

EVALUATING YOUR POTENTIAL POLICE MISCONDUCT CIVIL RIGHTS CASE

by Ben Rosenfeld, Attorney
San Francisco, CA¹

Last Updated March 2010

CONTENTS

I. OVERVIEW AND DISCLAIMER	2
II. A “CIVIL SUIT”	2
III. THE LAWYER’S BOTTOM LINE (“ <i>What’s s/he thinking?</i> ”)	3
IV. EVALUATING YOUR CASE	3
V. STATUTES OF LIMITATIONS AND OTHER DEADLINES	6
VI. FILING YOUR CASE WITHOUT AN ATTORNEY (IN “PRO PER”)	10
A. Can You Afford It?	11
B. Avoid Communicating Directly with Officials	11
C. Communicating with Witnesses	12
VII. TYPES OF CLAIMS AGAINST LAW ENFORCEMENT OFFICIALS	12
Federal Law Claims	12
State Law Claims	13
Qualified Immunity	13
Other state and federal claims	14
Limits on Municipal Liability	14
Limits on State Liability	14
Other Differences Between Federal and State Court	14
VIII. SUMMARY OF OPTIONS	15
IX. CONCLUSION	18
X. OTHER RESOURCES	18
A NOTE ABOUT REVISIONS OF THIS GUIDE, AND POSTING	19

¹ For credentials and references, see, e.g., the attorney search section of the California Bar website at www.calbar.org, or information at www.cldc.org.

I. OVERVIEW AND DISCLAIMER

This primer was first developed to aid San Francisco Bay Area residents – particularly, political and social activists – in evaluating and preparing their police misconduct civil rights cases. It is not intended as legal advice. And since every case is different, it is not a substitute for individualized legal advice. A number of the legal rules discussed – including, especially, the citations to California statutes – might not apply outside of California. For instance, the discussion about statutes of limitations is very specific to California (although other states might have similar frameworks.) Finally, since the law is always changing, all readers, including California readers, should be sure to update this information.

II. A “CIVIL SUIT”

If you are a victim of police abuse, you might be considering whether to file a civil lawsuit (sometimes called a civil “action” or “complaint”). In a civil suit, *you* are the plaintiff, and the police officers and/or government entity are defendants. A successful civil suit culminates in an award of monetary damages. In rare cases, it may also lead to “injunctive relief”, such as an order or agreement that the police or policymakers do, or refrain from doing, one or more things. In all but the rarest cases, the municipality pays the settlement or judgment.²

Unlike a criminal case, a civil suit does not result in a jail sentence. While you can lodge a complaint with a prosecutor (the district attorney, or the state or federal attorney general) , or file a complaint *with* the police *against* the police – only prosecutors and judges have the power to initiate criminal proceedings.

Despite the glut of lawyers, there are relatively few lawyers available and willing to handle civil rights cases, in part because civil rights cases are notoriously difficult to maintain and win. Lately, the Supreme Court puts us a little more out of business every time it sits down.³ Moreover, civil rights cases are financially risky for lawyers who sometimes “front” part or all of the costs of litigation and defer their fees until the end – sometimes years away – on behalf of their usually indigent clients.

In short, there is a big chasm between the righteous case and the winnable case, and many deserving people fall into this chasm.

² See, e.g., California Government Code § 825(a), indemnifying police officers. See also, 28 C.F.R. § 50.15(c)(1) and (4), providing for indemnification of federal officials.

³ See, e.g., Equal Justice Society (www.equaljusticesociety.org) for analysis of rollbacks of civil rights protections.

III. THE LAWYER'S BOTTOM LINE (“*What’s s/he thinking?*”)

The typical police misconduct civil rights lawyer is overworked and underpaid (*I know, cry me an ocean*), spends a large part of every day giving out free legal advice, does an inordinate amount of pro bono and volunteer work, and hasn't taken a non-working vacation in years. Many of us accept cases on “contingency”, meaning that we do not expect to get paid unless the client wins or settles. Then, we expect to take a “cut”, typically between 33% and 50%, depending on the nature of the case, and the stage at which it concludes.

Civil rights attorneys strike different financial arrangements with their clients depending on such factors as the nature and riskiness of the case, the client's financial circumstances, the attorney's financial circumstances, and the attorney's current caseload (i.e. number of long-shots vs. more viable cases). Some of us pay the costs of the lawsuit out of our own pockets, but depending on the scope of the case and the client's ability to pay, we may require the client to pay some or all of the costs. In some cases, we may take a retainer, which is a fee designed to compensate us for having to turn down other work that would conflict, ethically or time-wise, with the retained case, as well as to offset some of the financial risk.

While it may be reasonable for a civil rights attorney to ask an indigent client for a retainer fee before taking a long-shot case, requesting a large fee for a small case might signal that the attorney has doubts about the likely success of the case. A responsible attorney would sooner advise a client not to pursue a tenuous case, but this calculation may be hard to make ahead of time for a variety of reasons, including the often abstract value of damages in a civil rights case.

You should understand that although your civil rights attorney probably shares many of your political views and would like to support your activism, you are one among numerous people asking for assistance, and the attorney cannot stay afloat, or sane, by providing charity to everyone who requests it. Therefore, if possible, you should approach an attorney with ideas about how to share the workload and/or the costs in your case.

