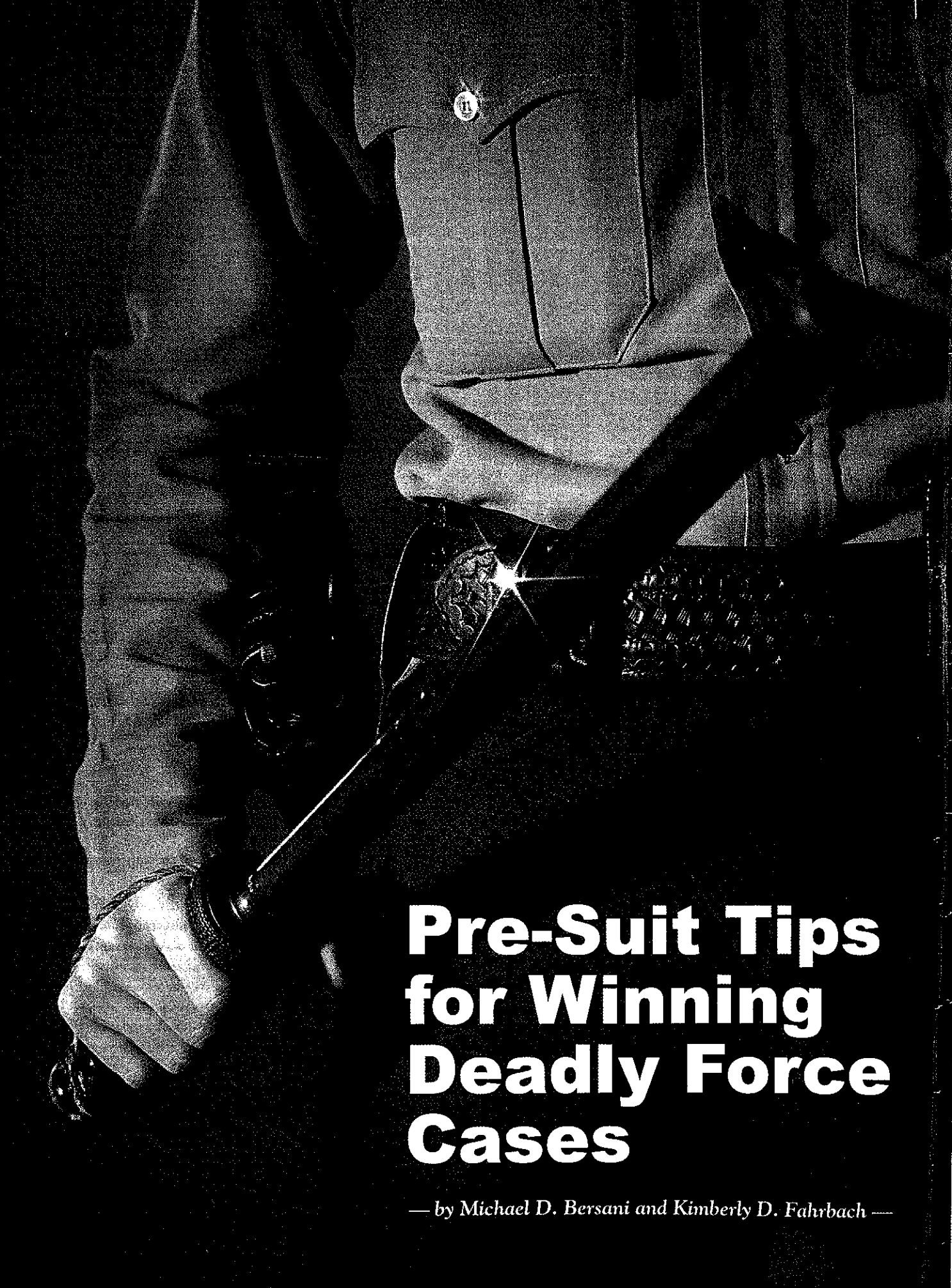

Pre-Suit Tips for Winning Deadly Force Cases

— by Michael D. Bersani and Kimberly D. Fahrbach —

An excessive force case should be simple to litigate, right? After all, such cases all boil down to essentially the same thing: the plaintiff claims he was kicked, punched, or otherwise hit by the police officer, and the officer denies that any wrongdoing occurred. What's complicated about that? Discovery should be relatively easy, with the parties generally limiting themselves to deposing witnesses to the alleged incident. Similarly, should the case proceed past the summary judgment stage to trial, each side will simply tell the jury his side of the story.[1]

Step One: Expect a Lawsuit

To say that all excessive force cases ultimately involve the same issue, of course, does not mean that all excessive force cases are the same. To the contrary, there are those rare occasions where the plaintiff's claim is much more serious than the typical, "He kicked me," or "He stepped on me" allegation. Deadly force claims fall into this latter category. This is especially true when the officer's use of deadly force results in the unfortunate death of an individual.

