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Police shootings: A guide to winning justice

A LOOK AT THE LEGAL PROCESS AND THE PROVEN STRATEGIES FOR WINNING AN EXCESSIVE-FORCE CASE

A police-shooting case, particularly when someone dies, is akin to a murder. To successfully prosecute a police-shooting case, you will have to act as a first responder, detective, forensic criminalist and prosecutor. You must reconstruct the shooting and show the jury how the decedent was shot and killed unjustifiably. Your work-up of the case is vital, given that your adversary is the government with systemic safeguards in place to manufacture a justified shooting. This article provides a guide to litigating police-shooting cases both in state and federal court from inception to trial.

You must conduct a thorough investigation

The moment a police shooting occurs, you must act quickly to prevent law enforcement from manipulating evidence, ensure evidence is preserved, and prevent law enforcement from negatively shaping the narrative about why they shot and killed someone. The quality of your investigation hinges on information, which you can obtain independent of law enforcement. Given that investigations by law-enforcement agencies last well over a year and evidence is exempted from disclosure, it is imperative that you obtain independent information,

If a shooting is being investigated by the California Attorney General pursuant to Assembly Bill 1506, investigations are taking well over two years. Consequently, once it is time to file a claim and the lawsuit itself, if you merely rely on information from the government, you are starting at a disadvantage because you have limited information. In turn, this can hurt your case by failing to present necessary claims and information at the tort claim stage and even the lawsuit-filing stage.

At the outset, it is critical that you physically go to the scene of the shooting as soon as you are retained for the case. At the scene, you will gain a better understanding of the setting and you will have an opportunity to canvass for witnesses as well as potentially secure video and/or audio evidence.

The CPRA request

At the same time, you will issue a California Public Records Act request ("CPRA"), sometimes incorrectly referred to as FOIA, pursuant to Government Code section 7920.000, et seq. You have to ensure you include a request for the officer's name(s) pursuant to *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59. In *Long Beach Police Officers Association*, the Supreme Court held that a public entity must make a particularized showing when refusing to disclose the identity of officers involved in a shooting and rejected a blanket rule of non-disclosure. (*Id.* at 75.) You also need to ensure you request the officer's personnel file pursuant to Penal Code section 832.7.

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In terms of actual documents and reports, a vast majority of the time, the law-enforcement agency will not provide a substantive response given the applicable exemptions due to the ongoing investigation. However, the agency must provide you with the identities of the officers pursuant to *Long Beach* unless they can articulate a credible threat to the officer's safety and must provide personnel files, if they exist. Furthermore, the agency must also publish a critical incident video 45 days after the shooting unless an exemption applies. (See Gov. Code, § 7923.625.)

Indeed, in 2018, the California Legislature passed Senate Bill 1421 (Right to Know Act) and Assembly Bill 748. SB 1421 amended the Penal Code to permit the disclosure of certain peace officer personnel files such as incidents involving the discharge of a firearm and sustained finding of excessive force. Senate Bill 16, effective in 2022, further broadened the types of personnel records which could be disclosed pursuant to a CPRA request. The types of personnel files which are subject to disclosure can be found in Penal Code section 832.7.

AB 748 requires law-enforcement agencies to disclose a video or audio recording relating to a critical incident (police shooting) 45 days after the critical incident. Typically, law-enforcement agencies will publish body-worn video, related video, and audio of the shooting on their YouTube channels or their respective websites.

It is imperative that you use SB 1421, AB 748, and SB 16 as part of your investigation to obtain as much information as possible about the shooting. At minimum, personnel files, if they exist, and the critical-incident video relative to the shooting should be disclosed to you by the agency 45 days after the shooting.

