defendant has served an offer of judgment, the plaintiff must evaluate this risk very early in the case before he or she has had the opportunity to conduct any discovery. This can put the plaintiff at a significant disadvantage.

Plaintiffs who proceed to trial often do worse than if they had settled.

A recent study found that plaintiffs who reject settlement and proceed to trial typically recover less money than they would have received had they settled. The study found that "most plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken the offer."²⁴ Randall Kiser, co-author of the study, stated, "The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more."²⁵ The authors reached this decision after studying 2,054 cases that went to trial between 2002-2005. Such overvaluation presents a clear reason for a plaintiff to seriously consider settlement at mediation.

PRESSURE POINTS ON § 1983 POLICE OFFICERS AND MUNICIPALITIES.

Civil rights cases also feature several unique pressure points for police officers and municipalities.

Attorneys' Fees/or Prevailing Plaintiffs

"Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced."²⁶ This statute allows a prevailing plaintiff to recover its reasonable attorneys' fees. Thus, the risk of a judgment against the defendant is compounded. Moreover, the further along the litigation proceeds, the higher plaintiff's attorneys' fees become. Unlike cases without such a fee provision, this can increase the value of a case as it proceeds. For example, in a typical personal injury case, a defendant may reason that if there are \$1,000,000 in total damages and a 25% chance of losing, then the case is worth \$250,000. The defendant may choose to pay more to avoid litigation costs, but that basic calculation does not change as the litigation proceeds. By contrast, a civil rights case with the

same damages and chance of losing will increase in value as the case proceeds because the plaintiffs attorneys' fees increase. Thus, a case valued at \$250,000 at one stage in the litigation will be worth more as the litigation advances and the plaintiff incurs additional attorneys' fees that may be recoverable. This often plays out if the plaintiff survives a summary judgment motion. The prospect of an adverse verdict compounded by the plaintiff's attorneys' fees places significant pressure on the defendants to settle.

Creating Bad Law

Because police officers and municipalities are repeat players in civil rights litigation, they must be concerned about litigating cases where an adverse ruling can set bad precedent. This is particularly true in the civil rights arena, where the defense of qualified immunity hinges on demonstrating that the officers did not violate "clearly established" law. Thus, defendants may want to settle defensible claims to avoid the risk of a ruling that would place them in a worse position in future cases.

Fact Issues Precluding Summary Judgment

Decisions on qualified immunity are not immediately appealable if there are fact issues.²⁷ Thus, a summary judgment order denying qualified immunity because there is a fact issue will proceed to trial, not to an interlocutory appeal before a circuit court of appeal. This often happens in excessive and deadly force cases where plaintiffs, officers, and witnesses remember the critical events differently. For instance, an excessive force case stemming from a dog bite would not be a likely candidate for summary judgment if an officer and the suspect disagreed about whether the officer shouted warnings before releasing the canine. If a case cannot be resolved through a motion, then the defendants must choose to either settle the case or take their chances with a jury.

Morale of the Police Force

The Washington Post recently reported that "Chiefs of some of the nation's biggest police departments say officers in American cities have pulled back and have stopped policing aggressively as they used to."²⁸ Discussing the "Youtube Effect," Sergeant Andrew Romero, chairman of the Austin Police Association's Political Action Committee, said "It affects recruiting, retention and morale."²⁹ Litigation can cause declining morale within the department, particularly if the incident at issue is replayed in local, or national, news. Department morale must be considered by police officers and municipalities defending civil rights lawsuits.

Morale of the Community

Police officers may also want to settle in order to buy peace in the community. Former Baltimore Mayor Kurt Schmoke intimated that this was a concern in Baltimore's recent settlement with Freddie Gray's family. Baltimore settled the lawsuit for \$6.4 million, which Mr. Schmoke described as "The mayor and her staff are trying to do all they can to heal the wounds in the community, and this is a step in the right

direction. This settlement will give some people in the community at least some sense of justice. ³⁰ Police officers need public support to effectively combat crime and particularly in high-profile cases, public outreach may provide some basis for settling a claim.