Indeed, while the legal standard in deadly force cases is the same standard applied in non-deadly force cases—was the officer's use of (deadly) force reasonable?[2]—deadly force cases have their own set of rules when it comes to litigation. Certainly, while the typical, non-deadly force case is usually straightforward in that it involves only the officer, the citizen, and any witnesses to the incident, deadly force cases often involve the entire department, as the action of every police officer is scrutinized.

Why the difference? Think green, and think dollar signs. By their very nature, deadly force cases are provocative and captivating. They also have a built-in sympathy factor. The presence of these two components means that media coverage is a given. Accordingly, the plaintiff's attorney has the perfect vehicle to plead his case, rile up the community, and otherwise pressure the municipality into offering a handsome settlement before he even files a lawsuit. Should the municipality decline to settle the case, the plaintiff's attorney simply postures his case for trial, where a victory results in receiving attorney's fees, and a percentage (usually a third) of whatever the jury awards the plaintiff.[3] In a deadly force case, that sum can easily reach seven figures.

Under these circumstances, from the plaintiff's attorney's point of view, a deadly force case equates with a winning lottery ticket. It is a diamond in the rough that, with only a little work, can reap a big reward. The chances of obtaining such a large pay-off outweigh the risk of litigating the case and ending up with nothing. Against this backdrop, whenever the use of deadly force results in death, a municipality should *expect* that a lawsuit will soon follow. By approaching incidents with this mindset, a municipality puts itself in the best position possible to mount a defense should a lawsuit be filed. Simply put, the more thorough a law enforcement agency's initial investigation into a deadly force incident, the easier it will be for a defense attorney to defend the lawsuit.

Guidelines to Consider

As explained in this article, a municipality should consider the following guidelines to maximize its ability to mount a defense in a deadly force lawsuit:

- Implement specific policies dealing with deadly force crime scenes;
- Take photographs of the evidence and prepare crime scene diagrams immediately after the incident;
- Keep a crime scene log;
- Have each officer present complete a report about his activity at the scene;
- Include a comprehensive canvass of the neighborhood; and
- Subject each use of deadly force to the same level of investigation and documentation.

For example, combating a claim that evidence was planted or removed from the scene is obviously simpler if photographs of the evidence are taken as soon as possible. Crime scene diagrams are also helpful. By documenting the location of the officer, victim, weapons, and key pieces of evidence, as well as the distances between each, immediately after the incident, it will be harder to accuse the officer of making up his story later on. Similarly, claiming that an officer at the scene tampered with evidence or otherwise contaminated the scene is harder if a crime scene log is well-kept, and *every* officer at the scene completes a report about his activity at the scene. Finally, a comprehensive neighborhood canvass, which includes speaking to potential eyewitnesses and hearing witnesses, will make an individual who comes forward later and claims to have witnessed some wrongdoing on the part of the officer, less plausible.

Physical and Scientific Evidence is Key

Conducting a thorough investigation, especially from the standpoint of documenting, collecting, and processing evidence, takes on new significance with the recent advances in forensic science.

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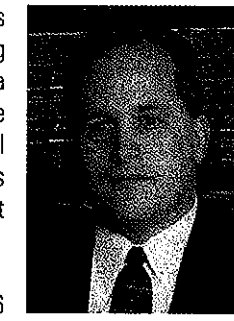

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Deadly Force Cases

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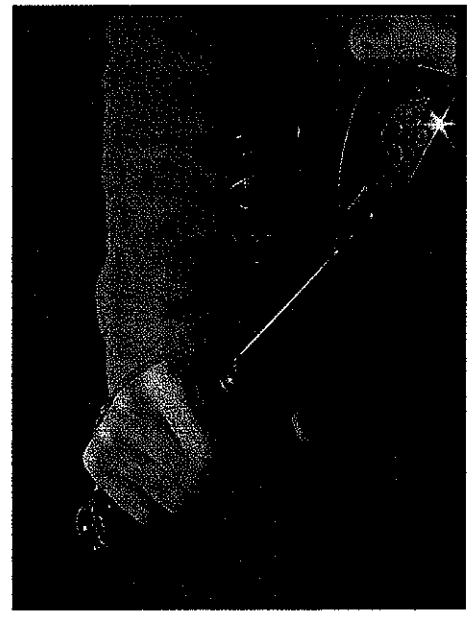
In the past, it would not be uncommon for the plaintiff to produce a police procedures expert at trial. This expert would explain that the municipality's law enforcement policies were deficient or that the officer's failure to follow a policy was unreasonable, and that unreasonableness led to the unlawful use of force. Such experts, however, are a dime a dozen. As a result, a lawyer defending the municipality would not have difficulty in retaining another expert who would testify that the policies were, in fact, adequate, and the officer followed them accordingly.