Finally, if the public entity is refusing to comply with your CPRA request, you can file a petition for writ of mandate compelling compliance with the CPRA. The writ of mandate is a separate lawsuit. (See Gov. Code, § 7923.100.) Depending on the county where the writ is filed, the writ can be resolved within several months. In Los Angeles County, I litigated a writ which took a year and a half to resolve from filing to final order. In Riverside County, I litigated a writ within four months from filing to final order. The additional benefit to filing a writ is that you can move for attorney's fees if the writ compelled the public entity to comply with the CPRA. (See Gov. Code, § 7923.115.)

Initiation of the government claim

In California, you must file a tort claim within six months of the shooting asserting state-law causes of action. (See Gov. Code, § 911.2.) In your tort claim, it is critical that you include all theories of liability. Case law provides that, where the complaint merely elaborates or adds further detail to a claim but is predicated on the same fundamental actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint. (*Stockett v. Association of California Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447.) However, the Tort Claims Act and other case law also provide that each cause of action should be reflected in the claim. (See Gov. Code, § 945.4; *Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79 [". . . each cause of action must have been reflected in a timely claim"].) The typical state causes of action in a police shooting case are negligence, battery, and Bane Act. The Ralph Act may apply if the decedent was having a mental-health crisis or some sort of disability existed. Alleging the Bane Act and Ralph Act is key if you will only proceed with state-law claims in the litigation because attorney's fees, penalties, and a multiplier of damages are recoverable pursuant to Civil Code section 52.

If you fail to file a claim, you have the option of filing an application to file a late claim with the public entity, then filing a petition for leave to file a late claim with the Superior Court. (See Gov. Code, § 946.6.) One of the bases for obtaining relief can be based upon mistake, inadvertence, surprise, or excusable neglect. (Gov. Code, § 946.6, subd. (c)(1).)

However, you also have the option of arguing equitable estoppel and the delayed-discovery doctrine apply. There is a distinction between petitions for leave to file a late claim and arguing that the tort claim is in fact timely pursuant to the delayed discovery doctrine. (See *Ovando v. City of Los Angeles* (C.D. Cal. 2000) 92 F.Supp. 2d 1011, 1022 [". . . where there is a dispute regarding the public entity's finding of untimeliness, the claimant's recourse is to file a complaint on the merits. The issue of timeliness can then be raised in the form of a demurrer, motion for summary judgment, motion for judgment on the pleadings or motion to strike. . ."].)

Depending on the facts of your case, you should file a tort claim no matter what – even if it is more than six months after the shooting – and also a petition for leave to file a late claim. After you file the tort claim, you can file the lawsuit on the merits and argue that the claim was timely due to the delayed-discovery doctrine.

In addition to arguing the delayed-discovery doctrine, you can also argue equitable estoppel when filing the lawsuit on the merits. Equitable estoppel can be argued when the public entities' agents or employees engage in some affirmative conduct to prevent the filing of a timely tort claim. (See *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 ["It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act."]; see also *Ovando v. City of Los Angeles* (C.D. Cal. 2000) 92 F.Supp. 2d 1011, 1023-1024.)

Federal claims are not subject to the Tort Claim Act, and federal causes of action can be filed within two years of the shooting. (See *Donovan v. Reinbold* (9th Cir. 1970) 433 F.2d 738, 742 ["Congress

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has not evinced any intention to defer to the states the definition of the federal right created in section 1983, or to adopt the states' remedies or procedures for the vindication of that right. It has never indicated an intent to engraft onto the federal right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act."]; see also *Mills v. City of Covina* (9th Cir. 2019) 921 F.3d 1161, 1166 [noting that federal courts in California apply the state's statute of limitations for personal injury actions].)

After the public agency rejects your tort claim, you have six months from the date of rejection to file a lawsuit. (Gov. Code, § 945.6, subd. (a)(1).) If a public entity does not provide written notice of a rejection, a lawsuit must be filed within two years of the accrual of the cause of action. (Gov. Code, § 945.6, subd. (a)(2).) Further, if your client survives a shooting and is criminally charged in connection with the shooting, the statute of limitations is tolled. (Gov. Code, § 945.3.) However, only the statute of limitations is tolled, not the six-month requirement to present a tort claim. (*Ibid.*)

Choice of forum – state or federal court?