Divergent interests between Officers and Governmental Entity

The police officers involved in the incident and the municipalities may have different interests in the litigation. For example, a police officer may want the case to be resolved as soon as possible in order to rid him or herself of the stress of litigation and move on; however, the entity may not want to settle what it believes is a frivolous claim. This can result in friction between the officer and the police force, even if they are represented by separate counsel.

Settlement may be worthwhile in order to avoid such conflicts.

CONCLUSION

Civil rights claims against police officers and municipalities pose many unique challenges to mediation. In addition to the standard concerns regarding stress and protracted litigation, there are emotional components and legal defenses and risks that are in play. A skilled mediator must be aware of these issues and address them in order to successfully guide the parties toward resolution. **SB**



Scott Young is a shareholder at Snow, Christensen & Martineau in Salt Lake City, Utah. Young's practice focuses on defending governmental entities and employees in civil rights disputes, commercial litigation and insurance and transportation defense. Young is the president of the Utah Chapter of the Federal Bar Association; he can be reached at sy@scmlaw.com.

Endnotes

¹See Federal Judicial Caseload Statistics, 2015, Table C-3.

²See Interview with William Hodgman, *The O.J. Verdict* (Oct. 4, 2005), www.pbs.org/wgbh/pages/frontline/oj/interviews/hodgrnan.html.

³Richard Perez-Pena and Timothy Williams, *Glare of Video is Shifting Public's View of Police*, N.Y. Times (July 30, 2015), www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?

⁴See *Id.*

⁵Hand L., *Deficiencies of trial to reach the heart of the matter: three lectures on legal topics*, Association of the Bar of the City of New York, 89:105 (1926).

⁶Dr. Larry H. Strasburger, *The Litigant-Patient: Mental*

Health Consequences of Civil Litigation, J. Arn. Acad. Psychotherapy Law, Vol. 27, No. 2 (1999).

⁷See Hickling, Edward, Edward Blanchard, and Matthew T. Hickling, *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAs*, DePaul Law Review, Vol. 55, Issue 2, Winter 2006, Article 15, at p. 625 (citations omitted).

⁸*Id.*

⁹*Id.*, 625-626.

¹⁰*Id.*, 626.

¹¹Tunajek, Sandra, *Dealing with Litigation Stress Syndrome*, AANA News Bulletin (July 2007), www.aana.com/resources2/health-wellness/Documents/nb_milestone_0707.pdf.

¹²*Graham v. Connor*, 490 U.S. 386, 396 (1989) (citations omitted).

¹³*Id.* (Citations omitted)

¹⁴*Id.* (Citations omitted).

¹⁵*Id.*, at 397.

¹⁶*Id.*

¹⁷See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

¹⁸*Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011).

¹⁹See *Mullenix v. Luna*, 136 S.Ct. 305 (2015).

²⁰See *Behrens v. Pelletier*, 116 S.Ct. 834, 841 (1996).

²¹See *Monell v. New York City Dep't of Social Servs.*, 98 S.Ct. 2018, 2037-2038 (1978).

²²See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

²³See *City of Canton v. Harris*, 489 U.S. 378, 385-86 (1989).

²⁴Jonathan D. Glater, *Study Finds Settling is Better than Going to Trial*, New York Times (Aug. 7, 2008), www.nytimes.com/2008/08/08/business/08law.html.

²⁵See *Id.*

²⁶*Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010).

²⁷See *Johnson v. Jones*, 515 U.S. 304 (1995).

²⁸See Aaron Davis, "YouTube Effect" Has Left Police Officers Under Siege, Law Enforcement Officers Say," Washington Post (Oct. 8, 2015), www.washingtonpost.com/news/postnation/wp/2015/10/08/youtube-effect-has-left-police-officers-under-siege-law-enforcement-leaders-say/?utm_term=.af98feb7439e.

²⁹Noble, Andreas, "Police fear "YouTube Effect" Affecting Work, Contributing to Rise in Violent Crime," Washington Times (Oct. 25, 2016), www.washingtontimes.com/news/2015/oct/25/police-fear-youtube-effect-affecting-work-contribu/.

³⁰Yvonne Wenger and Mark Puente, *Baltimore to pay Freddie Gray's family \$6.4 million to settle civil claims*, Baltimore Sun (Sep. 8, 2015), www.baltimoresun.com/news/maryland/fred-die-gray/bs-md-ci-boe-2015-0908-story.html.