

Midwest Law Enforcement Executive Development Seminar MLEEDS

Liability Risks Of The Law Enforcement Executive: A Trial Lawyer's Perspective

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LIABILITY RISKS OF THE LAW ENFORCEMENT EXECUTIVE: A TRIAL LAWYER'S PERSPECTIVE

I. POLICE ARE A FREQUENTLY SUED GROUP – WHY?

A. 42 U.S.C. § 1983

1. Civil Rights Act of 1871
 - Post Civil War Reconstruction Statute
2. *Monroe v. Pape*, 365 U.S. 167 (1961)
 - Police act “under color of law” even when not authorized by statute or law. However, city is not a person.
3. *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978)
 - City = Person
 - Municipal liability pursuant to a custom, practice or policy.
4. Municipality becomes a Deep Pocket - Indemnification

(Notes)

B. 42 U.S.C. § 1988 (1976)

1. Civil Rights Attorney's Fee Award Act – The Private Attorney General Theory
2. *Riverside v. Rivera*, 477 U.S. 561 (1986) – Plaintiffs get attorneys fees when successful – The plaintiff's lawyer will get “paid.”
3. Prevailing Plaintiffs, Not Defendants, Recoup Fees

4. Cost of Litigation = More Settlements

(Notes)

C. Societal Attitudes

1. The Rodney King Saga - Jury Perceptions
2. Continuing Public Mistrust of Law Enforcement- the 1990's
3. September 11, 2001 - is the Pendulum Swinging Back? No!
 - a. Some sympathy for law enforcement immediately after 9/11
 - b. Juries continue to be very skeptical of police
4. Illinois- Areas of Concern
 - a. Wrongful Convictions- death row emptied
 - b. Torture Allegations
 - c. High profile police misconduct

(Notes)

II. LITIGATION - AREAS OF CONCERN

A. Use of Force - Classic Jury Trials

1. General Comments

- a. Fourth Amendment Standard of Reasonableness
- b. Examples

2. Tips on preventing and handling excessive force issues

- a. Exercise Proper Judgment and Training in Use of Force.
 - Follow your training, i.e. defensive tactics.
 - Maintain updated training file.
 - City of Canton, Ohio v. Harris, 489 U.S. 378 (1989); City and Police Chief can be held liable for failing to train its officers.
- b. Treat Injuries - Always Offer Medical Treatment.
 - Don't turn "no case" into claim for failure to provide adequate medical attention.
- c. Report Writing.

(1) Legible and Timely Reporting.

- A bad report can cause officer to lose civil case; Plaintiff's attorney will use report to impeach you.
- Take time to prepare readable and accurate reports.
- Supervisors need to review reports.

(2) Document Arrestee's Injuries.

- Document injuries accurately; an arrestee often exaggerates his injuries and how they were obtained.
- If subject is injured during arrest, put it in report even if subject did not receive medical treatment.

(3) Document Alcohol or Drug Use.

- Include facts in report when alcohol is involved.
- Juries look down on drunk plaintiffs!

(4) Document Officer Injuries.

- Always document officer injuries (even minor ones) during an incident, even if you don't receive medical treatment.

- Possible counterclaim in civil suit.

d. Booking Photos and Videotapes.

- Plaintiff will clean himself up for civil trial – but booking photo doesn't lie!
- Save video and audio tapes when incident involves use of force; you may need the evidence later in civil suit.

e. Determine Appropriate Criminal Charges.

- Officer should consult with supervisor or state's attorney on appropriate charges if necessary.
- Make sure the criminal charges match what offenses are described in your report.

f. Importance of Criminal Trial Testimony.

- Officer testimony in criminal trial can be used against you in civil case. Be careful to prepare and be completely truthful.
- Make sure state's attorney is prepared for your case.
- Follow your cases → avoid SOL!

g. Internal Investigations

- When citizen files complaint with Department, officer is often required to give a recorded statement during internal investigation. Note - those statements will be discoverable in civil case.