IV. EVALUATING YOUR CASE

Whether or not you should pursue your civil rights case, and whether or not you will be able to interest a lawyer in it, will depend in part on the following factors:

- 1. Have you been criminally charged in the incident?** If so, however unjust the charges may be, your primary focus should be on your criminal case. Freedom is more precious than money. Also, filing a civil claim or lawsuit while your criminal case is pending might cause the government to work harder to secure your conviction, since a

conviction or guilty plea likely will bar your civil case, in whole or in part.⁴

Moreover, pursuing your civil case may require you to make statements about the incident, which in turn will provide “discovery”⁵ and investigative opportunities to the police and the prosecutor – no doubt to the consternation of your criminal defense attorney. In contrast, if you wait a while (but not too long), you may find that your criminal attorney has gathered valuable discovery for *your* benefit in an eventual civil suit. The law gives you some time before you have to file your civil case. (See discussion concerning statutes of limitations, below).

2. Is it worth it? Lawsuits are time-consuming and costly (financially and emotionally). Your lawsuit might redress the injustice done to you and deter future misconduct. Or, it might rob the community, including your family and friends, of your valuable contributions in other areas of life during the time you are embroiled in your lawsuit. If you are a political protester, remember that you probably didn’t show up originally to protest the police.

3. Do you have evidence? Theoretically, you could win or settle a lawsuit based solely on your word against the officer’s (or more likely, *officers’* plural), but you probably won’t. You need some evidence. Really, you need a lot. You have the burden of proving your case by a “preponderance of the evidence,” and the verdict must be unanimous in federal court, or by at least a three fourths majority or better in a California Superior Court. It should not come as a shock that police often lie in their reports. Some of them are practiced liars. Jurors are seldom your peers; they probably have not been victimized by the police. They tend to presume that police are honest, sacrificing, and heroic, and that they would not have tormented you unless you deserved it. So, bitter as the pill may be, if you don’t have enough evidence to overcome this presumption, your case probably falls into the righteous but unwinnable category. With some evidence, you

⁴ See, e.g., *Heck v. Humphries*, 512 U.S. 477, 486-87 (1994): “We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote 6 omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.” But see also, e.g., *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984) (“As with excessive force, appellants may recover for other injuries caused by acts independent of their arrest even if the arrests are found to be supported by probable cause.”)

⁵ “Discovery” means the phase of a lawsuit in which the parties demand and exchange information. The term “discovery” is also used as a shorthand by attorneys to describe the information which is exchanged, including written documents, reports, and transcripts, other media, depositions (pretrial testimony under oath by the participants and witnesses to a lawsuit), and inspections of places, things, or people.

might have a shot at a settlement, but your chances of getting a lawyer willing to invest his/her time and money for such paltry prospects are slim.

Evidence takes many forms, including witness testimony, prior witness statements or testimony (i.e. transcripts), police reports, videos, photographs, and police personnel records (involving prior citizen complaints). You are a witness, so the evidence includes your testimony. You *will* have to testify; you do not have the right to remain silent in a civil case.⁶ Evidence also includes contradictory or illogical police statements, affidavits, reports, logs, dispatch recordings, etc. Sometimes, it includes things which the police should have done, but omitted to do, like interview witnesses, collect evidence, or conduct follow-up investigation. If the official story is plainly inconsistent or illogical, you might prevail even without any independent evidence of your own. But rarely is their story *plainly inconsistent*.

4. How do you rate in the popularity contest? “The great thing about our democracy”, the trite expression goes, “is that all people stand equal before the law”. The police must follow the law and respect your rights, even if you misbehaved. However, every lawsuit is, ultimately, a popularity contest, and a competition for the sympathies of the people who will decide your case – the judge, jurors, and to some extent, the attorney(s) for the government (who will make settlement recommendations, or not, based on how well you come across to them). In the real world, these people will bend over backwards to decide the case against you if they don’t like the way you acted. And while pointing out to jurors that the police ignored their own rules can make a powerful case, if jurors have to deliberate over your bad behavior, there is a high risk that they will cast their votes based on passion or prejudice, not law.

Of course everyone’s civil rights are entitled to respect and advocacy, and many hard working attorneys, such as prisoners’ rights attorneys, represent people who behaved badly at one time almost by definition. But the psychology of asking jurors to award damages to a person confined and “paying his/her debt” for an earlier transgression is very different from asking jurors to award money to someone whom they believe helped provoke the incident in question. Thus, while you have the right to flip off the cops, call them pigs, or chastise them for their pastry preferences, if they smack you around a little during your jaywalking citation for doing so, a mainstream, thin-blue-line comforted jury might not feel sorry enough for you to want to give you money.

Needless to say, the police won’t admit at trial that they beat you for flipping them the bird; rather, they’ll say they thought you posed a danger to yourself or others, and when they went to detain you, you were combative.

A good protest does not always a good lawsuit make. Sometimes, it may be that you can have a good, boisterous protest or a good legal case, but not both.

⁶ That is, you can remain silent, but if you do, your case probably will be dismissed.

