Why handle a civil rights case?

Civil rights cases give the opportunity to protect basic American rights but can present unique challenges

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Civil rights plaintiffs, who present you with a compelling case, and I will talk about what those look like below, offer you a wonderful opportunity to fulfill and expand your role as a vindicator of wrongs and a practitioner of basic American rights. As a plaintiff's attorney, you hail from a strong tradition. The history of the modern plaintiff's bar, beginning at the end of the 19th century, is filled with stories of brave and courageous attorneys, many immigrants or children of recent immigrants, taking on governmental bureaucracies despite enormous obstacles and with few resources, and winning big victories and significant fees for their hard work.

An attorney living in a smaller community, or in remote or less populated counties in California, might be hesitant to take on local law enforcement officials, DA's or other governmental entities. After all, life in small-town California is pleasant, cozy and filled with people who know each other and make an effort to get along. This is especially true in small court branches where the judges, DA's, PD's and the local civil bar have practiced together for many years. A lawsuit against the police is bound to generate some controversy, particularly if the plaintiff is not an upstanding member of the mainstream community, but is instead poorer, less-educated or a member of a minority. That controversy and potential for harming reputations motivates many attorneys in these communities to turn these cases down or find a "big-city" attorney to take the case. Bear with me; I would suggest the small-town attorney can take on such a case and do it the right way, creating a positive outcome for both the attorney and the community.

42 U.S.C. section 1983

Most civil rights violations, where a government actor injures or wrongs a citizen, can be brought under 42 U.S.C. section 1983. That Reconstruction Era law allows redress for any constitutional violation through an affirmative suit seeking monetary, injunctive or declaratory relief.[1] Proper defendants are the individuals and the employing entity, though the employing entity may not be liable under a vicarious liability theory. While most attorneys think of using a 1983 suit primarily to sue a police officer for using excessive force (under the Fourth Amendment), the statute is much broader.

• *First Amendment violations*: I have used the statute to sue public entities that try to shut down public events, typically outdoor music events, alleging First Amendment violations. In fact, many adult businesses, such as bars and nightclubs, often encounter governmental hostility. The threat of a federal suit for First Amendment/associational rights violations can be very effective. I recently backed down a public entity that was trying to close an African-American owned evening entertainment business. The entity did not like the crowds of young African-American men gathering outside the club and threatened it with closure due to various building and permit violations.

• *Defamation:* These suits can also be used to sue public officials for slander and libel. Years ago one client was publicly called a "murderer" by the police chief investigating the crime. The client later sued under Section 1983. With these types of cases, however, you must show "defamation plus," meaning there has to be a tangible loss resulting from the defamation, e.g., job loss.

• *Public Employee Employment suits*: On the employment side, an employee terminated or demoted by a governmental entity may also bring a Section 1983 suit. A recent case involved a police officer who experienced retaliation for providing information to internal investigators of her unit. She had blown the EEOC and DFEH deadlines for bringing suit and also had not filed a government tort claim (Gov.Code, §910 et seq.), a prerequisite to suing for state law causes of action, but still had one remaining and viable cause of action, the 1983 claim.

• *Prison conditions*: 1983 suits are a common vehicle for prisoners with claims against their jailers. These cases flourish in the federal courts. Due to the

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enormous number of filings, Congress passed the Prison Litigation Reform Act in 1995 (effective 4/26/96). That law limits the attorney's fees to 150 percent of the District's Equal Access to Justice fees (the fees paid to appointed federal public defenders) and mandates that prisoners exhaust their administrative remedies before they can file suit. In the Northern District of California, the hourly rate works out to be around $135 per hour. Needless to say, this fee limitation has proved to be a huge disincentive for attorneys contemplating prisoner's cases and the exhaustion requirement has also proved to be nettlesome to prisoners.

• *School molestation cases*: Suits involving student-on-student molestation or teacher-student molestation can also be brought under Section 1983 (usually in conjunction with a Title VII action).