3. DEFENDING AGAINST THE EXCESSIVE FORCE LAWSUIT

a. Importance of Deposition Testimony & Written Discovery Answers Given Under Oath.

- Don't get caught in trick bag → avoid inconsistent testimony which can be used to impeach you.

b. Teamwork With Legal Counsel.

- Make sure your attorney in civil case spends the time with you to properly prepare for deposition and trial.

- Best client is the involved client!

c. Honesty is the Best Policy: The importance of truthful testimony during internal investigation, deposition and courtroom.

- Federal judges and juries are generally smart → they know if you are not being truthful.

B. False Arrest/Wrongful Convictions

1. Qualified Immunity - did the conduct violate the clearly established constitutional rights of the Plaintiff?

2. Wrongful Convictions - due process claims under *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001)

- Police investigators are most likely targets of suit.

(Notes)

C. Bias Based Policing - Understanding Racial Profiling

1. Definition - "Profiling" is the interdiction, detention, arrest or other non-consensual treatment of an individual because of a characteristic or status (CALEA) 61.1.8

2. Evidence Used in Profiling/Discrimination Cases

a. Direct Evidence- clear intent, obvious

b. Indirect Evidence - inference or patterns with no apparent or obvious intent

c. Combination of direct and indirect

3. Understanding Relationship Between Fourth Amendment (Probable Cause) and Fourteenth Amendment (Equal Protection)

a. Expansion of police officer tools through the Fourth Amendment under U.S. Supreme Court

1. *Whren v. U.S.* – 517 U.S. 806 (1996)
 - Minor traffic violation sufficient pretext for drug suspicion stop.
 2. *Maryland v. Wilson* – 519 U.S. 408 (1997)
 - Passenger may be ordered out of vehicle.
 3. *Illinois v. Wardlow* – 528 U.S. 119 (2000)
 - Unprovoked flight from high crime area – may stop fleeing individual.
 4. *Thornton v. U.S.* – 541 U.S. 615 (2004)
 - May search passenger compartment incident to arrest.
 5. *People v. Caballes* – 543 U.S. 405 (2005)
 - Dog sniff pursuant to traffic stop.
 6. *Hudson v. Michigan* – 547 U.S. 586 (2006)
 - Violation of knock and announce rule does not necessarily require suppression of evidence.
 7. *Scott v. Harris* – 127 S.Ct. 1769 (2007)
 - Car chase terminated by forcing suspect off road does not violate 4th Amendment.
- b. Discriminatory use of sanctioned Fourth Amendment tools = Fourteenth Amendment violations (equal protection)
- Remember that probable cause (4th Amendment) and equal protection (14th Amendment) are different!

(Notes)

D. Employment Liability

1. Discrimination - Sex, Age, Race, Disability, Religion, etc.
 - a. State level administrative process
 - b. Federal level administrative process

(Notes)

2. Retaliation- The First Amendment in the Workplace
 - a. *Comanda v. Country Club Hills*
 - b. *Niebur v. Town of Cicero*

E. Discipline Within the Ranks

1. Perform Fair and Impartial Investigations
 - a. Use outside resources, if necessary
 - (1) State Police
 - (2) States Attorney
 - (3) Attorney General
 - b. Follow Statutory Guidelines

2. Employee Lying may be Fatal

- * Valio v. Board of Fire and Police Commrs, 311 Ill App 321, 724 NE 2d 1024 (2nd Dist. 2000)

(Notes)

III. THE PUBLIC OFFICIAL PUNITIVE DAMAGE CRISIS

A. Scope Of Punitive Damages Problem

1. Damages Available in Civil Rights Cases

- 1. Compensatory damages - make plaintiff whole
- 2. Punitive damages - punish and deter future misconduct.