5. How do you rate in the credibility contest? If the facts are in dispute, as they usually are in police abuse cases, your lawsuit is also a competition for credibility. Credibility turns on many factors, and sometimes just a sense one person gets about another (unconsciously incorporating, of course, his/her own biases). But some things plainly undermine credibility. Chief among these is getting caught in a lie. Even if it is a small lie, the other side will exploit it to great effect (as will we, when we catch the police overtly lying), and rail up and down that the liar cannot be trusted about anything.

Even innocent mistakes, careless summaries, evolving accounts, and small exaggerations can cost you. Being human, jurors don't expect people to have perfect recall, but they may tend to wonder: *if it was such a grave injustice, why does s/he seem to remember it a little differently each time s/he recounts it?* This is why lawyers, as a general rule, try to discourage their clients from making many oral or written statements about their cases before trial.⁷

If you have a long rap sheet, jurors will tend to believe you are a ne'er-do-well, up to your usual rotten deeds. If, during your case, a juror spots or reads about you engaging in offensive behavior, this will cost you. If you get in "more trouble" while the case is pending, the other side will exploit this fact. And your lawyer will eat the costs...and then eat the wood veneer off his/her cheap desk in order to subsist the next month.

6. Is your case timely? A case must be timely filed, within the applicable statute of limitations. (See discussion below.) In addition, if you hope to interest a lawyer in your case, you should approach him/her with ample time to investigate it before the time runs out.

Summary so far: In short, the best way to have a winnable, civil rights case is to be a good and honest person who was grievously wronged, with evidence to prove it.

V. STATUTES OF LIMITATIONS AND OTHER DEADLINES

NOTE: Please recall that the following discussion is specific to California, even though other states might have similar frameworks. The reader should consult a local attorney about the deadlines which apply in his/her particular case, even in California.

Statutes of Limitations (affectionately, "statutes"), intended to be uniform and simple, are instead, like all things legal, convoluted and complex. The times provided

⁷ In some "political" cases, public outreach and education might be a very important component, justifying an exception to this general rule.

Generally, if you want to preserve your recollection of events, it is wisest to compose them in an "attorney-client" privileged letter to your attorney (or any attorney you are consulting about the case), and then to make sure to keep the letter confidential, so as not to destroy the privilege. If you show the letter to others who are not party to the privilege, then your opponents might be able to demand to see it, and/or introduce it at trial.

below are to help you err on the safe side; read them as running from the date of the incident. These are general markers; they may differ in your particular case.

12 - 24 Hours: Many store surveillance tapes and the like are on a continuous loop, so that if you do not ask to have them preserved, they will automatically tape over themselves. (Of course, your request to preserve them is only as good as the manager's or custodian's willingness to comply. You should send all requests by certified mail.)

100 Days: California police and other officials may destroy emergency dispatch and radio recordings (such as 911 calls and police radio transmissions – “CADs” in San Francisco) after 100 days. See Cal. Government Code § 34090.6. However, some cities elect to keep them longer. If they are evidence in a filed claim or pending litigation, the government is obligated to keep them until the litigation is resolved. However, government agencies seem generally oblivious to this rule. Therefore, it is advisable to write an “anti-spoliation” letter to the custodian of the records, CCd to the City Attorney (or County Counsel, if suing county officials) demanding preservation of this evidence (by certified mail). Better yet, obtain it before it is destroyed by requesting copies of it through the channels provided for requesting public records, or through your criminal defense attorney if you are being prosecuted. Again, the request is only as good as the government's willingness to comply, and if the agency destroys the evidence anyway, there is little remedy.

****WITHIN SIX MONTHS AFTER THE INCIDENT (TORT CLAIM)**:**

Under Cal. Government Code §§ 910 et seq. (meaning section 910 and the following sections), you must file a “tort claim” within six months from the date of the incident, spelling out your claim(s) and your demand(s), in order to preserve your right to file a lawsuit later based on violations of state law.⁸ **This is a confusing, but non-negotiable requirement, and a big trap for the unwary, so do your best to understand it.** You may not file a lawsuit based on state law claims until after you file the tort claim, and either (a) the municipality rejects it, or (b) waits more than 45 days without acting on it.⁹ After that, you have only six more months in which to file a lawsuit based on state law claims.

Your tort claim gives the government an opportunity to try to settle the case by making you an offer. In all likelihood, however, the government will deny your claim, since police misconduct cases are politically sensitive and highly contentious. If they make you an offer, you can accept, reject, or seek to negotiate it.

A tort claim is not a lawsuit; rather, it is an administrative hurdle which precedes a lawsuit. It is a form of notice to the municipality (or state) that you intend to file a lawsuit. It must include certain information, such as your name, the name and address of the person submitting the claim on your behalf (i.e. you or an intermediary – preferably an intermediary), the date, time, and location of the incident, the names of the officials

⁸ Also called, sometimes, an “administrative claim”, “notice and claim”, or “Government Code § 910 claim”.

⁹ You can look up California Code sections at <http://www.leginfo.ca.gov/calaw.html>.

who wronged you (or “John or Jane Does” if you don’t know their names), a short, factual description of the incident, a list of the violations you are alleging, the amount of damages you are seeking and why, and the date and signature of the person submitting the claim (you or your intermediary). Many municipalities have forms you can use, and they are often downloadable on the internet. You are most likely to find them housed in the City Attorney’s, County Counsel’s, Mayor’s, City Council’s, City or County Supervisors’, City Clerk’s, Controller’s offices, or online.¹⁰

It is best to have someone (e.g. a lawyer, or trusted relative or friend) submit your tort claim for you, so that your narrative description of the incident does not become a statement which could be used to impeach you, in case you make a mistake in drafting it.

