

Thoughts on Use of Force Experts in Section 1983 Lawsuits

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1

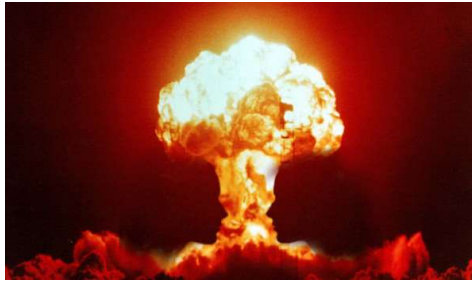
Three Questions for Use of Force Experts

- ▶ Do I need an expert?
- ▶ What should I do with my expert?
- ▶ How do I get the testimony admitted?

2

Not so different ...

- Extreme cost
- Arms race mentality
- Conflict altering power
- Not going away
- So, be *strategic*, not *reactive*



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3

“
The expert-witness arms race in which we find ourselves makes litigation more expensive, more complicated, and more protracted than it would otherwise be. ”

Robert J. Shaughnessy, Dirty Little Secrets of Expert Testimony, *Litigation*, Winter 2007, at 47, 52

4

Disclaimers

- ▶ Today is about big-picture lessons; every case is different
- ▶ Not legal advice
- ▶ Largely defense perspective in excessive force / false arrest cases
 - ▶ Will suggest plaintiff's considerations on occasion
 - ▶ Other types of Section 1983 cases require different approaches

5

Who are potential use of force experts?

- ▶ Law Enforcement Professionals
 - ▶ Usually retired and consultants
 - ▶ Sometimes senior members of another agency
- ▶ Academics
 - ▶ Often double as consultants
 - ▶ Research and publish on relevant topics
- ▶ Scientists
 - ▶ Overlap with academics, but focus on hard science over soft
 - ▶ Could be affiliated with government, academia, or industry

6

What will use of force experts discuss?

- ▶ Police training standards and protocols
- ▶ (Alleged) best practices and common police tactics
- ▶ Operation and use of police equipment
- ▶ Effect and post-use analysis of weapons
- ▶ Compliance (or not) with departmental policies or training
- ▶ Opinions on “reasonableness” of officers’ perceptions or actions in a scenario, often thinly disguised legal conclusions

7

Question 1: Do I need an Expert?

- ▶ Three sub-questions as analytical framework
 - ▶ What kind of case do I have?
 - ▶ What kind of witnesses do I have?
 - ▶ What kind of opponent(s) do I have?
- ▶ Avoid the mindless arms race, but don’t bring a knife to a gunfight

8

What kind of case do I have?

- ▶ *What* cases v. *Why* cases
 - ▶ One of these questions typically predominates
 - ▶ A “what” case is usually a simple credibility dispute
 - ▶ A “why” case tends to be more complex and raise issue of motives, training, perceptions, and counterfactuals
- ▶ Expert less likely in *what* case, but more likely in *why* case

9

What kind of case do I have? (Pt. 2)

- ▶ Less relevance and persuasiveness in a “what” case
- ▶ Admissibility problems
 - ▶ *Goodwin v. MTD Prod., Inc.*, 232 F.3d 600, 609 (7th Cir. 2000) (“An expert cannot testify as to credibility issues. Rather, credibility questions are within the province of the trier of fact, in this case a jury.”)
 - ▶ *Andersen v. City of Chicago*, 454 F. Supp. 3d 808, 816 (N.D. Ill. 2020) (applying *Goodwin* to “police practices expert”)

10

What kind of witness do I have?

- ▶ You can't pick fact witnesses
- ▶ You can pick your experts
- ▶ Consider the available fact witnesses (yours and your opponents)



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11

What kind of witness do I have? (Pt. 2)

- ▶ Expert witness might not be needed if a fact witness can provide the same information
- ▶ Expert testimony might be critical if your fact witness has problems with credibility, education, or articulation



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12

What kind of opponent do I have?

- ▶ WWII scenario v. guerrilla war in Afghanistan
- ▶ What can I expect from other side?
 - ▶ Do I need an expert to counter their testimony and opinions?
 - ▶ How will an expert help (or hurt) each side's theme?
- ▶ What kind of experts will the other side have?
 - ▶ Do I need an expert to counter their expert?
 - ▶ If so, testifying or consulting?
- ▶ Consider optics of expert(s) to jury

13

What should I do with my expert?

- ▶ Short answer: whatever you'd do with other experts
- ▶ Longer answer
 - ▶ Start early and coordinate your message
 - ▶ Defense examples of "use of force continuum" or "action beats reaction"
 - ▶ Plaintiff's counter of "action beats reaction" or theme of "hit first, talk second"
 - ▶ Collaborate to attack the other side's theme (and expert)
 - ▶ Is the goal a *Daubert* motion, a cross examination at trial, or both?
 - ▶ What can you attack best? Credentials? Facts underlying their opinion?

14

How can I get my expert's testimony admitted?