2. Punitive Damages Sought In Most Every Civil Rights Case - Usually Within Jury's Discretion

- * intentional misconduct not necessary for punitive damages - *Smith v. Wade*, 461 U.S. 30 (1983)

3. Large Punitive Awards Occurring with Greater Frequency

4. Illinois Municipalities Cannot Pay Punitive Damage Awards - 745 ILCS 10/2-302 (Nov. 1986)

- * Pre-1987 - municipalities had to pay punitive damages assessed against officials - *Kolar v. Sangamon County*, 756 F.2d 564 (7th Cir. 1985)

5. Problem of Punitives Unique to Public Officials

a. Private Sector - employment discrimination cases - Title VII of Civil Rights Act of 1964 - 42 U.S.C. § 2e *et seq.*

- * Individuals cannot be sued under Title VII, only the entity. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995)
- * Businesses under 15 employees cannot be sued under Title VII. 42 U.S.C. § 2000e(b)
- * Combined compensatory/punitive damage caps on companies of 15 or more employees. 42 U.S.C. § 1981a(b)

b. Public Sector - § 1983 cases

- * Municipalities cannot be sued for punitive damages - *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981)
- * Only individuals can be sued for punitive damages in public sector lawsuits.
- * No caps on punitive damages available against public officials.

B. How To Protect Yourself - Action Plan

1. Consult Estate Planning Lawyer - Protect Assets - Do It Before Being Sued

- a. Residence (in Illinois) can be held in tenancy by the entirety (See Attached)
 - b. Consider transfer of property to spouse or other family member (certain downsides - not for everyone)
2. Legislative Initiative to Amend Tort Immunity Act - Should punitive damages be indemnified?
- * Indemnification will not cause large awards - juries not told about indemnification.
 - * Personal exposure not necessary to deter misconduct - better deterrents available (i.e., employment consequences and possible criminal prosecution)
3. If Sued, Understand and Explore Your Right to Independent Counsel.
- * *Seibert v. Illinois Municipal League Risk Mgt. Assoc.*, 223 Ill. App. 3d 864 (4th Dist. 1992) - Presence of claim for punitive damages entitles officer to separate counsel paid for by the association.
4. Understand Your Coverage - Insurance or Risk Pool
- a) Traditional insurance exclusions
 - b) Risk pool - contractual waiver of conflict
 - * *Village of Lombard v. Intergovernmental Risk Management Association (IRMA)*, 288 Ill. App. 3d 1003 (2d Dist. 1997) - IRMA contract properly allows for “no coverage - no defense” of punitive damages claim
5. Encourage Your City or Village to Pass a Broad Resolution of Reassurance and Indemnification

- See Itasca example (See Attached)

(Notes)

PROTECTING ASSETS FROM PUNITIVE DAMAGES

By: Kevin G. Kulling of Hervas, Sotos, Condon & Bersani, P.C.

With a little planning, important assets can be protected from being attached to satisfy a punitive damage award.

Changing the way that title to property is held is a simple and effective way of protecting what is generally an individual's largest asset: the residence. Illinois will not allow a judgment to be enforced against real property when either the real property or a beneficial interest in a land trust is held in tenancy by the entirety. 735 ILCS 5/12-112. Tenancy by the entirety is simply a method of holding title to real property and it is only available to a husband and wife as long as they are married. If a lienholder's claim is against one of the tenants, he can not satisfy the debt from the property. However, this protection will not be available if the property was transferred with the sole intent to avoid the payment of debts existing at the time of the transfer. Many married couples hold title to their property in joint tenancy. While this is beneficial in certain respects, joint tenancy does not protect against judgments in the same way that tenancy by the entirety does. Establishing a tenancy by the entirety is as simple as executing a deed to convey the property into a tenancy by the entirety and then recording the document with the County Recorder's Office.

Another way to protect an asset from judgment is to relinquish title to the asset. This is the idea behind such instruments as irrevocable trusts. A trust is established with the execution of a trust document when the title to certain property is transferred from an individual to a trustee. In order to receive protection, however, the trust usually must be permanent and cannot be amended or revoked. In addition, sometimes a clearly documented transfer of title from one spouse to the other can protect an asset from judgments.

