



Assessment and evaluation of police-shooting cases

AN INVESTIGATION THAT GOES BEYOND THE POLICE REPORT IS CRITICAL BEFORE YOU COMMIT TO TAKING THE CASE – AND COMMIT TO TRYING THE CASE

Attorneys working in the field of police shootings encounter seemingly overwhelming legal and practical hurdles in the pursuit of claims on behalf of persons and families impacted by police shootings. The resources required to successfully pursue police-shooting cases can likewise be overwhelming in terms of time, financial costs and opportunity costs. My goal here is to offer a straightforward approach to the evaluation of police-shooting cases and to offer concrete examples of the application of successful litigation techniques in police-shooting cases. Ultimately, the pursuit of police-shooting cases is rewarding in many respects, and my goal here is also to introduce you to some important items, issues and factors that you must consider in evaluating each police-shooting case.

Evaluation of a police-shooting case

The costs, in terms of time and financial resources, make the evaluation of police-shooting cases a critical part of your police-misconduct practice. Taking the wrong case can commit you to years of difficult and expensive litigation. On the other hand, rejecting a case that has a good likelihood of success can amount to a missed opportunity to meaningfully help a victim of police abuse or to help a family recover from a great tragedy. Close and careful evaluation of the shooting is a must. But, if the target police agency has committed the entire weight of its investigatory structure to the justification of the shooting and if you have little, if any, information available to you initially, how do you decide whether the shooting case that comes to your office has the makings of a worthwhile commitment to you and your firm?

To make things worse, most media reports of the shooting will initially support the conclusion that the shooting was justified as the police agency floods

the airwaves with reports of facts and evidence to justify the shooting. Considering this, at first blush, most police shootings appear to be justified, on the surface. But even the direst of circumstances require that you look beyond the initial “official” reports offered by the police agency to support their claims of a warranted use of deadly force.

Frontloading your efforts

At the outset, when considering a police-shooting case, you should ask yourself, “Are you willing to commit all of the time and resources to take this case to trial?” If you’re not, pass on the case. The hope of settling a police-shooting case should be banished from your mind because this hope will get you into trouble. The strong sense of injustice that your client feels after having been shot by police or from having a loved one killed in such a shooting will fuel a great resolve in their hearts. Your clients’ strong belief in their case should not blind you from critically analyzing all the facts available to you for your decision, however. Likewise, the fear that you may be missing out on a potentially great case should not commit you prematurely to a case.

Ultimately, you must initially invest the necessary personal effort and resources into the case to acquire reliable information for your decision. As such, tell your clients that you will investigate the shooting and that you will not let any information that is available to you go without close consideration. You must hunt down that information and test its credibility. Only then can you decide if the case warrants your investment.

But what is that information? Briefly, *you* must speak to every possible eyewitness, *you* have to collect and preserve any available physical evidence – including through private forensic

studies, and *you* have to scout out any recordings related to the shooting.

In the end, after you’ve collected the evidence that is available to you, the cost/benefit analysis that you have to conduct is deeply personal and should take into account your caseload and the related demands upon your time, the resources available to you in terms of staff time and the economic costs of such a case, and whether your experience sufficiently enables you to take on such a case.

Preservation and assessment of available evidence

“... just the facts ma’am, just the facts.” (Sgt. Joe Friday, *Dragnet*, circa 1951.)

Collecting the official version

Before you can begin to discredit the official police version of the shooting, you need to know what it is. It might be accurate. Ultimately, you will have to deal with it if you take the case. Start with the press release issued regarding the shooting. Most agencies will post it on their website. Broad online searches are often a good place to start for general information. Check the websites for the local television stations and other digital media outlets for information on the shooting. They will often have statements from agency representatives. Make sure you preserve these. Most important, media reports often identify witnesses who have made statements about the shooting. If the witness has spoken to the media, the witness will likely be willing to speak to you, usually.

A note about the media: If you intend to work in this field, you should nurture relationships with local newspaper and television reporters. A good way to start such a friendship is to give an “exclusive” – i.e., provide them with unique and exclusive access to the information about your case. Once the initial/exclusive report on your case is

published, other outlets will usually contact you to do a follow-up on the story. Getting exclusive access is valuable to reporters and you might find that they are a source of valuable information regarding your case.

