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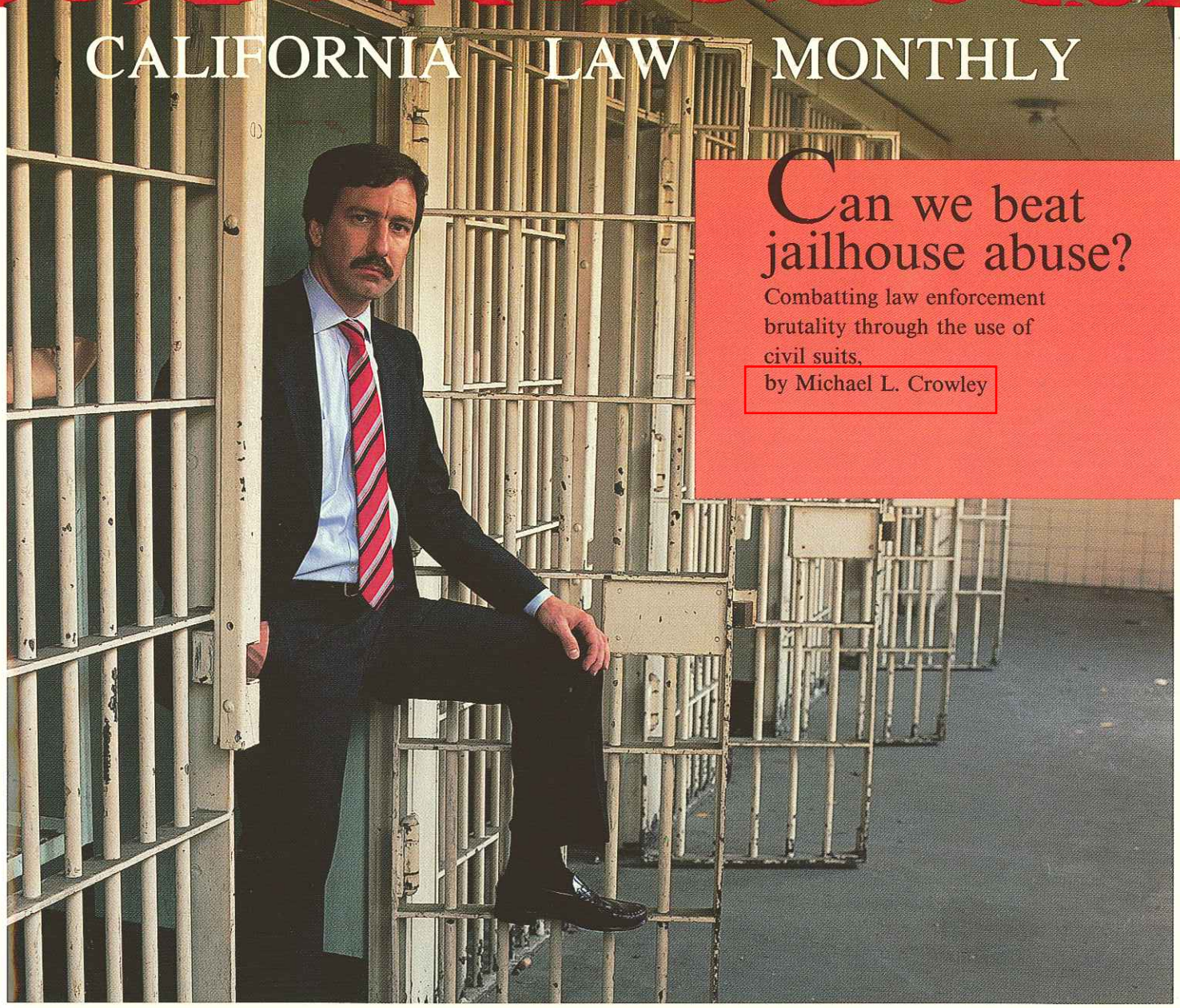

Can we beat jailhouse abuse?