• *Due process violations*: Plaintiffs can also bring an action alleging due process violations, e.g., failure of a governmental entity to follow notice and other requirements prior to seizing property or denying a substantive right. While too numerous to catalogue here, the suit can name an irrigation district, an elections board or a housing authority, to name only a few examples.

Of course, the vast majority of 1983 suits you will encounter will be brought against local police alleging excessive force and unlawful arrest.

Venue consideration

While the suit under Section 1983 can be brought in superior court, an overly unsympathetic and pro-police jury pool, the potential for removal to federal court and other procedural matters will often counsel a more experienced attorney to file in federal court. In the case of the small town practitioner, filing in federal court can also remove some of the pressure and conflicts that a superior court filing might provoke.

There is a caveat. Be careful about filing *federally* at what may seem, at first blush, to be great cases. For example, bystander cases are best filed in state court since federal law now provides that if a bystander is injured or killed by the police (or even by the suspect being chased) the officer has no liability unless what he or she did "shocks the conscience." (*Sacramento County v. Lewis* (1998) 523 U.S. 833.) You are better off trying the case under a simple negligence theory under state law. The courts will still apply a "reasonableness" standard, both as a matter of law (at summary judgment) or for the jury instructions in assessing the officer('s) conduct.

Of course, you can try to file a bystander case in federal court and file "supplemental" state law causes of action pursuant to 28 U.S.C. 1367. But again, unless what the officer did "shocks the conscience," an extremely high standard, you are better off starting the case in state court. If you start in federal court and lose the federal claim, the judge will generally only rule on that claim, and if he or she dismisses it, you will have 30 days to refile your state causes of action in state court. Of course, you will be at the beginning of the litigation again awaiting a trial date a year or more from that point.

Attorneys' fees

For attorneys concerned about recovering costs and time spent on the case, the statutory scheme includes an attorneys' fees provision. (42 U.S.C., § 1988.) This means you can take on a case with minor damages, file, prepare for trial and demand reasonable fees at settlement bifurcated from the damages, or, if the case ends in a plaintiff's verdict, file for the court's approval a much larger fee petition.

Assessing cases

Let's say a prospective client comes into your office, wanting you to sue a law enforcement officer for excessive force under the Fourth Amendment. The client has no witnesses to the event, no clear forensic evidence (like the impression of the officer's boot print on the side of the face like one of my former clients had), minor or no physical injury, but does have a significant track record of contacts with law enforcement (admissible to show possible bias). That's a tough case to win and barring some *X* factor, most likely you will not take it.

But let's look at another case. Suppose your client lives in an apartment adjacent to another apartment. The police come to the other apartment with a search warrant. The other tenant has your client's key and looking to get the heat off him, gives the police your client's key. They open the door, enter, detain your client, search the premises, then leave. As far as basic Fourth Amendment search and seizure law is concerned, the police still need a warrant to enter a residential property absent exigent circumstances. This is a decent case, and while damages will not be huge, it still has value. In addition, since a liability finding is likely, you can push for attorney's fees as a separate item at settlement. If the other side refuses your offer, you can take the case to trial and when you win, you can petition for fees.

As with any case, there are familiar road marks you look for when determining the likelihood of success before a jury based upon any particular story you will hear from an aggrieved citizen. Most often, you will discover that the citizen/cop encounter started with some perceived unlawful behavior and ended with an arrest. (While there are cases of mistaken identity, they account for a smaller percentage of the overall intake compared with non-mistaken encounters.) Probing that arrest and your client's criminal culpability (*e.g.*, DUI, physically fighting with a spouse), will help you understand your client and will help you determine if you really want to go down a one-and-a-half to two-year road with him or her.

There are clear liability cases. One category is the mistaken identity cases.

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For instance, I had a client whose name was common, like John Smith, except, his middle initial was *W*. When the police stopped him and ran his identification through the computer, they came up with an old bench warrant for a missed criminal appearance for John Smith. Except that the computer printout showed the middle initial as *P*. That case is more of a state law negligence case rather than a civil rights violation, the difference being that civil rights violations have an intentional element. Accordingly, you should file in state court.