You should aim to make your tort claim specific enough to establish the basic facts upon which your lawsuit will be based, and hopefully to persuade a claims adjuster to make you an offer, but vague enough to avoid tipping your hand too much to the other side, or locking yourself into details which you may not really know yet, because they depend on talking to witnesses and gathering evidence. During your lawsuit, you may be precluded from making a factual argument which you did not advance in your tort claim. However, simple, declarative statements will generally suffice.¹¹ Similarly, you should incorporate all of the legal claims which you will bring in your lawsuit, or risk waiving them. You may, but are not required, to list your federal law claims, since the tort claim requirement in Government Code §§ 910 et seq. applies only to state law claims. (See discussion of state law vs. federal law claims, Part VI below.) If you do not know the names of some of the officials responsible, save a place for them by listing them as John/Jane Does, Nos. 1 through X (where X is the maximum number of additional officials you think you might name; 20 is often a good number).

You should think carefully about the timing of your tort claim, as *you will have only six months from the date it is rejected to file a lawsuit based on state law claims*. Thus, you might accidentally shorten your own deadline if you file too early. (See discussion of “One Year” deadline, below.) **As a general rule, the optimal time to file a tort claim is between five and six months after the incident.**

You should deliver your tort claim in person to the office designated to receive it, and ask them to stamp an extra copy received, for your records. If you can’t deliver it, you should at least mail it certified, and include an extra copy with an SASE so it can be

¹⁰ In SF: <http://www.sfgov.org/site/uploadedfiles/cityattorney/fileclaim/CLAIMS.PDF>. In Oakland, visit <http://www.oaklandcityattorney.org/fileclaim.html>. For more information, see, e.g., <http://prisonerswithchildren.org/pubs/suing/tort.htm>.

¹¹ For example, it is better to write “the police violently arrested me, injuring me in the process. I sustained cuts, bruises, and strains. In addition, I suffered emotional injuries, including pain, fear, humiliation, and anxiety” than to write: “Officer Christian twisted my right arm behind my back while sweeping my feet out, causing me to fall and bruise the right side of my face, after which Officer Crusader pressed his knee into my neck.” Remember, though, that it is best not to have someone else write it, referring to you in the third person.

stamped and returned to you. The effective filing date is the date they receive it, not the date you mail it.

Note regarding claims against the United States: Before you can sue the United States Government as an entity, you must file a *federal* tort claim. The rules and limitations periods are totally different.¹² Lawsuits against federal officials in their official capacities will be deemed lawsuits against the United States, and require the timely filing of a tort claim. Lawsuits against federal officials in their individual capacities do not require the filing of a tort claim.

****WITHIN SIX MONTHS AFTER DENIAL OF THE TORT CLAIM (LAWSUIT)**:** In California, you actually have two different filing deadlines: one applies to your state law claims, and the other to your federal law claims.

State Law Claims deadline: You have six months from the date of the incident to file a tort claim, and six months from the government's letter in response to the tort claim to file a lawsuit.

Federal Law Claims deadline: In California, you have two years from the date of the incident to file a lawsuit containing federal claims.¹³

As a general rule, the wisest course is to file a tort claim shortly before the six month mark, then file one lawsuit, alleging both federal and state law claims, *within six months after the government first responds to the tort claim.* This way, you maximize your filing time, without missing the deadline for filing your California claims. Of course, there are always exceptions. (For more details, see footnote.¹⁴)

¹² See, e.g., <http://www.briefworks.com/FTCA%20Commentary1.htm>.

¹³ The federal civil rights statutes, 42 U.S.C. § 1983 *et seq.* do not contain their statute of limitations. Instead, they “borrow” the states’ statutes of limitations. In California, the statute of limitations for filing personal injury (including police misconduct) cases is two years. Cal. Code of Civil Procedure § 335.1. Therefore, in California, the applicable deadline for filing federal civil rights claims is two years from the date of the incident. See, e.g., *Kiss v. City of Santa Clara*, 2004 WL 2075444 (N.D. Cal); *Abreu v. Ramirez*, 284 F.Supp.2d 1250 (C.D. Cal. 2003).

At the same time, however, California has not changed the requirement that a tort claim be presented within six months of the injury, and that a lawsuit be filed within six months of the rejection of the tort claim. Therefore, the wisest practice still, until the law catches up with itself, is to file a tort claim shortly before the six month mark, then file one lawsuit, alleging both federal and state law claims, within six months after the government first responds to the tort claim.

¹⁴ The following footnote is for people who want to understand the difference in deadlines between state law and federal law claims:

State Law Claims: Remember that you have to file a “tort claim” to preserve your state law claims. You must do this any time within six months from the date of the incident. Thereafter, the municipality will consider, and probably reject, your tort claim. You then have six months from the date the government first responds to your tort claim in which to file a lawsuit. They will tell you this right on the notice of rejection.

If you file your state tort claim at about the six month mark, you will actually have more than a year (from the date of the incident) in which to file your state law claims,

If you neglect to file a tort claim on time, all is not lost. You can still file a federal civil rights action, based solely on federal law claims, within two years of the incident.