These are merely suggestions and they are not necessarily the best method for everybody.

While there are do-it-yourself books and web sites available to guide people through the process of protecting assets, it is worth the time and expense to meet with an estate planning professional (i.e., attorney and/or accountant) who can consider each individual's unique circumstances and concerns.

RESOLUTION NO. ____-99

**RESOLUTION OF REASSURANCE AND INDEMNIFICATION OF
OFFICERS, EMPLOYEES AND APPOINTEES OF
THE VILLAGE OF ITASCA**

WHEREAS, the Village of Itasca and its officers and employees face liability risks by reason of their position or employment with the Village of Itasca; and,

WHEREAS, the Village of Itasca also utilizes individuals that are appointed to serve on various boards, commissions and panels which benefit the Village. Liability risks also extend to those appointed individuals who serve the Village on various boards, commissions and panels; and,

WHEREAS, the Village of Itasca finds it necessary and appropriate to indemnify, defend and hold harmless its officers, employees and appointees in any action seeking damages for acts undertaken within the scope of employment or within the duties of any officer, employee or appointee of the Village of Itasca.

NOW, THEREFORE, BE IT RESOLVED by the Village President and the Board of Trustees of the Village of Itasca as follows:

SECTION ONE: To the fullest extent permitted by the Constitution of the State of Illinois of 1970 and all other applicable laws, all Village officers and employees, and each member of each board, commission or panel of the Village, or by appointment of any individual by a Village officer, established pursuant to applicable state statute, ordinance or resolution of the Village, shall be indemnified, defended and held harmless by the Village from and against all liabilities, expenses or investigation, judgments and amounts paid in settlement which may be imposed upon or reasonably incurred or paid by such officer, employee or appointee in connection or resulting from any claim made against him or her, or any action, suit, proceeding or investigation in which he or she may be involved by reason of his or her having been such

officer, employee or appointee; provided, however, that the foregoing indemnity shall not extend to any of the following:

- (a) Any liability or cost with respect to any matter in which the officer, employee or appointee is finally adjudged to be guilty of a criminal act.
- (b) Any liability or judgment against an officer, employee or appointee which is payable to the Village itself or where the Village was injured and the individual either obtained personal benefit or financial gain as a result of his or her wrongful conduct.
- (c) Any liability or cost incurred as a result of a Village initiated or approved investigation into the misconduct of the officer, employee or appointee.
- (d) Any liability or cost incurred as a result of the officer, employee or appointee's failure to reasonably cooperate in the defense of such claim, action, suit or proceeding.
- (e) Any liability excluded by a written waiver from the officer, employee or appointee.

The foregoing rights of indemnification shall be in addition to any other right to which such officer, employee or appointee may otherwise be entitled as a matter of law under state statute or Village ordinance.

SECTION TWO: This Resolution shall be in effect immediately from and after its passage and approval.

SECTION THREE: REPEAL OF PRIOR RESOLUTIONS. All prior Resolutions and Ordinances in conflict or inconsistent herewith are hereby expressly repealed only to the extent of such conflict or inconsistency.

AYES: _____

NAYS: _____

ABSENT: _____

ABSTAIN: _____

-APPROVED and ADOPTED by the Village President and Board of Trustees of the Village of Itasca this ____ day of _____, 1999.

APPROVED:

Claudia "Gigi" Gruber, President

ATTEST:

Carole Schreiber, Village Clerk

CERTIFICATION

I, the undersigned, do hereby certify that I am the Village Clerk of the Village of Itasca, DuPage County, Illinois, and that the foregoing is a true, complete and exact copy of Resolution _____ -99 enacted on _____, 1999, and approved on _____, 1999, as the same appears from the official records of the Village of Itasca.

Carole Schreiber, Village Clerk

PASSED: _____

APPROVED: _____

RECORDED: _____