Witnesses

Having independent witnesses is ideal but rare. More likely, if anyone saw the incident, it will be your client's friends (who were with him or her during the incident) or fellow officers of the alleged aggressive officer. Not surprisingly, the officers' accounts of the event will track their colleague's story and your client's friends will back your client. The police report (which you will want to get as soon as possible) will help you understand whether the officer's story makes sense. (Sometimes, it just could not have happened the way the officer wrote it up.) Additional statements filed by other officers and witnesses at the scene can help you determine just what happened and whether you can make a case to the jury that your client's version of events is the most believable.

If there are independent witnesses, call them as soon as possible to get an initial read on their credibility and their value. If they did see the unconstitutional conduct (*e.g.*, a baton blow to someone on the ground, a blow to someone already in handcuffs), have a law clerk or investigator take a written statement from them and have the attesting witness sign it.

The "qualified immunity defense"

Determining whether you have a good case however, also requires you to view the officer's conduct through the eyes of the officer at the time he or she was confronting your client, e.g., with 20-20 hindsight. This is more than an academic test. Defendants often move for summary judgment based upon the concept of "qualified immunity." (*Saucier v. Katz* (2001) 533 U.S. 194.) That doctrine, paraphrased and applied in the summary judgment context, provides that if a reasonable officer, facing the circumstances described in plaintiff's complaint, would have acted as the officer did (*e.g.*, hitting your client with a baton, shooting your client's decedent), then the case against the officer must be dismissed, as a matter of law. What you will often read in your opposition's summary judgment papers and particularly in the declarations filed, are descriptions of the officer seeing your client reach for his or her back pocket or some other fact that will paint the officer's subsequent reactions (hitting or shooting the decedent) in a *reasonable* light. There must be significant conflicting facts to convince the judge that the jury must decide the case.

Fighting "qualified immunity"

In many cases, the plaintiff will allege facts that the officer will deny. For example, the plaintiff will often claim that they acquiesced to the officer's commands (*e.g*., to put up hands, etc.). The officer will often refute that statement. Luckily, this dispute of fact will steer you past summary judgment. Even if you beat the qualified immunity defense at summary judgment, you will most likely face it again at trial.

In other instances, however, you may find that the parties' view of the facts is not so divergent. In one case, I represented a man who had been arguing with his son in the front seat of his car. He banged the windshield causing neighbors, who believed it was a gunshot, to call the police. The police showed up with a dog, surrounded the client (who had been ordered out of the car) and told him to pull out his shirttails then put his hands on top of his head. He was warned if he did not obey, the officer would release the dog. The client failed to act quickly enough for the officer, who released the dog. My client was bitten badly. However, the judge granted the defendant's motion for summary judgment, ruling essentially that it was reasonable for the officer to have sent the dog in under these circumstances.

To defeat this defense, you will often need an expert witness to testify (via declaration) that the use of force in the particular situation was unnecessary. Additionally, if witnesses are found, they can submit declarations that support your theory that the client was acquiescing to all commands or that the client was already subdued when force was used.

Members of the civil rights bar are a great resource for experts as is the National Police Accountability Project[2], affiliated with the National Lawyers Guild.[3] The latter project has a national Listserv that provides practical advice, expert referrals and case evaluation for attorneys suing under Section 1983 (or related state law causes of action.)

Damages

Damages in a Section 1983 suit are generally treated the same as in any personal injury suit. Damages can be compensatory, nominal or punitive though punitive damages are not available against a public entity, only against individuals.

Conclusion

Taking on a governmental entity and its employees may not be the easiest case, but it can have fantastic rewards, both to the practitioner and to the community. Unfortunately, current hiring and training practices for law enforcement personnel are minimally effective in preventing the use of force and unlawful arrests. With no let-up in cases, the communities in which we live will suffer unless the plaintiff's bar pushes back and challenges police and sheriff's departments across the state to use greater care in their work.

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Endnotes

[1] The statute, first enacted in 1871, states in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

[2] http://www.nlg-npap.org

[3] http://www.nlg.org. For the San Francisco area, see http://www.nlgsf.org

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