Exceptions, Tolling Provisions, etc.

Certain exceptions may apply in particular cases to the deadlines set forth above. They are too arcane and complex to recite here. Among the main ones, a person incarcerated at the time of the incident may get more filing time under California law, and a person whose underlying criminal case is still pending may also get more time.¹⁵ If you are alleging a conspiracy by the police or other officials, your conspiracy claim might not “accrue” (meaning, the clock might not start ticking for statute of limitation purposes) until the conspiracy has terminated. However, these exceptions are all subject to complex arguments on both sides. Furthermore, they might only lengthen the California statute of limitations, not the federal one, so it is safest to follow the general rule: file a tort claim shortly before the six month mark, then file one lawsuit, alleging both federal and state law claims, *within six months after the government first responds to the tort claim.*

VI. FILING YOUR CASE WITHOUT AN ATTORNEY (IN “PRO PER”)

You do not have to have an attorney to file a lawsuit; you can file your own case in *propria personam*, or “pro per” for short. Some people who file in pro per get an on-the-job legal education, and emerge as quasi-lawyers. Most get horribly confused, exploited, and disillusioned. Some people start their own cases, then obtain counsel later. However, most attorneys are very reluctant to take over pro per cases, because they are usually in cardiac arrest and nearly impossible to resuscitate. You are advised to get an

since the municipality can and probably will take up to 45 days to reject your claim, whereupon you will then have another six months in which to file your lawsuit.

Federal Law Claims: You have strictly two years from the date of the incident in which to file your federal claims, but you are under no tort claim requirement (except for actions against the United States as an entity; see above). That is, you don’t have to wait until after filing the California “tort claim” to file your federal claims. You could march directly into court the day after the incident and file a lawsuit based on federal rights violations. However, as discussed above, you should generally file both your federal and state law claims together in one lawsuit. Therefore, the wisest course, generally, is to file a tort claim shortly before the six month mark, then file one lawsuit, alleging both federal and state law claims within six months after the government first responds to your tort claim.

¹⁵ See, e.g., Cal. Government Code § 945.3, which requires a person to wait before filing a civil suit based on the same incident which gave rise to the pending criminal charges, until after the criminal case is resolved. Note, however, that while this section gives such a person more time in which to file the lawsuit, *it does not extend the six month period in which the tort claim is due, or in any way alter the one year deadline for filing federal claims.*

attorney. If you cannot, and you are determined to go forward, you should consider all of the factors discussed in Part IV (Evaluating Your Case), as well as well as the following:

A. Can You Afford It?

Civil suits are relatively cheap to file, but costly to maintain. You should (though you are not required to) take the depositions of all or most of the police officers involved, as well as any witnesses disclosed by the opposing side. A deposition lasting just two hours will cost \$500, give or take. (The opposing side will pay to take yours and your witnesses' depositions, but you will have to buy them from the court reporter if you want to use them – albeit for a reduced price.) Other significant expenses include investigator and expert fees. Experts can cost thousands of dollars. You may be able to cut some corners, but if you cut too many, it might cost you the case.

B. Avoid Communicating Directly with Officials

An inherent risk in proceeding in *pro per* is that you do not have an advocate or intermediary to speak through, so your statements to opposing counsel, and anyone else, are potential evidence which can be used to impeach you.¹⁶ The risks are not as great as in a criminal case, where your freedom may be at stake. If you have a pending criminal case, you should be very leery of proceeding in *pro per* in a related civil case. Talk to your criminal attorney about it first.

In general, you should seek to communicate with adversaries through an intermediary. In an abundance of caution, you should think of all of the following people as your adversaries: all opposing counsel, including the district attorney (i.e. prosecutor) and his/her staff, and the government's defense attorney (e.g. City Attorney or County Counsel) and his/her staff; all opposing counsel's investigators or assistants; the police officers involved; the other side's witnesses; and any supervising officers or oversight agencies or officials. (In a criminal case, you should also generally refrain from speaking to the judge, except through an attorney.)

There is one big exception: in a civil case, you will almost certainly have to provide testimony before trial in a deposition (and then testify again at trial). The other side has the right to call you to testify in your civil case; you cannot assert the Fifth Amendment right to remain silent (though you can still assert the Fifth Amendment right against self-incrimination in any proceeding).

Also, if you are in *pro per*, you will need to speak to opposing counsel regarding scheduling and case management issues, but you should limit such conversations to these logistical matters.

¹⁶ In some circumstances, even your attorney's statements can be used against you, though this is rare. Consult an attorney if you are concerned.

C. Communicating with Witnesses

In a civil case, the other side cannot make your witnesses talk to them, except by subpoenaing them for a deposition or trial. You can inform your witnesses of this, but you must avoid interfering, and should make clear that the witness has the choice. You must be very careful to avoid coaching, or offering any inducement to, or exerting any undue influence on witnesses. Your conversations with witnesses generally are not privileged, and the other side can question either of you about such conversations. (Some exceptions apply – for example if the witness is your spouse. However, the spousal and marital privileges are not complete, so be careful before relying on them.)

Also, in a civil case, you should take the depositions of the defendants and their witnesses, which means that you will have to talk to them to ask questions. However, they do not get to ask *you* questions when you are taking *their* depositions.