Combatting law enforcement brutality through the use of civil suits,
by Michael L. Crowley

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JULY 1988 VOL. 10 NO. 7

BARCLAYS
CALIFORNIA LAW MONTHLY

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BARCLAYS CALIFORNIA LAW MONTHLY (ISSN 0164-3835) is published monthly by Barclays Law Publishers at 384 Oyster Point Boulevard, South San Francisco, CA 94080-1992. Second class postage paid at South San Francisco, CA.

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DIGEST OF NEW LAW includes all recent cases (except criminal) from the California Supreme Court, Courts of Appeal, U.S. Supreme Court, Ninth Circuit and Ninth Circuit Bankruptcy Appellate Panel, as well as selected cases from the Federal and D.C. Circuits with application in California. Also reviewed are California Attorney General opinions, new statutes and selected administrative regulations. Included in the Digest section are all U.S. and California Supreme Court pending cases, organized by practice area.

Comment/Michael L. Crowley

Rocking the jailhouse: guidelines for successfully litigating law enforcement abuse cases

JIM BUTLER is a former priest, Navy chaplain and winner of the Bronze Star. He was repeatedly beaten, his shoulder was dislocated, and he was denied medication for his high blood pressure while in the Vista Detention Center in San Diego County. Judy Hejduk, a 20-year-veteran flight attendant and mother of two, was also repeatedly beaten, stripped naked and chained in a cell at the same jail for more than 12 hours. Both had been arrested for misdemeanors that were eventually dropped.

These are just two of the alleged abuses of inmates in the San Diego County jails which have dominated the media for months in this predominantly law and order/military city. The publicity has reportedly spawned the proverbial "opening of the floodgates" of litigation.

Since the county's major metropolitan newspaper, the *San Diego Union,* recently began reporting on this issue, more than 100 men and women called the paper during a six-week period alleging that they were beaten, stripped, chained or held naked in one of the county's jails. Most of those complaining, according to the *Union,* were arrested for misdemeanors, generally involving alcohol.

Union reporter Valerie Alvord says she has never received such a response from any other subject on which she has reported. Additionally, Alvord says all the contacts have been of a nature complaining of the abuse, "none of them (the calls) have been negative about the stories."

Sheriff John Duffy has responded by attacking the alleged victims as mostly having criminal records or being "stoned out of their heads" at the time of their arrest. Duffy has cited statistics compiled by the Sheriffs' Department showing that the incidents of excessive force in the jails are rare.

But the public allegations have led the F.B.I. and the county grand jury to launch separate investigations potentially leading to indictments. Meanwhile, the local chapter of the A.C.L.U. has decided to set up an Abuse Hotline to go into effect sometime later this year. The Hotline is intended to advise victims and provide referrals to attorneys handling these types of matters.

Lawsuits against jailers

Litigation previously handled by a few sympathetic criminal defense attorneys and the A.C.L.U. is now making its way into the mainstream of tort litigators. In the past, some normally radical defenders of the injured who have no problem suing municipalities for improperly maintained roads have shied away from these lawsuits.

Hejduk, 41, says she did not pursue a lawsuit against San Diego County because she was discouraged from taking any action by two separate attorneys. She also received incorrect advice concerning the statute of limitations. Although Hejduk has now filed a claim with the county after receiving further advice, it is likely the county will utilize the "governmental claims statute" (Gov. Code sections 910 *et. seq.*) to deny her claim.

This article will examine the claims statute and other major concerns when bringing this type of action including:

- whether to file in state or federal court (there is concurrent jurisdiction over civil rights cases under *Martinez v. California* (1980) 444 U.S. 277 and *Maine v. Thiboutot* (1980) 448 U.S. 1),
- whether to include a federal civil rights cause of action if filing in state court,
- implementation of crucial discovery as governmental entities have become accustomed to withholding documents concerning law enforcement officers when they are requested in criminal cases. Attorneys for the entities attempt to carry this concept over to the civil abuse cases and it is therefore critical to get early and complete discovery.
- protecting your client from character assassination, which is the classic defense in these types of cases, and
- obtaining attorney fees from the defendants.

The claims statute

The first concern of anyone handling a police or sheriff abuse case is compliance with the draconian nature of the statute of limitations under the claims law. Previously, any claim against a governmental entity had to be filed with the entity within 100 days from the injury. (Government Code section 911.2.) The 1987 state legislature saw fit to change the claim period to six months, effective on January 1, 1988.