In other words, expert testimony on police procedures is usually a wash at trial, and the verdict comes down to the credibility and appearance of the officer. Is the officer likeable? Does he seem like he would lie about what happened? If not, and especially in cases where there is no witness available to dispute the officer's version of what happened, there would be no reason for the jury to not return a verdict in favor of the officer.

Scientific testimony, however, can be more problematic. While forensic science has long been utilized by criminal defense attorneys and prosecutors, it has only very recently made its foray into the civil arena. By including scientific testimony in a deadly force case, however, the plaintiff is able to offer physical evidence that supports his claim that the officer's version of what happened cannot be believed. In other words, the plaintiff is able to use the physical evidence as an independent witness, and argue that, since physical evidence does not lie, the officer's testimony must be rejected.

The physical evidence and corresponding scientific testimony can take many forms. Consider a scenario where an officer confronts a suspect from approximately 65 feet away, and the suspect is swinging a rifle in his hands. The officer takes cover behind a tree and tells the suspect to drop the gun. The suspect refuses, and the officer repeats his command. After the third command, the suspect swings the rifle to a shooting position and aims it at the officer. The officer fires his weapon from 65 feet away, the bullet hits the suspect in the head, and the suspect falls to the ground, dropping his rifle.

The officer and his back-up approach the fallen suspect. Upon reaching him, the officer slides the rifle approximately three feet from the suspect's body so that it is out of reach. The officers subsequently begin to administer first aid while waiting for an ambulance, but to no avail. The suspect is pronounced dead before reaching the hospital. His family subsequently sues the officer in a federal civil rights action, claiming that the officer's use of deadly force was excessive because the suspect was never really holding a rifle; rather, the officers planted it at the scene to cover up their unlawful actions.



A case like this—with no potential witnesses except the officer—can produce a variety of experts. After all, the plaintiff's attorney needs to prove that the shooting could not have happened the way the officer said it did; specifically, that the victim was not holding a rifle at the time. Unfortunately, in today's world of experts-for-hire, it will not be difficult for the plaintiff to present seemingly credible physical evidence showing just that.

First, the plaintiff can hire an expert to opine that, judging from the direction the bullet entered the victim's body, the officer could not have been standing where he said he was standing at the time he fired his gun. Further, the expert can testify that the path of trajectory of the bullet from the officer's gun to the victim shows that the victim could not have been aiming his rifle at the officer because, if he had, the bullet would have hit the rifle, not the victim's face.

Second, the plaintiff can hire a blood spatter expert. Blood spatter analysis or bloodstain interpretation is based primarily on blood that has exited a person's body. Once blood leaves a person's body, it is subjected to external forces, and it ultimately lands or falls on various surfaces, forming a bloodstain. A blood spatter expert then analyzes the size, shape, orientation, and distribution of the bloodstains on these surfaces to ascertain a variety of information, such as the position of the victim in relation to that surface when the blood exited the body.[4]

In the above scenario, a bloodstain analyst can review the stains on the victim's rifle and opine that, had the victim been holding the rifle at the time he was shot, the rifle would have a different kind of bloodstain than the stain actually present. Additionally, the expert can testify to the rifle's lack of smeared bloodstains, which is inconsistent with the officer's story of having slid the rifle out of the victim's reach.

This combination of ballistics and bloodstain testimony allows the plaintiff's attorney to plant a seed of doubt in the jurors' minds that the officer is telling the truth. Indeed, if a scientific expert says that it was physically impossible for the officer's version to have occurred, the officer must not be telling the truth. In this example, the plaintiff has been able to secure scientific testimony in support of his two main points. To refute the officer's testimony that the victim had been pointing a gun at him, the plaintiff can point to the ballistic expert's testimony regarding the angle of entry and the path of the bullet, and the bloodstain expert's testimony that the rifle did not have the bloodstain pattern he would expect to see had the victim been holding the rifle. To support his further claim that

the officers planted the rifle, the plaintiff can point to the bloodstain expert's testimony that the lack of smears on the rifle shows that it was likely the rifle was not slid away from the suspect.

Against this backdrop, the plaintiff has taken what appears to be a straightforward, justified shooting and twisted it into a case where the jury may doubt the appropriateness of the officer's actions. Such is the nature and the strength of scientific testimony.