- ▶ The familiar standard
 - ▶ Fed. R. Ev. 702: 1) specialized knowledge that will assist trier of fact; 2) based on sufficient facts or data; 3) product of reliable principles and methods; 4) methods reliably applied to this case
 - ▶ Federal court as "gatekeeper"
 - ▶ Reminder: Rules 401 and 403 still apply
- ▶ Barred expert opinion is waste of resources
 - ▶ What good is a nuke you can't launch?
 - ▶ So, don't offer inadmissible expert testimony, unless
 - ▶ You have a good strategic reason to match what the other side will do
 - ▶ You have a judge known for letting almost anything in

15

Most recent word from COA 7

- ▶ *United States v. Brown*, 871 F.3d 532 (7th Cir. 2017)
 - ▶ Criminal trial against CPD officer for willful violation of civil rights
 - ▶ Arose from unprovoked beating, on video, at convenience store
- ▶ Defendant wanted expert testimony on CPD procedure
 - ▶ District court barred testimony, and COA 7 affirmed
 - ▶ Expert testimony might be relevant in some cases
 - ▶ Irrelevant here because case was "a textbook example of easily comprehensible facts" and proposed expert "would have added nothing." *Id.* at 539.

16

Other (limited) guidance from COA 7

- ▶ *Cacciola v. McFall*, 561 F. App'x 535, 538 (7th Cir. 2014) (expert testimony about “proper police practices, and the factors relevant to the hypothetical uses of force” properly admitted)
- ▶ *Florek v. Vill. of Mundelein, Ill.*, 649 F.3d 594, 601 (7th Cir. 2011) (expert testimony about what a “reasonable” police officer would have known and done properly excluded because it was “adequately comprehensible by laypeople”)
 - ▶ “Expert testimony more likely to be admissible” when “something peculiar to law enforcement” (e.g., police dogs)
 - ▶ Expert testimony less likely to be admitted when dispute is “matter of everyday experience,” like “**most primitive form of force” of using bare hands**
- ▶ *Legg v. Pappas*, 383 F. App'x 547, 550 (7th Cir. 2010) (expert testimony about how police allegedly violated department policy and general standards of practice properly excluded as irrelevant to whether excessive force used)

17

Older but critical guidance from COA 7:

“It may be that Officer Hesper's possible violation of the CPD's General Orders is of interest to his superiors when they are making discipline, promotion or salary decisions, but **that information was immaterial in the proceedings before the district court and was properly excluded.**”

Thompson v. City of Chicago, 472 F.3d 444, 455 (7th Cir. 2006) (emphasis added).

“**The jury, after having heard all of the evidence presented, was in as good a position as the experts to judge whether the force ... was objectively reasonable given the circumstances.**”

Thompson v. City of Chicago, 472 F.3d 444, 458 (7th Cir. 2006) (emphasis added).

18

Recent NDIL Decision

- ▶ *Fields v. City of Chicago*, 2018 WL 1652093 (N.D. Ill. Apr. 5, 2018)
 - ▶ Then-Chief Judge Castillo bars two defense experts
 - ▶ Defendants' proffered forensic expert on shooting reconstruction excluded because it "attempts to weigh factual disputes" while "jury is able to evaluate" the conflicting evidence for itself. *Id.* at * 5.
 - ▶ Defendants' proffered police practices expert excluded because whether CPD policy was followed is irrelevant to whether force used was reasonable
- ▶ Exclusion of police practices expert routine, exclusion of forensic reconstructionist may be outlier

19

Other notable decisions in this circuit

- ▶ *Abdelal v. City of Chicago*, 2017 WL 1196977, at *3 (N.D. Ill. Mar. 31, 2017) (denying motion for new trial based on exclusion of plaintiff's proposed police practices expert because case turned on whether decedent was pointing a weapon, something the jurors could decide for themselves without an expert)
- ▶ *Sturm v. Hedges*, 2017 WL 11001224, at *4 (S.D. Ind. June 19, 2017) (expert testimony in Taser case allowed as to how Tasers work, and police department training on how to use Tasers, but excluding portion of testimony dealing with plaintiff's injuries and reference to any specific general order)
- ▶ *Davis v. Duran*, 277 F.R.D. 362, 367 (N.D. Ill. 2011) (barring plaintiff's police practices expert who opined on sincerity and integrity of post-shooting investigation and purported to resolve disputed facts)
- ▶ *McCloughan v. City of Springfield*, 208 F.R.D. 236, 239 (C.D. Ill. 2002) (plaintiff's expert opinion on whether proper procedure followed barred as backhanded credibility argument when "common decency" was enough to find alleged police action improper)

20

Takeaways on Admissibility

More likely to be admitted if

- ▶ General testimony about police procedures and training
- ▶ Presented in a way that does not make credibility judgments
- ▶ Technical or specialized subject matter
- ▶ Tells the jury something new and relevance specifically explained

More likely to be excluded if

- ▶ Focused on violations of department policy
- ▶ Weighs factual disputes or credibility
- ▶ Simple, commonsense issues in dispute
- ▶ No good explanation for how it adds to what the jury can see and hear for itself

21

The end

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This presentation will be available shortly on the firm's website at <http://www.hcbattorneys.com/>

David previously worked as an Assistant State's Attorney for Cook County, as a Litigation Associate for Kirkland & Ellis LLP, and as law clerk for Hon. Danny J. Boggs, Chief Judge of the U.S. Court of Appeals for the 6th Circuit.

22