However, there was no mention in the legislation concerning any retroactive effect and no reported decisions at this time concerning claims occurring at the end of 1987. The argument should be made that even though an injury occurred in late 1987, one has six months to file the claim if that period would run into 1988.

Any attempt to be relieved from the statute has been met with a narrow interpretation of "excusable neglect," by both the entities and the courts. Application to present a late claim is made pursuant to Gov. Code section 911.4. The courts have been consistent in denying relief, even when the victim received erroneous advice from an attorney (*Mitchell v. State Dept. of Transportation* (1985) 163 Cal.App.3d 1016, 210 Cal.Rptr. 266) or when counsel is unaware of the statute. (*Torbitt v. Fearn* (1984) 161 Cal.App.3d 860, 208 Cal.Rptr. 1).

Potential plaintiffs are left with two options if the claim statute is blown. They can, of course, sue their attorneys for malpractice, or they can pursue fed-

eral civil rights actions which are *not* subject to the claims statute, according to both the federal and California courts. *Toscano v. County of Los Angeles Sheriff's Dept.* (1979) 92 Cal.App. 3d 775, 784, 155 Cal.Rptr. 150; *Williams v. Horvath* (1976) 16 Cal. App.3d 834, 842, 129 Cal.Rptr. 453; *Ney v. State of California* (9th Cir. 1971) 439 F.2d 1285.

State or federal court?

Before filing an abuse case, counsel should always consider the various pros and cons of both filing in state or federal court, and if filing in state court, whether to include a federal civil rights cause of action. It is much better to have the choice, i.e. if the claims statute has been satisfied.

The typical federal civil rights action for abuse in the jails is the Civil Rights Act of 1871. (42 U.S.C. § 1983.) There are severe consequences to being limited to an action under section 1983. First, it is tougher to prove a civil rights violation than an unprivileged battery, false arrest or false imprisonment. Although the seminal case on section 1983, *Monroe v. Pape,* (1961) 365 U.S. 167, likened civil rights violations to state tort liability (*Id.* at 187) the Supreme Court since then has narrowed the liability. See, e.g., *Baker v. McCollan* (1979) 443 U.S. 137.

For example, in California to prevail in an excessive force case, the same element of an assault and battery are utilized (i.e. "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another;" (Penal Code section 240—definition of assault) or "any willful and unlawful use of force or violence upon the person of another." (Penal Code section 242—definition of a battery)). Proof of the additional element that the force was not reasonable is usually required. See Penal Code section 835a.

In a civil rights action the burden is greater. *Johnson v. Glick* (2d Cir. 1973) 481 F.2d 1028. A plaintiff must prove a constitutional violation. For example, in an excessive force case the typical constitutional allegations are under the Fourth Amendment for unreasonable search and seizure, the Eighth Amendment for cruel and unusual punishment and for those detained but *not* arrested (merely "temporarily detained" under police parlance) or convicted, the substantive due process of the Fourteenth Amendment—the admonition against deprivation of life, liberty or property without due process of law.

The syllogism necessary to analyzing whether there is a civil rights violation is analogous to the archaic but often used metaphor of trying to nail jello to a tree. There are cases to support or oppose nearly any position or fact pattern.

The second serious drawback to federal civil rights action is the lack of respondeat superior as to the governmental entity. Initially, under *Monroe,* a plaintiff could not even bring an action against the municipality, only the officers involved. *supra* at 187-92. *Monroe* defined "person" in the statute to exclude governmental entities. *Id.* In 1978 the watershed case of *Monell v. Department of Social Services* (1978) 436 U.S. 658 the Court reversed itself on the definition of "person" but only to allow liability when there is violation due to an "official policy." This concept has been relentlessly limited by the Burger and Rehnquist Courts. e.g. see *St. Louis v. Praprotnik* (1988) — U.S. —, 48 CCH S.Ct. Bull. 1053.