D. Keep Track of the Statutes of Limitations

Once your time runs, it runs. The courts are crowded, and the easiest way for the court to dump a case is to find that the statute has run. See discussion regarding statutes and other deadlines, above.

VII. TYPES OF CLAIMS AGAINST LAW ENFORCEMENT OFFICIALS

In a civil rights lawsuit against the police, claims may be classed as federal or state law claims. “Federal law claims” means that they arise under federal law, and “state law claims” arise under state law. Do not confuse the nature of the claim with the occupation of the defendant. You can bring either type of claim against either type of defendant. For example, “unlawful arrest” is a federal claim which arises under the Fourth Amendment to the U.S. Constitution. “False arrest” is a state claim which arises under California common law, statutory law, and the California constitution.

Federal Law Claims: The most common claims against police officers involve violations of Fourth Amendment rights (under the U.S. Constitution), such as unlawful arrest and/or imprisonment, illegal search and seizure, and excessive force. One enforces these federal rights by suing under a provision of the Civil Rights Act of 1864, codified at 42 U.S.C. § 1983 (meaning, Title 42, United States Code, Section 1983). Thus, you might bring a claim under 42 U.S.C. § 1983 for a violation of your Fourth Amendment right to be free from unlawful arrest. Such legal practice is known as Section 1983 litigation.

You may also sue federal law enforcement officers, but the jurisdiction arises not under Section 1983, but under a Supreme Court case called *Bivens v. Six Unknown Named Agents* (affectionately, a “*Bivens* action”). The law concerning such actions is not identical, but similar enough to leave it at that for purposes of this overview.

Both Section 1983 and Bivens Actions are generally brought against officials in their *individual* capacities. If you sue them in their official capacities, the Court will interpret that to mean that you are suing the municipal or U.S. Government, and a whole different set of rules applies. (See discussion re federal tort claims, Part V, above.)

State Law Claims: Most federal violations – such as unlawful arrest, illegal search and seizure, and excessive force – have state law analogs. For example, excessive force is actionable as the state law tort of “assault and battery”. (Different elements of proof, standards, legal precedents, defenses, privileges, and procedures may apply to state law vs. federal law claims, even if they describe the same conduct.) Wherever possible, a civil rights plaintiff should allege both federal and state law claims in a single complaint, even if they overlap.

In civil rights practice, both types of claims can be brought in either federal or state court. However, you cannot file state claims in federal court unless they are attached (made “pendent” or “supplemental”) to federal claims. Which claims to bring and which court to file in turn on a number of questions, too complex to discuss here. One important matter to be aware of is that if you file federal claims, the defendants are entitled to insist that the case be heard in federal court,¹⁷ and to assert the defense of “qualified immunity.”

Qualified immunity: “Qualified immunity” is a sinister and absurd legal doctrine invented by the Supreme Court essentially to exonerate the police. Police may assert the defense of qualified immunity against any federal claim, whether the claim is heard in state or federal court. However, California courts have held that qualified immunity is not available as a defense against state law claims. For example, if you bring claims against an officer for both assault and battery (a state law claim) and use of excessive force (a federal claim) in a California Superior Court, the officer could either defend the case in state court, or have it “removed” to the nearest federal court. Either way, the officer could assert the defense of qualified immunity against the excessive force claim, but not against the assault and battery claim (though the odds are great that if a federal judge dismisses the excessive force claim under qualified immunity, s/he will also find a way to dismiss the assault and battery claim, even if it involves misunderstanding and misapplying the law of qualified immunity).

Qualified immunity is an extremely broad defense, said by the Supreme Court to protect all officials from suit or liability except those who are plainly incompetent, or those who knowingly violated the law. The particulars complicated. Every year, federal courts across the land issue new outrageous decisions thickening this shield, enabling trial judges to perform amazing feats of mental gymnastics and torture obvious facts into conclusion opposite those which any compassionate or rational person would reach, and thereby to throw out cases with plain merit involving police officers who behaved screamingly badly. For more information about qualified immunity, you can read our (fairly non-technical) article about our victory in Judi Bari and Darryl Cherney’s historic

¹⁷ The process is called “removing” the case to federal court.

civil rights case against the Oakland Police and the FBI, at www.judibari.org/nlg_practitioner_fall_2002.html.

Other state and federal claims: The police might violate other rights. For example, if they acted with the substantial intent of retaliating against or interfering with a person's exercise of free speech, they may have violated one's First Amendment rights. While a police officer's intent is irrelevant to whether s/he violated a person's Fourth Amendment rights, intent is an integral part of the inquiry in a First Amendment claim.

Other fairly common federal law claims against police include Fourteenth Amendment deprivation of due process, and deprivation of medical care in violation of the Eighth and/or Fourteenth Amendments. Failure to read one's Miranda rights is not, by itself, actionable. However, obtaining and/or using an illegally obtained confession or other statements might be actionable under the Fifth Amendment.

Other, fairly common state law claims include malicious prosecution, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. Under both federal and state law, police officers can be held liable for conspiring. However, conspiracy is not a claim, but a theory of liability which serves to tie in defendants against whom evidence might be thin, perhaps as a result of their own efforts to destroy, conceal, or cover it up. In a civil case, proof that the defendant conspired does not, by itself, give rise to damages. The offense which s/he conspired to commit is what establishes the damages.