Keep in mind that a short 30-second news report of the shooting underlying your case often comes after hours of work on the reporter's part and a lot of information about your shooting is left on the editing room floor. The only way that you will learn of the witness that came forward to talk to the press but didn't make the news clip is if you talk to the reporter.

Ultimately, be mindful of the fact that the police agency's account of the shooting should be objectively viewed. Do not reflexively take their accounts as one-sided . . . although they often are. Remember, you have the burden of proof. If you meet it, you will have to overcome their proffered version or otherwise disprove it to succeed in your case.

You should immediately send out a preservation letter to the police agency on behalf of your clients asking that they preserve all manner of evidence related to the shooting. The preservation letter can later serve as your initial request for production of evidence. Most practitioners in this field have stock preservation letters which exhaustively identify every possible piece of evidence that might be collected by police investigators in a shooting case, and most practitioners in this field will gladly provide you a sample. Most police agencies utilize body-worn video cameras. The footage from such cameras are public records under the California Public Records Act, and agencies are required to release video of police shootings to the public no later than 45 days after an incident is recorded. Minor exceptions for disclosure exist, but for the most part you will get the footage if you request it.

Canvassing for witnesses

Every police shooting has at least two eyewitnesses. The person shot and the person doing the shooting. In many cases, the shooter is the only remaining

eyewitness. The circumstances of most shootings, however, often provide you with witnesses to the shooting — some reliable, some not. Your task is to quickly find them, personally evaluate their account of the shooting, and document their account for your initial purposes.

Private investigators are well versed in the collection of evidence and are handy for that initial canvassing of the shooting scene for witnesses. Make sure that your investigator is relentless in his or her investigation. Get them to the shooting scene immediately. It often helps to have them at the location at the time that the shooting took place. Ultimately, you must go out to the shooting location yourself and familiarize yourself with the conditions at the time of the shooting and the layout of the shooting scene. Distances and angles are often hard to evaluate through photographs and video footage. Nothing beats the assessment that you can make during a first-hand visit to a shooting scene.

When using investigators, ask them to keep a log of the work they do and keep the log for your future reference. You may want to return to a witness who was initially quiet or unhelpful. Most folks who witness a police shooting are reluctant to speak to investigators, much less lawyers. As time passes, this reluctance often wanes. You should develop a relationship with investigators that you can trust as having good bedside manner with reluctant witnesses. Assessing this skill comes from going out with your investigator to see how he or she interacts with witnesses.

Once you find a talented investigator who is "good with people," cherish him or her. They can save you countless hours of work and can narrow the focus of your energies. On the other hand, only a personal interview of important witnesses can provide you with the insight into the facts that you need. I was asked to participate in a case involving the police pursuit of a motorcycle where the officers were accused of wrongfully using a spotlight on the motorcyclist to cause him to be temporarily blinded and crash

into a parked truck. The damages were horrific: He died and his passenger was terribly injured in the crash.

I was initially impressed about the strength of the case based on the written witness summaries prepared by a private investigator used by the referring attorney. But after speaking to the witnesses, I was surprised by how much their accounts differed from the investigator's summary. The case lost some of its luster, and I was convinced that the favorable treatment given in the investigator's summaries to some of the statements was driven by an urge to support a case where none existed. Ultimately, we found other witnesses who provided sufficiently weighty statements to make out a case, but they were found only through personally sitting with and talking to the initial witnesses. Again, *you* must talk to the witnesses, *you* must be convinced of their credibility and *you* must be persuaded that their accounts make sense.

I urge you to personally canvass the shooting location for witnesses, if you can. There is nothing like having a witness walk you through what she saw at the scene of a shooting to truly give you a meaningful sense of what happened. Reading an investigator's account just doesn't compare. Ultimately, if you've spoken to the witnesses yourself and tested their credibility, you'll have more confidence in your decision to proceed.

Video footage

There is nothing like video footage to give you a nearly conclusive account of what happened. It is surprising how much of our landscape is monitored by video cameras now. Typically, the data is digitally recorded and the fear of the data being "copied over" is a thing of the past. But it still happens. Your canvassing of the shooting scene should include questioning regarding video footage. Whether it involves a witness capturing the shooting on her cell phone camera or the shooting being captured on a fixed camera, you won't find it if you don't ask or look for it.

