

Reflecting on the Diversity & Inclusion Committee's Police Liability Programs

By Kiera Murphy and Katherine Earle Yanes



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George Floyd was a Black man who died at the hands of Minneapolis police officers on Memorial Day of 2020. Widespread protests followed, with chants of “I can’t breathe” reverberating in our consciences. The outrage over Mr. Floyd’s death sparked an ongoing national conversation on law enforcement training and liability. As part of that conversation, the FBA Diversity & Inclusion Standing Committee organized a two-part program to educate the legal community on use of force, racial profiling, and prosecutions of the police.

Because the theme of this edition of *The Federal Lawyer* is civil rights, we want to again share the insights that were discussed during the presentations. And with the criminal trial of the police officers involved in George Floyd’s death approaching this spring, it is imperative to stay engaged with these issues. We thus hope that this article is educational for those of you who are not experienced with police liability issues, and for those of you who are, we hope that you continue to work toward justice and equity.

The first panel featured three experts on police training and prosecution:

- Dr. Alex Del Carmen, the associate dean for the Tarleton State University School of Criminology, who has trained approximately 15,000 police officers and all the Texas police chiefs on racial profiling.
- David Douglass, managing partner of the D.C. Sheppard Mullin office and deputy federal monitor over the New Orleans Police Department.
- Andrew M. Luger, a former U.S. attorney for the District of Minnesota who oversaw the federal investigation into the police shooting of Philando Castile.

The program began with several insights from Dr. Del Carmen on law enforcement training and oversight. First, he explained that the definition of “use of force” varies widely throughout the United States, with some police departments even deeming an officer merely removing his or her gun from its holster

a use of force. The use of force training that officers receive varies widely as well, with some departments analyzing how to approach different situations rather than going through physical exercises. Second, Dr. Del Carmen framed the question of racial profiling not as the motivation for a stop, but rather as the outcome of a stop. For example, if a given officer stops and searches 100 white men and 100 black men in a year but finds contraband on 50 percent of the white men versus 10 percent of the black men, the outcome of the officer’s searches begs the question of whether there was racial motivation. Likewise, focusing less on the motivation for a stop could avoid the question of whether the officer had a pretextual excuse for his or her actions.

Mr. Douglass and Mr. Luger then spoke on the legal process surrounding law enforcement prosecutions. Mr. Luger first answered the question of what else had to be investigated when an encounter is videotaped. He told listeners that discerning a defendant’s intent is paramount. Important evidence of a defendant’s intent could be his or her statements to others in the moments just after the use of force happened. And he further explained that the public’s frustration with how long an investigation may take showed a not necessarily unjustified lack of trust in the criminal justice system. Mr. Douglass later discussed strategies for combatting racial bias in law enforcement prosecutions. He suggested breaking the incident down moment by moment for the jury, stressing at each point that the officer’s reaction stemmed from implicit bias regarding the victim’s race.

All three speakers lastly discussed several solutions to increase law enforcement accountability. Dr. Del Carmen suggested that we implement universal training and guidance on use of force, when deadly force can be used, and behavior constituting racial profiling. Mr. Douglass and Mr. Luger thought that these solutions could decrease improper use of force (thus decreasing prosecutions), create a uniform legal standard by which to measure officers’ behavior, and shift law enforcement culture to one that emphasizes de-escalation techniques.

The second panel included three seasoned defense attorneys with deep experience in representing officers against criminal and civil liability:

- Drew Findling, immediate past president of the National Association of Criminal Defense Lawyers, who also represents celebrities such as Gucci Mane and Cardi B.
- Sharonda Williams, a former city attorney for the city of New Orleans.
- Celeste Koeleveld, formerly a criminal division chief at the U.S. Attorney's Office for the Southern District of New York and an executive assistant corporation counsel at the New York City Law Department.

Mr. Findling discussed the unique facets of cases against law enforcement officers, including the rights officers have under *Garrity v. New Jersey*.¹ As Mr. Findling explained, when a law enforcement officer or other public employee faces an accusation regarding employment-related activity, any statement the employee is required to make as a condition of their employment may not be used against the employee. Attorneys defending a law enforcement officer must be vigilant to ensure that the officer's statement is not used in the course of a potential criminal investigation of the officer's actions and does not taint the decision of whether to charge the officer with a crime. Mr. Findling also discussed the types of expert witnesses that may be important in a criminal case involving a law enforcement officer, such as use of force experts, human factors experts, and forensic enhancement experts.

Ms. Williams and Ms. Koeleveld discussed the doctrine of qualified immunity, under which a law enforcement officer is protected from civil liability unless the officer violates clearly established statutory or constitutional rights of which a reasonable person would have known. The first step in the qualified immunity analysis is to determine whether there was a constitutional violation, while the second step asks whether the right was clearly established, or whether it was objectively reasonable for the officer to believe that the officer's actions did not violate clearly established law. The rationale for this standard is to protect officers in high-pressure situations by allowing room for mistakes in judgment. The panelists also discussed whether the qualified immunity doctrine has been stretched too far in protecting all but the most egregious violations.

Conversely, qualified immunity does not protect municipalities. The primary issues in cases involving agencies or municipalities are whether a plaintiff can demonstrate a pattern or practice, custom, or policy of a department that leads to constitutional violations. Alternatively, there may have been deliberate indifference or disregard of a known or obvious consequence of actions by officers in accordance with a pattern or practice of officers.

The panelists next highlighted how systemic issues such as the training an officer received and the department's policies can affect liability. Mr. Findling explained that in defending an officer against criminal liability, the training an officer has received—or has not received—may be critical to evaluating the officer's actions. He stated that in order to defend law enforcement officers, a lawyer must be willing to “attack the system,” such as by filing public records requests and determining whether the training the officer received was inadequate. Officers may be placed in complex, life-and-death situations with very little education on how to handle those situations.

There may also be issues involving implicit bias and structural racism that the officer's training may never have addressed.

Training may also play a role in defending civil cases as well; sound training that the officer followed will support the defense of both the officer and the municipality, while if the officer deviated from the training he or she received, the municipality may not be able to defend itself. With that said, Ms. Koeleveld expressed that implicit bias training is a must at this point, and municipalities that do not provide such training are placing themselves at risk for claims. Training must also address use of force and what types of force are acceptable. The panelists likewise strongly supported providing officers with de-escalation training as well as hands-on training that simulates real-life scenarios, as opposed to just lectures.

Along with the quantity and types of training officers receive, the panelists concluded with a discussion on other policy solutions. Ms. Williams discussed aspects of the consent decree the city of New Orleans entered into, which included, among other requirements, revised use of force policies, community policing, retention and hiring practices, body-worn cameras, and mandatory reporting policies. Ms. Koeleveld suggested the creation of a compensation fund, in which individuals who had suffered a harm, such as a wrongful conviction or an injury by law enforcement officers, could be compensated for the harm without requiring them to show fault or intentional wrongdoing by law enforcement.

The recent deaths of Mr. Floyd and others at the hands of law enforcement officers have ignited protests, discussions, and calls for change across the country and throughout the world. As members of the legal profession, we are uniquely situated to educate ourselves about these complex and nuanced issues, share our knowledge with members of our community, and contribute to the national dialogue. We must seize this opportunity to transform a system that too often fails to protect the least privileged among us and not allow the chants of “I can't breathe” to fade from our minds until justice is served. ☺

Endnotes

¹385 U.S. 493 (1967).

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