Limits on Municipal Liability: Under federal law, a municipality (i.e. city or county) is not liable just because it employs the offending police officers. Rather, a municipality is only liable under Section 1983 for its own unconstitutional conduct – i.e., for maintaining an expressly unconstitutional policy, or a tacitly unconstitutional practice or custom.

Under California law, the municipality *is* liable for the intentional misconduct of its police officers, if they were acting in the course and scope of their official duties, according to a theory called *respondeat superior*.¹⁸ Under California law, the municipality can also be directly liable for its unconstitutional policies or practices, as under federal law.

Limits on State Liability: The 11th Amendment to the U.S. Constitution is sometimes construed to limit one's power to sue state officials, including state police, in federal court. Also, states (and state officials acting in their official capacity) might be immune from suit in state court, except to the extent they have waived sovereign immunity.

Other Differences Between Federal and State Court

Other significant differences between federal and state court include the jury pool, the jury selection process, other immunities and privileges, and damages provisions.

¹⁸ See Cal. Government Code § 815.2.

VIII. SUMMARY OF OPTIONS

1. Do Nothing

Pros: no financial or further emotional pain.

Cons: no gain.

2. Wait

Pros: gain clarity; gather information and evidence; allow time for criminal case to resolve.

Cons: memories fade; evidence gets lost or destroyed; witnesses move; political moment passes.

3. File an Internal Affairs (“IA”) Complaint

(Disfavored)

Pros: While police departments seldom police themselves in any meaningful way, of all the agencies involved, they are the most likely to do so. A record of your complaint is generated and kept.

Cons: Police rarely police themselves. You will have to speak to police, on their turf, to file the complaint. If you have a criminal case pending, or one possibly in the offing, you should *never* speak to the police about it. Likewise, you may be equipping your adversaries with evidence they will use to defeat you in a subsequent civil case.

4. File a Complaint with the prosecutor (or federal or state Attorney General)

(Disfavored)

Pros: Only such a prosecuting authority has any power to bring criminal charges against the officers who violated your rights.

Cons: The overwhelming likelihood is that they won’t (they’re probably buddies, and prosecuting police is politically sensitive and/or difficult). If you have criminal charges pending, or possible, you should never speak directly to the D.A., lest you give him/her information to use against you. Also, you may generate statements that can be used to impeach you in your civil case.

5. File a Complaint with a Citizen Police Review Board¹⁹

(Recommended action only if you do not plan to file a civil suit, or after your civil suit has run its course or is substantially underway)

Pros: These groups are generally well-intentioned and dedicated to tracking and staunching police abuse. You might be able to sit back and let them do an investigation, culminating in an opportunity to testify at a hearing, which may result in a sustained complaint and recommendation that the offending officer(s) be disciplined. Your complaint will be kept on file, allowing future victims of the cop who wronged you to contact you about possibly helping them,

¹⁹ Such as (such as San Francisco’s Office of Citizen Complaints (“OCC”), Berkeley’s Police Review Commission (“PRC”), or Oakland’s Citizen Police Review Board (“CPRB”).

gradually increasing the likelihood that the city will retrain, reassign, or fire the cop, or at least that his/her ability to harm other people through false arrests and convictions will be blunted.

Cons: These groups are under-funded and overwhelmed, and they are not empowered to mete out discipline, but only to recommend discipline to a police chief or police commission. Exhaustive lobbying efforts by police unions (the strongest unions in the country), coupled with negative recent cases, have severely curtailed the powers of citizen review boards, as well as restricted their power even to disclose statistics and investigation results to the public. Sometimes, witnesses cannot even get their own statements after a certain interval of time, hampering the work of civil rights lawyers who lack access to witness' statements well into a case, which the police and their attorneys have ready access to.

Well-intentioned as they may be, citizen review board investigators get chummy with officers and their representatives, and often ask questions of officers in such a way as to suggest innocent explanations for their conduct. The whole citizen complaint process gives officers a preview of the evidence against them, and an opportunity to rehearse and tailor their stories. In addition, the complaint process exposes victims and their witnesses to impeachment at trial based even on innocent inconsistencies in their accounts, which police lawyers will exploit to no end in an effort to tarnish their credibility.

Finally, if the citizen review board finds no misconduct by the officer, as they typically do (sometimes only because witnesses get cold feet and don't come forward), the officer may try to introduce this finding in the civil trial as evidence of proper conduct. On the other hand, if the board does sustain the complaint, the officer has extensive appeal rights.

Recommendation: As a general rule, if you have no intention of filing a civil lawsuit, you should definitely file a complaint with a citizen police review board. However, if you intend to file a lawsuit, you should wait until after your lawsuit is finished, or at least substantially underway (after the parties and witnesses have begun to lock in their accounts) before initiating such a complaint. Citizen review boards often have their own statutes of limitations, so you should check to determine how long you can wait before bringing a complaint. Sometimes, the filing of a civil lawsuit will "toll" the review board's statute of limitations – i.e. extend the deadline until after the civil case has concluded.

6. Seek to Hire a Lawyer

Pros: If you succeed in retaining a lawyer, s/he will shoulder most of the work, and navigate the shoals of the legal profession for you.