Keep in mind that video cameras also record sound. Audio evidence is powerful. I once interviewed a family who was having dinner at the time a shooting took place outside of their apartment. The interview seemed to be going nowhere, until I asked if they knew of any video footage of the shooting. The adults told me and my investigator that they did not see the shooting but that their young daughters were videotaping each other with the mother's phone at the time of the shooting and that they captured the sound of the gunshots. We listened to the recording intently. The footage from inside the living room showed the girls playing and giggling as their parents ate dinner. There was no background noise until the gunshots outside appeared in the audio portion of the video footage. Then, the officers' commands followed, as did the cries of my client's husband who begged for help after being shot. The officers' version was that he failed to obey repeated commands that were issued *before* they fired their guns. The audio portion of the video footage impeached them. Obviously, forensic analysis was ultimately necessary to confirm the sequence of the events and this evidence was powerful.

Likewise, YouTube, Facebook, Twitter and other social-media platforms are a great source to tap in your search for video footage of your shooting. Even if there is no actual footage related to your case, comments and other information regarding your case might help you identify witnesses. General searches here are often productive.

Medical records

Not all shootings result in the death of the person shot. If your client survived the shooting, obtain the medical records and closely review them. The medical records usually provide a wealth of evidence related to the shooting trajectory and may serve as the basis for impeaching the shooters and the police investigators. Note that the emergency-room records may contain statements made by your client. The records may necessarily

include references to alcohol, prescription drugs and illegal drugs. This is an important consideration, as general drug use relates to your client's overall credibility in the minds of some jurors, should this evidence be admitted. On the other hand, the presence of drugs should also be used in evaluating the officers' conduct. Most agencies provide instruction on the handling of intoxicated suspects. Failure to follow such rules can be used to support a claim that the shooting officer was careless in handling the pre-shooting circumstances. Keep in mind that negligent pre-shooting tactics may serve as a basis for liability in a shooting case. (*Hayes v. County of San Diego*, 2013 57 Cal.4th 622.)

Early consultation with an expert

Most liability and forensic experts that you may have worked with in the past are usually willing to provide you with guidance in your assessment of a new case. As with investigators, you should work to develop a relationship of trust with your experts. Ultimately, early expert consultations should take place after you have developed enough evidence to present to them for an initial evaluation. Once you have satisfied yourself as to the merits of a case, then proceed to an expert. You will only get a meaningful opinion if you have a meaningful amount of critical evidence. Ultimately, I believe that even if you must spend money at the onset to get an expert's initial evaluation of a case, you will be better off in the long run. Again, if the case has sufficient merit, you can proceed with confidence. On the other hand, if your expert comes back with a negative opinion, heed it. Inform your clients of the opinion and very seriously consider withdrawing from representation.

Which experts will you need? You should have access to a police-practices expert, especially one who is familiar with the agency involved in the shooting. Also, you should consider a forensic expert such as a pathologist. Private autopsies are also important tools in the evaluation of a case. The completion of an official

autopsy report often takes six to eight months. A private autopsy can quickly provide you with vital information for your initial assessment: bullet trajectory, soot/stippling analysis, body position at the time of the shooting, and toxicological evidence.

Personal evaluation of the case: cost/benefit analysis

So now what? You've talked to the witnesses: some support your client's version, some don't. You've hunted down YouTube and security camera footage; some is favorable, and some is just too blurry to be meaningful. You've discovered the presence of illegal drugs from the medical records. The private autopsy tells you that the bullet trajectories are consistent with the officers' version. Your police-practices expert gave you a thumbs-up, however, but he says it's a tough case. Do you take the case? Where else can you seek help?

Some cases are clearly worthwhile. I have a pending case involving a man who was shot seven times in the back. The private autopsy confirmed that the trajectories are consistent with a man standing with his hands behind his head as an eyewitness reported. Although there is some trace of drugs and alcohol in his system, the physical evidence and witness accounts confirm that the man was not charging at the officers as reported in the media. All these facts suggested likely success. Most cases, however, are not so certain.

One resource that I still rely on for evaluations of cases I'm on the fence about is a group of colleagues who work in this field. We rely on each other as sounding boards as we discuss the pros and cons of difficult cases. As uncomfortable as it is sometimes, I posit the worst-case scenario of a prospective case and ask them to pick it apart. Sometimes, I leave out a detail or two in favor of dropping the case, just to see if my evaluation is on target. Then I introduce the facts into the discussion to see if the "bad" facts change their evaluation. I'm occasionally surprised that

my take on such facts is sometimes overblown. Likewise, I've often been directed at issues and facts that I misjudged or missed outright. It is useful to have honest outside input from colleagues you respect. You should foster such friendships and provide honest assessment if asked to help. Again, you are likely to find that most seasoned practitioners working in this field are willing to share their views and assist in evaluating your case.