Federal Court

At this point, the critical decision of filing in federal court versus state court must be made. I love federal-court litigation, but I dislike federal-court trials. Federal-court litigation favors plaintiffs due to broad discovery obligations, each case having a magistrate judge assigned to oversee discovery and the early disposition of cases due to a stringent timeline and early trial dates. But federal trials disfavor plaintiffs given that there must be a unanimous verdict and many judges do not permit voir dire. (See *Johnson v. Louisiana*, 406 U.S. 356, 369-70 & n. 5 [The Seventh Amendment requires jury verdicts in federal civil cases to be unanimous].) In fact, in my last federal trial, the judge did not provide the attorneys any opportunity whatsoever for voir dire.

Furthermore, there is no federal equivalent of Code of Civil Procedure section 170.6. Moreover, the jury pools in federal court draw jurors only from voter-registration lists and also draw jurors from other counties such as Santa Barbara and Ventura if your case is venued within the Western Division of the Central District. (See United States District Court, Central District of California, General Order No. 03-12.)

Finally, qualified immunity applies to your federal claims. Qualified immunity is a federally created doctrine that applies to section 1983. Even if you prevail against qualified immunity, defendants have the right to file an interlocutory appeal, which can delay your case another two years while the appeal is pending.

State court

On the other hand, you can elect to litigate your police-shooting case in state court by filing in state court and solely asserting violations of state law (negligence, battery, Bane Act) and defendants will be unable to remove to federal court. There are many advantages to litigating in state court. Foremost, you only need three-fourths (9 of 12) jurors for a verdict. (See Cal. Constitution Art. I § 16.) Next, qualified immunity is not applicable to state-law claims, only to section 1983 causes of action. (See *Venegas v. Cnty. of Los Angeles* (2007) 153 Cal. App.4th 1230, 1247.) Unlike federal court, voir dire is available and there are no time limits. (See Code of Civ. Proc., § 223, subd. (b)(2).) Further, Code of Civil Procedure section 170.6 can be used. Finally, jury pools in state court draw from DMV records, providing for a pool reflecting a broader spectrum of the community.

Moreover, the development in civil-rights law at the state level has significantly improved in recent years. In 2019, Governor Newsom signed Assembly Bill 392 into law. AB 392 amended the Penal Code to update use-of-force law to conform with United States Supreme Court jurisprudence. Among other things, AB 392 amended Penal Code section 835a to authorize a peace officer's use of deadly force only when *necessary* in defense of human life. In turn, the Judicial Council amended CACI 441 – Negligent Use of Deadly Force by Peace Officer and CACI No. 1305B – Battery by Peace Officer (Deadly Force).

CACI 441 and CACI 1305B now contain an element that requires the use of deadly force to be necessary to defend human life. CACI 441 and CACI 1305B define deadly force necessary to defend human life as deadly force by an objectively reasonable officer necessary to defend against an imminent threat of death or serious bodily injury. In other words, peace officers can only use deadly force when it is necessary because the officer was faced with an imminent threat of death or serious bodily injury to the officer or others by the person they shot.

Also as important, CACI 441 and CACI 1305B define an imminent threat of death or serious bodily injury as "based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed." In almost every police-shooting case, the officers assert that they feared the person they shot was going to do something. As shown above, merely a fear of future harm is not enough. This language is central to your case.

Accordingly, given how comprehensive the jury instructions have become in police-shooting cases at the state level, the trial dynamics, and the inapplicability of qualified immunity, litigating a police- shooting case in state court may be the better choice in your case. To a greater extent, state court may be your only option where the facts of your case are similar to those facts where other courts have found that qualified immunity applies.