Cons: None, if you find a good attorney. 😊

7. File a Small Claims Action

Note: This attorney is not well versed in the practices and procedures of small claims actions. You should consult the small claims courts' self help center at www.courtinfo.ca.gov/selfhelp/smallclaims/, or a practice guide, such as the one published by Nolo Press, www.nolo.com/.

Pros: It is a “people’s court”, designed for non-lawyers. If you sue a police officer in his/her personal capacity, s/he will have to face you directly, without an attorney. The process is cheaper, and the court is generally patient with people appearing in their own behalf, since it is set up for this purpose. In San Francisco, the commissioners who preside tend to be more sympathetic, as a group, to victims of police misconduct than the judges in either the superior or federal courts.

Cons: There is no discovery in small claims court. The maximum you can seek is \$5000 (though this may well be enough, especially if your costs do not accumulate too much). The City Attorney will prepare the case for the officer, even if the City Attorney cannot appear in court. If you sue the municipality, the City Attorney can appear as the representative. In some cases, the judge/commissioner will find that you sued the officer in his/her official capacity, and allow the City Attorney to appear in court. If the other side loses, they have an automatic right of appeal to Superior Court, where the City Attorney will definitely represent the defendant(s), and a judge (probably a more conservative one) will hear the case, not a jury. If you lose there, you cannot appeal. You may be limited in the number of small claims actions you can file within a year.

8. File a Lawsuit in California Superior Court or Federal Court

Your experience, and results, may differ greatly depending on whether you file an action yourself (in *propria personam* or “*pro per*”), or hire a lawyer to do it for you. Whether to file in federal or state court turns on a welter of issues, too complex to discuss here. Your best option may differ depending on the case particulars, and your choice may have practical consequences. At the same time, there are usually tradeoffs, so different attorneys may advocate different approaches for equally valid reasons.

As a general rule, you may want to file all claims together (both state and federal) in state court, with the expectation that the other side will “remove” the case to federal court, as is their right and custom in San Francisco and Oakland, when the case involves federal question jurisdiction (i.e. it contains federal civil rights claims). In federal court, the discovery is smoother, and the rules less Byzantine. If the federal side of the case is dismissed, you can then remand the case to state court, and get a more local jury. (If you file originally in federal court, you cannot remand your state law claims to state court; rather, you can re-file them there only if the statutes of limitations have not run.) See discussion above concerning the protective cloak of **qualified immunity** which often shields officers from federal claims.

IX. CONCLUSION

If the police brutalized you, falsely arrested you, unreasonably searched and seized your person or property, pursued spurious charges against you, covered up their own wrong-doing, or interfered with your rights of free expression or association, then you probably need some form of help or redress. Otherwise, the injury is likely to fester, and infect your work, relationships, and health. Filing a lawsuit is one response. Others include counseling, venting to sympathetic listeners, pursuing administrative complaints, volunteering to assist in someone else's coordinated response to the kind of abuse you suffered, such as volunteering time for an organization like Copwatch, or re-directing the hurt and anger back into protest or alternative community. While maintaining a lawsuit can be cathartic, it can also be draining, especially if you must go it alone, without the help of an attorney.

If you have spoken to numerous attorneys and cannot interest any of them in your case, perhaps this should tell you to cut your losses and move on. You might consider pretending you have a tough outer skin, and asking an attorney for an honest opinion. What an attorney tells you may hurt to hear, but it might also spare you more misery and wasted time down the road. Don't hesitate to seek a second or third opinion, but hesitate to seek a tenth or twelfth one.

Your time and creative energies are finite, and might serve the community better in the long run – and might serve you better too – if you stay focused on the bigger picture, and fight back against the hands manipulating the puppets, not the puppets. At the same time, police thuggery, arrogance, and lack of accountability are major social ills in this country today, which demand our collective attention. You should think carefully about your choices, and be willing to reevaluate your decisions based on changing circumstances and new information.

X. OTHER RESOURCES

Additional resources are available through numerous civil liberties monitoring and advocacy groups, legal collectives, legal aid clinics, and lawyer referral services, including, but certainly not limited to, the following:

- National Lawyers Guild (national office; see local chapters too): www.nlg.org
- Civil Liberties Defense Center: www.cldc.org
- Midnight Special Law Collective: www.midnightspecial.net
- National Police Accountability Project: www.nlg-npap.org
- I-Witness: www.iwitnessvideo.info
- Copwatch: see local chapters, e.g., www.berkeleycopwatch.org
- ACLU: see national and local sites, including ACLU of Northern California at <http://www.aclunc.org>
- Electronic Frontier Foundation: www.eff.org
- First Amendment Project: www.thefirstamendment.org
- Center for Constitutional Rights: www.ccrjustice.org
- Lawyers Committee for Civil Rights: www.lawyerscommittee.org

- Partnership for Civil Justice: <http://www.justiceonline.org/site/PageServer>

The best referrals are from someone you know and trust. The worst method is the phone book.

A NOTE ABOUT REVISIONS OF THIS GUIDE, AND POSTING

If you post this document, please alert the author (Ben Rosenfeld, brosenfeld@alumni.middlebury.edu, 415-285-8091), so I can forward you any revisions in the future. If you are an individual wondering if this document has been updated, you may contact my office directly. If possible, I prefer email inquiries to phone inquiries. Thank you.