Even after such consultations, *you* get to make the decision. You should assume that the case will end up in trial. Obviously, the damages that you might be able to prove is an important factor which should not be ignored. I once assisted a colleague in evaluating a case involving a through-and-through gunshot to a man's chest. The bullet trajectory, however, was at an angle that caused very little physical damage. The bullet entered the man's right pectoral muscle near his armpit and exited out the front of his chest, traveling through the outer surface of his pectoral muscle. The underlying circumstances were important. He was prosecuted for involvement in a drug deal, during which the shooting occurred, and he took a plea deal.

Ultimately, we concluded that the evidence of his involvement in a drug deal, including his co-defendant's admissions, would make its way into the trial of the civil case if the case was defended properly. I was not optimistic about the case. Now, if he had been more seriously injured or even killed, would my recommendation have been different? Maybe. The bottom line is that you will be faced with difficult scenarios which will call on you to evaluate all relevant circumstances in making the decision, including your experience, your ability to finance such a case, and your aversion to risk. Close evaluation of as much of the related evidence and circumstances, as well as a healthy caution about the likely success of any police-shooting case, will serve you well.

Planning your discovery as you evaluate your case

It is important that you begin developing a discovery plan as you evaluate and consider taking on a particular police-shooting case. My aim here is not to provide you with a specific guide as to the discovery that you must do to successfully prosecute your case. Each case has its own DNA and you must explore the details of it to find the right approach to achieve success. Once you decide to take on a case, however, your evaluation of the merits of the case continues and is driven by discovery.

Themes

If you haven't read "Rules of the Road" by Rick Friedman and Patrick Malone, you should. The "rules" for your case and its themes are intertwined. Police work is very procedure driven. Usually, the written procedures have related memoranda or implementation guidelines which explain the policy underlying the procedure. These rules amount to an internal police guideline for you to compare the officer's conduct against. The policies and procedures are goldmines for developing themes and "rules" for your case.

Special attention should also be given to damages when developing your themes. If the shooting resulted in a death, you should consider the immediate aftermath. The suffering caused by the shooting should be offered as a concrete example of what happens when the rules that you have introduced are not followed. Attending the shooting victim's funeral is important. Obviously, due respect for your clients' privacy should be observed. Eulogies and other memorial statements by loved ones, however, offer powerful insight as to the impact of the death on the surviving loved ones.

A formal discovery plan is mandatory

Even if it consists of a basic outline of witnesses and evidence that you hope to secure, you need a discovery outline. Many of your police cases will end up in

federal court. Make sure you know the workings of FRCP, Rule 26. Likewise, the judge that your case is assigned to may have specific requirements regarding litigation in her courtroom. Make sure you have these requirements incorporated into your discovery plan. The investment of a few hours into developing an initial formal discovery plan will pay huge dividends. Moreover, it will keep you focused on the issues and themes you have identified, and it will protect you from wasted efforts.

Keep in mind that as you proceed through the litigation of your case, you will be reflecting on your plan and tweaking it or expanding it as evidence is collected and evaluated. Likewise, your discovery plan can serve as a useful outline as you prepare for your presentation to the jury.

Focus on what is important – prioritizing

It is important to remain cost effective. You owe it to your clients, and you owe it to yourself. On the other hand, don't be "penny wise and pound foolish." I recognize the value of videotaped deposition and I always videotape the shooters' depositions. On the other hand, videotaping every deposition is money poorly spent.

You must balance your need for important evidence with the cost of securing it. Again, your discovery plan will help you focus on the important items that you need to prove liability and meaningfully present damages. Ultimately, your experts should be consulted to ensure that the evidence and materials necessary for their strong opinions is secured. Reflect on what will be presented at trial and in what format you will be presenting it. Likewise, if your judge has a reputation of limiting trials to very short presentations, you might be wasting a lot of time and money pursuing evidence that might never see the light of a courtroom. Again, a detailed discovery plan, combined with your experience should guide your prioritization.