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Discovery/expert discovery

Once in litigation, it is necessary that you obtain all the investigative materials generated by the investigative agency. In the course of the investigation, the shooting officer(s) are interviewed and they provide their account of the events. Police officers are assigned an attorney prior to giving an interview and at times, are even allowed to review evidence. The interviewer is a detective/investigator and always asks easy questions. However, the interview is key because it confirms the officer's version of events and the officer will be unable to walk back any statements without appearing contradictory.

In that same vein, it is also important to always depose the shooting officer(s) first before any other additional depositions are taken in order to prevent the officer(s) from manipulating their testimony based upon any other evidence. Once the depositions of the officer(s) are taken, of course, depositions of third-party witnesses, including any officers at the scene, should be taken.

Equally important, obtain all the relevant evidence prior to deposing the officers. This includes personnel records. In federal court, you must allege a municipal liability – *Monell* claim – to be entitled to the personnel records of the shooting officers. In state court, you need to file a *Pitchess* motion.

Also, law-enforcement agencies or the investigative agencies have forensic divisions that collect and process forensic evidence. For example, in a police-shooting case I tried where there was no body-worn video, I was able to prove through bullet trajectories that my client was shot in the back, and therefore, the shooting was unjustified.

Moreover, the coroner/pathologist also needs to be deposed. The testimony of the pathologist is important because if a decedent sustained multiple gunshot wounds, identifying which gunshot wound was the deadly wound will further allow you to argue that a shot was unjustified and caused the decedent's death. For example, in a case I recently resolved, the decedent was shot first in the chest and then in the back. I was able to establish that the shot to the back was also deadly and thereby, unjustified. Additional testimony such as whether a shot was immediately debilitating can also help you establish your case because it can belie an officer's account that additional shots were necessary.

Ensuring all forensic evidence and all independent witnesses are deposed will also assist your experts in formulating their opinions. A police-practices expert is required in every case. Depending on the facts of your case, a forensic pathologist can also be retained. For example, in the case I recently resolved where the decedent was shot in the back, my forensic pathologist provided valuable insight relative to the extent of the deadliness of the shot to the back.

A biomechanical expert should also be retained to shed light into bullet trajectories and how they entered the body. A forensic-image analysis expert can also be retained to analyze body-worn video and audio corresponding to the video. Finally, depending on the facts of your case, a forensic-crime-scene expert may be appropriate such as a DNA expert. For example, in a case I tried in federal court last year, I retained a DNA expert to disprove defendant's assertion that the decedent possessed a firearm at the time he was shot.

Motions for summary judgment/ qualified immunity

Once discovery ends, defendants in every case will file a motion for summary judgment. This is especially true in federal court because qualified immunity is typically raised at the motion for summary judgment stage. The key to defeating a motion for summary judgment is creating a triable issue of fact. In federal court, you should argue that summary judgment in excessive-force cases is improper because such cases are factually intensive whereby a jury must sift through the evidence and make factual determinations preventing a court from entering judgment. (See *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1443 ["whether a particular use of force was reasonable is rarely determinable as a matter of law"].)

Indeed, in motions for summary judgment, given that the reasonableness standard "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we [the Ninth Circuit] have held on many occasions that summary judgment or judgment as a matter of law in excessive-force cases should be granted sparingly." (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125 (quoting *Santos v. Gates* (9th Cir. 2002) 287 F.3d 846, 853.)

Next, you must defeat qualified immunity. "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Rivas-Villegas v. Cortesluna* (2021) 595 U.S. 1, 5 (quoting *White v. Pauly* (2017) 580 U.S. 73, 78-79.) The qualified-immunity analysis involves two prongs: (1) whether the officer's conduct violated a constitutional right, and (2) whether that right "was clearly established at the time of the events at issue." (*Monzon v. City of Murrieta* (9th Cir. 2020) 978 F.3d 1150, 1156.)