Preparing a Defense

Fortunately, the municipal lawyer is not without a defense. Indeed, what works for one side will work for the other, and a municipal lawyer has equal access to forensic experts. A municipal lawyer's ability to retain a highly respected expert, however, will be greatly enhanced if he understands the science involved and how it can be used against his client. Nevertheless, dealing with forensic science issues, much less the intricacies of blood spatter analysis, is not something that municipal lawyers do on a routine basis. Consequently, many municipal lawyers are likely to feel uneasy and on unfamiliar ground when first presented with these issues.

It is in this respect that a law enforcement agency's thorough investigation—including the photographing, collecting, and processing of evidence—becomes all the more valuable. Proper documentation not only provides the attorney with an accurate overall picture of what occurred, but also binds the plaintiff, and therefore his expert, to those records. Without such documentation, the expert is free to fill in the blanks as he pleases, and such conjecture will undoubtedly be unfavorable to the officer's case.

Under these circumstances, a municipality's best defense to a deadly force lawsuit begins before the lawsuit is even filed. Ensuring that the officers have adequate training is just a start. Policies expressly dealing with deadly force crime scenes and the ensuing investigation can emphasize the importance of tasks such as maintaining a crime scene log, conducting a neighborhood canvass, photographing and collecting physical evidence, and documenting any other activities at the scene. Indeed, through the existence of such policies, a municipality ensures that every time deadly force is used, an investigation will be conducted so that, should a lawsuit be filed, the municipality is in the best position possible to defend it.

To say that all excessive force cases ultimately involve the same issue, of course, does not mean that all excessive force cases are the same. To the contrary, there are those rare occasions where the plaintiff's claim is much more serious than the typical, "He kicked me," or "He stepped on me" allegation. Deadly force claims fall into this latter category.

This last point cannot be emphasized enough. No matter how justified the use of deadly force appears to the officer at the scene, his supervisors, and the command staff, it is imperative that each use of deadly force be treated with the same respect and the same level of documentation. Chances are a lawsuit will be filed. Consider the following example.

Two officers proceed to a residence in an attempt to serve an arrest warrant on a suspect. One of the officers knocks on the door, while the other stands approximately 15 feet behind him as a lookout for the suspect's dog. The door opens, and the officers are greeted by the suspect, who is standing not more than three feet from them and pointing a shotgun at their heads. The officer at the front door raises his hands, and the officer in the front yard informs dispatch of the situation. As the suspect takes turns aiming his gun at each of the officers, the officer at the door attempts to calm him, but to no avail. Finally, when the suspect is pointing his gun at the officer in the front yard, the officer at the door grabs the shotgun. The individual refuses to let go of the gun, however, and a struggle ensues, during which the suspect shoots the other officer three times in his side. The officer returns fire, and both fall to the ground. The suspect and the officer are rushed to the hospital, where the suspect dies. The officer ultimately recovers, but a bullet remains in his body.

If a lawsuit can be filed from this set of facts, and one was,[5] it is a safe bet that nearly any use of deadly force can also prompt a lawsuit. Therefore, as the above considerations can dramatically minimize the effectiveness of such a lawsuit and certainly make the job of defending the lawsuit much easier, a municipality has little to lose, and a lot to gain, in implementing these guidelines.

Notes

1. While the overwhelmingly majority of excessive force cases turn on a question of fact, there are occasions where the officer's alleged use of force is deemed reasonable as a matter of law. *See* Tennessee v. Garner, 471 U.S. 1, 11-12 (1985); Plakas v. Drinksi, 19 F.3d 1143, 1146 (7th Cir. 1994). Additionally, some jurisdictions have applied the doctrine of qualified immunity to excessive force cases. These courts have found that, even if the officer's use of force was unreasonable, the officer could have believed his actions were reasonable at the time. Therefore, the officer may not be found liable. *See* Mettler v. Whitledge, 165 F.3d 1197 (8th Cir. 1999); Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998).
2. *See* Graham v. Connor, 490 U.S. 386, 397 (1989).
3. Prevailing attorney's fees in excessive force cases are recoverable under 42 U.S.C. § 1988.
4. Several excellent books regarding blood spatter and bloodstain interpretation exist. *See* SCIENTIFIC AND LEGAL APPLICATIONS OF BLOODSTAIN PATTER INTERPRETATION (Stuart H. James, ed. 1999); STUART H. JAMES & WILLIAM G. ECKERT, INTERPRETATION OF BLOODSTAIN EVIDENCE AT CRIME SCENES (2nd ed. 1999); TOM BEVEL & ROSS M. GARDNER, BLOODSTAIN PATTERN ANALYSIS (Vernon J. Geberth, ed. 1997); HERBERT LEON MACDONELL, BLOODSTAIN PATTERNS (Rev. ed. 1997).
5. *See* Montalvo v. City of Batavia, et al., No.00 C 0264 (N.D. Ill. Mar. 21, 2001). **ML**