Finally, there is one more pitfall under a civil rights action. In years past, judges and juries alike have often let the individual officers off the hook by only finding liability of the municipality. The Supreme Court says that is no longer a viable option. In the 1986 case of *City of Los Angeles v. Heller* (1986) 475 U.S. —, 106 S.Ct. 1571, the Court said if you don't find an individual liable then there can be no municipality liability. *Id.*

There is also, of course, a statute of limitations for federal civil rights litigation. Because there is no limitation in the statute, courts have had to analogize to the closest state limitation. This has generated a great deal of litigation. In an attempt to standardize the limitations period, the Supreme Court in the case of *Wilson v. Garcia* (1985) 471 U.S. 261 said that a state's personal injury statute of limitations should apply.

In most states, this ruling lengthened the statute, but in California with its relatively short personal injury statute of limitations (one year under Cal. Code of Civ. Proc. section 340(3)) it shortened the time. Previously the Ninth Circuit had ruled that the statute of limitations in this circuit would be three years.

There was no ruling in the *Garcia* case as to the retroactive effect of the ruling. The Ninth Circuit has in essence ruled that there is retroactivity when it serves to extend the statute of limitations period (*Rivera v. Green* (9th Cir. 1985) 775 F.2d 1381) and no retroactivity when it shortens the period. (*Gibson v. United States* (9th Cir. 1985).

A unique approach to the statute of limitations by a district court judge appears in *Cabrales v. County of Los An-*

geles (C.D. Cal. 1986) 644 F. Supp. 1352. The judge said the statute of limitations was either three years from the date of injury or one year after the date of the *Garcia* decision on April 17, 1985, whichever was shorter. *Id.* at 1356. In the *Cabrales* case the plaintiff had filed one year and one day after the *Garcia* decision. The court dismissed the complaint. *Id.* At least one San Diego Superior Court has accepted the *Cabrales* argument.

One should also take into consideration the possibility of removal if filing in state court but including a federal civil rights claim. Various municipalities have differing policies on whether to remove these cases pursuant to 28 U.S.C. section 1441. Some, such as the City of San Diego, leave the matter up to the individual deputy city attorney, but seem to be adopting a removal policy to get out from under the county's tough Fast Track rules in Superior Court.

The discovery problem

Thus, once one has filed the complaint they should move immediately for discovery. The governmental entities and especially the law enforcement agencies will resist discovery requests vociferously. Persistence on the part of counsel is crucial to success as in any civil action. Discovery requests ("demands" under the new discovery act) should include:

1. the offending officer's personnel files to ascertain whether he or she has had previous problems with excessive force;

2. jail records as to who was on duty during the abuse and who were inmates at the time for obtaining witnesses;

3. possibility of video tapes used in the jails;

4. the governmental entity's operation or training manuals;

5. citizen complaints and the internal affairs investigation reports concerning the officers involved;

6. the incidents when the officers involved have filed criminal charges under Penal Code sections 148, 243 or 243.1 (Charges concerning resisting or obstructing officers and batteries on police or custodial officers are often brought against victims of abuse in order to counteract the abuse complaint by the victim.) Be sure to be on the lookout for the "switcheroo"—the district attorney agrees to drop the criminal charges brought against your client by the offending officer in exchange for your client's dropping of the civil case. Prepare your client in advance for this possibility.

The demands concerning the personnel records of the officers involved and citizen complaints cannot be made in the ordinary course. A motion must be made under Evidence Code sections 1043 and 1045 which are similar to a *Pitchess* motion in the criminal field.

Confidentiality of the officer and the complaining witnesses/victims is ostensibly the purpose of this statute. This concept along with arguments citing lack of relevancy are the contentions one has to fight in order to obtain the documents.

In opposition to these arguments you should utilize the following:

1. Evidence of defendant's (officer's) proclivity for violence is probative; *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212, 221; *Hinojosa v. Superior Court* (1976) 55 Cal.App.3d 692, 696-697.

2. Previous charges against officers are relevant even if unsubstantiated. *Kevin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 829.

3. Personnel records that are material are discoverable. *Pierre C. v. Superior Court* (1984) 159 Cal.App.3d 1120, 1122.

The judges vary widely in what they will require to be produced. An in camera review of the documents by the judge is required. Judges accustomed to putting severe limitations on discovery in criminal cases should be reminded that your case is a civil case in which the relevancy is greater than that in a criminal case. You should also point out to the judge your high burden of proof in a civil rights action under *Monell, supra,* i.e. a showing "that the City tolerated improper conduct and the officers knew it."