Your team: Incorporating your experts into your discovery

Only through regular and detailed contact with your experts can you ensure that you all are marching to the same tune. Again, your cost/benefit evaluation should consider the budget for your case, which, by the way, should also be determined early on. You will do yourself and your client a disservice if you allow runaway costs. Settlement and trial decisions can be clouded by the weight of huge cost burdens. When it comes to experts, be advised that you do not have to hire them all early in the case. Obviously, if you have a life-care plan to prepare, you might want to get your life care planner on board early in the case to make sure that your client's needs are appropriately evaluated. On the other hand, you do not need to hire the economist who will put a present value on the life-care plan until later in the litigation. Keep in mind that FRCP Rule 26 and some jurisdictions have specific timing requirements regarding expert report disclosures. Your discovery plan should contemplate these deadlines to ensure your timely compliance.

Early consultations

Notwithstanding the above, you should consider early consultations with your police practices expert, accident reconstructionist and forensic specialists. As an example, I recently arranged for a private autopsy of the body of a young man who was shot in the back as he fled from police. The defense version offered to the media by the police department was that the young man was turning as he reached for his waistband. Eyewitness accounts confirmed that he was simply fleeing as he ran. Obviously, the bullet trajectory evidence will be important here. I have no confidence that we will receive the official autopsy report soon. I asked our accident reconstructionist/biomechanist to attend the private autopsy for purposes of securing a solid foundation for his opinions in the future. Delaying your experts' participation to a point later in the case might prove

"pound foolish" in that their work might be compromised by a lack of the necessary foundations for their opinions.

Free experts?

As much as you should strive to include your consulting experts in the early part of your case, you should not disregard the option of collecting valuable expert information during discovery from non-retained experts.

In those cases where the client's loved one did not survive the shooting, you should also depose the coroner's staff early in the case. The coroner's investigators often have detailed conversations with police officials regarding the circumstances of the shooting. Contradictory statements from the police agency's investigators to the coroner's staff may serve as impeachment evidence later in the case. Ultimately, bullet paths through the person's body are of great value and must be documented carefully during the pathologist's deposition. Bullet paths may at times be suggestive of only one possible body position. If that position is consistent with your version of the shooting, or impeaches the shooter's version of the incident, your case has been solidly strengthened.

Again, consulting with your biomechanics expert is important before depositing the pathologist who conducted the autopsy. Also, do not forget to walk the pathologist through her examination of the various organ systems which was done during her autopsy of the body. Most autopsy reports meticulously report on the condition of every major organ. Inquire about the health of the various organs and systems to lay a foundation to establish the decedent's relatively good health before the shooting: "Would you agree, Dr. Wang, that Mr. Garcia's cardiovascular system is that of a healthy 24-year-old Hispanic man?" An official objective assessment of the decedent's good health will be important later as you argue that his documented good health is proof of his long life expectancy and of an expected long life with his loved ones.

Shooting reconstruction

As I mentioned above, there is great value in videotaping the deposition of a shooting officer. In California, a witness can be required to perform reenactments at deposition; i.e., provide non-verbal answers. (*Emerson Electric Co. v. Superior Court (Grayson)* (1997) 16 Cal.4th 1101.)

Keep this authority handy, as you should expect great pushback from counsel and the witness when you ask the witness to demonstrate their actions during the shooting. Body worn-camera footage and other video footage of the shooting may reduce the value of reenactments, but these reenactments often disclose the officer's thoughts at the time of the shooting and a verbal description of the officer's actions should be sought as the officer is walking you through his motions during the shooting.

I often find that the shooting officer is unwilling to reenact the movements of the person shot but will readily depict his or her movements. Push for both. These reenactments are priceless and essential for an accurate shooting re-creation. Think fast, however, as you may only get one crack at the reenactment before you have to deal with objections and instructions. The witness should be asked to demonstrate how she drew her weapon and how she shot. All of this should be done in real time as she did out in the field at the time of the shooting. Ultimately, before depositing a shooting officer, make sure that you have a conversation with your expert/reconstructionist about the setting under which the shooting occurred and as to what evidence they will require to accurately depict what happened during the shooting.

Conclusion

Pursuing police-shooting cases through trial is challenging, expensive and fraught with legal and factual obstacles to success. Careful attention to the facts of your case and an investment of time and resources at the inception of the case will help guide you to a decision

as to which cases might most likely succeed. Ultimately, only hard work and a drive to bring justice to your client's cause will bring home the verdict that your client deserves.

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