Foremost, you should argue that the defendant violated a constitutional right by using excessive force, and therefore, a triable issue of fact exists and qualified immunity cannot be granted. (*Liston v. County of Riverside* (9th Cir. 1997) 120 F.3d 965, 975, as amended (Oct. 9, 1997) ["summary judgment in favor of moving defendants is inappropriate where a genuine issue of material fact prevents the determination of qualified immunity until after trial on the merits"].) Your primary objective on summary judgment is creating a triable issue of fact and disputing defendant's version of events. This is done through your work up of the case as well as with presenting your experts' reports refuting defendant's version.

Courts, however, have discretion to decide which of the two prongs "should be addressed first in light of the

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circumstances in the particular case at hand." (*Pearson v. Callahan* (2009) 555 U.S. 223, 236.) This is the biggest flaw with the qualified-immunity doctrine because a court can very easily disregard all the triable issues of fact, go directly to the second prong of qualified-immunity analysis, and say that there is no clearly established law that puts the defendants on notice that they were engaging in a constitutional violation. Indeed, the Supreme Court over the last several years has "repeatedly told courts ... not to define clearly established law at a high level of generality." (*City of Escondido, Cal. v. Emmons* (2019) 586 U.S. 38, 42.) Worse yet, if a court decides the second prong first and determines that qualified immunity does apply, there will be a lack of development of clearly established law because courts are not publishing decisions about what is clearly established.

Finally, if you defeat qualified immunity, defendants are permitted to file an interlocutory appeal and the case will be stayed until the appeal is decided by the Ninth Circuit unless you are able to persuade the district court to grant your motion to certify the appeal as frivolous. I have been successful in such motions before, and it has allowed the case to proceed to trial while the appeal is pending in the Ninth Circuit.

In terms of state-court summary judgment motions, fortunately, qualified immunity does not apply. The key is still to create a triable issue of fact and reiterate how the court should construe evidence in your favor. Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389.) The reviewing court "must draw from the evidence all reasonable inferences in the light most favorable to the party opposing summary judgment." (*Caliber Paving Co., Inc. v. Rexford Industrial Realty & Management, Inc*. (2020) 54 Cal.App.5th 175, 190.)

Preparing for trial

After defeating the summary judgment motion, it is finally time to prepare for trial. If your case is in federal court and in the Central District of California, you will have to hold a Rule 16 conference 40 days before the final pretrial conference where different pre-trial matters are discussed. (See Fed. R. Civ. Proc. Rule 16; Central District Local Rule 16-2.) Typically, the district judge also sets out the specific deadline for trial documents, such as memorandum of contentions of fact and law, motions in limine, exhibit list, witness list, special verdict form, and jury instructions.

If you are in state court, the local rules for the county your case is venued in will govern.

In terms of general trial strategy, framing the issues, as in every case, is key. You need to communicate to the jury the standard that applies: Police officers can only shoot and kill someone when they are faced with an imminent threat of death or serious bodily injury. This threat must be objectively reasonable under the totality of the circumstances. Jurors must look at all the facts known to the officer when he or she used deadly force. It is key to frame the issue in this manner to show jurors that the shooting was unreasonable, and therefore, excessive.

This is done by first calling the officers to the stand to secure their version of events. Once their version of events is secured, you set the standard through your police-practices expert. Your police-practices expert will opine on what are established police practices and how the defendants did not follow their training and their conduct was not consistent with police practices. In federal court, police-practice experts are generally not permitted to render an opinion on the ultimate issue. (See *Hangarter v. Provident Life & Accident Ins. Co.* (9th Cir. 2004) 373 F.3d 998, 1016 ["[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law"].)

At trial, you will use all the evidence you obtained in your reconstruction of the shooting to show that the shooting constituted excessive force. I call independent witnesses, a forensic criminalist, and other retained experts to the stand to contradict defendants' version of events. It is critical to contradict the defendants and show their conduct was unreasonable and therefore, excessive, in violation of the decedent's constitutional rights.

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