Counsel should also argue the merits of a balancing test and the merits in your particular case. One of the best analyses of a balancing test that I have seen is in *Frankenhauser v. Rizzo* (E.D. Penn. 1973) 59 F.R.D. 339. Another good case for illuminating the necessity of discovery due to the burden of proof on the plaintiff is *Skibo v. City of New York* (E.D.N.Y. 1985) 109 F.R.D. 58.

Use of public records

Don't overlook the possibility of public records such as Civil Service hearing records and the civil and criminal indexes for informal discovery. These types of records can be especially useful in comparing what was obtained from public records to the discovery turned over by the governmental entities.

This discovery is critical to keep the governmental entity in the case either under a respondeat superior theory or *Monell, supra.* Even though California statutorily indemnifies public employ-

ees who are found liable (Gov. Code section 825), it is important to keep the governmental entity in the case because without the municipality it makes it easier for county or city attorneys to generate sympathy for the individual officer.

Counsel must always guard against character assassination of the client by all those involved on the defense. A close check of any record the client may have is imperative. If the client is the only witness to the beating, as is often the case, one has to determine what past client conduct is admissible as to his or her credibility under federal and state evidence rules.

Attorney's fees

One final consideration near and dear to the heart of all attorneys is the recovery of attorney fees. The prevailing party may be awarded attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. section 1988) and under the California private attorney general rules. (Cal. Code of Civ. Proc. 1021.5).

Plaintiffs are favored over defendants in the recovery of fees and the United States Supreme Court has ruled plaintiffs "should ordinarily recover attorney's fees unless special circumstances would render an award unjust." *Hensley v. Eckerhart* (1983) 461 U.S. 424, 429.

A plaintiff is considered a prevailing party if successful "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Coalition for Economic Survival v. Deukmejian* (1985) 171 Cal. App.3d 954, 961.

Fees are calculated under what is called the "lodestar" method. That is, the number of hours reasonably spent on the litigation is multiplied by an hourly rate that reflects the market value of a particular attorney's time as determined by factors detailed in *Johnson v. Georgia Highway Express Co.* (5th Cir. 1974) 488 F.2d 714.

One pitfall for attorneys in civil rights cases is the recent decision of *Evans v. Jeff D.* (1986) ___ U.S. ___, 89 L. Ed.2d 233, in which the Court held that a defendant can force the attorney to waive attorney fees in order to get a settlement. In other words, the defendant can agree to settle, giving your client relief, if attorney fees are waived. This, of course, puts the attorney in a tough ethical position.

Conclusion

Whether the plethora of new litigation in San Diego will remedy the apparent problem in the jails or it will come from the actions of the F.B.I. or grand jury, new legal precedents are sure to be made. Attorneys in Los Angeles report that abuse in the jails is apparently not as acute there as in San Diego and, according to reports, also in Orange County.

In Los Angeles, due to a 10-year-old class action, attorney monitors have regular access to all parts of the jail and tour the facilities talking to inmates on a regular basis, according to Rebecca Jurado of the Los Angeles A.C.L.U. In San Diego, no class actions regarding abuse have been brought, but the downtown jail is under a court order concerning overcrowding—a problem often cited as contributing to the abuse problems.

Recently, the *San Diego Union* reported that several sheriff deputies have come forth anonymously to confirm reports of abuse in the jails. The deputies told the press that the abuse is common practice and the result of peer pressure and a lack of strong management. Testimony of this type could, of course, be critical to the plaintiff's burden of proof necessary to show the policy of the department under *Monell, supra.*

Abuse cases are neither easy nor do they often yield quick settlements. Counsel must go into this type of litigation assuming they will go to trial. All evidence should be prepared for trial and with an eye toward admissibility. All witnesses should be kept in close contact and prepared thoroughly for depositions and trial. Carefully thought out strategy at the beginning of a case and an aggressive discovery posture will produce successful results in meritorious cases.

Michael L. Crowley is a solo practitioner in San Diego and the editor-in-chief of *Dicta,* the monthly magazine of the San Diego County Bar Association.