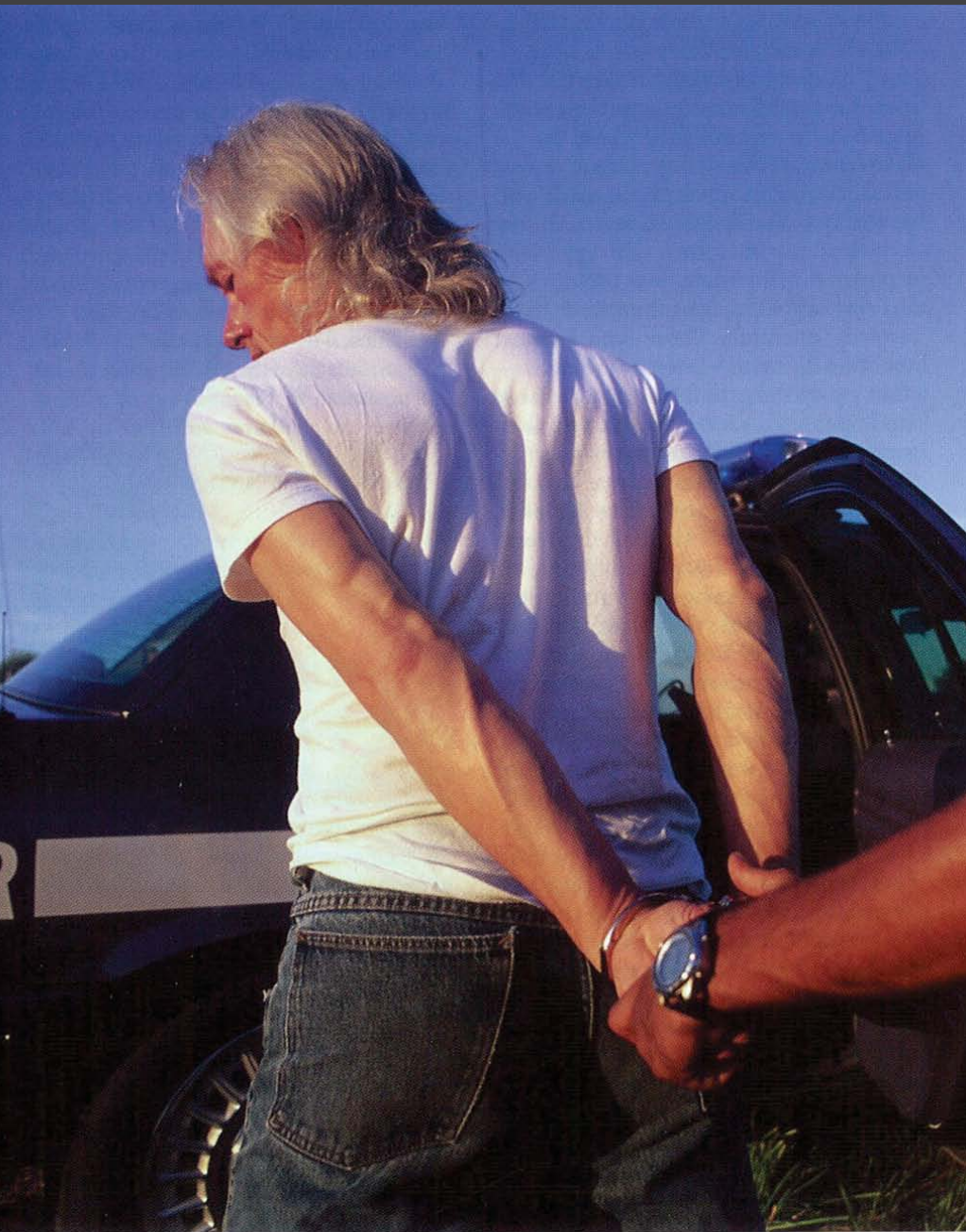


CASES INVOLVING LAW ENFORCEMENT OFFICERS: PART 1: LESSONS LEARNED



Your client has been shot by a police officer. Or, she was hit by a police cruiser engaged in a pursuit when, according to police, she went through a red light. Perhaps he is alleging he has been viciously attacked by a police dog, or beaten, or run down or sexually assaulted by officers sworn to uphold the law. But his or her physical well-being is not necessarily the biggest problem, nor your primary concern. After you have satisfied yourself that an emergency 911 call to the paramedics is not necessary, you learn that your client is also facing a serious criminal charge arising from the incident in which the injury occurred. The injury was apparently caused by an officer or officers during the course of a law enforcement operation and is the product of an intentional application of force, a negligent act or omission, or a coincidental convergence of circumstances. You have been retained to represent his or her interests. What do you do?¹

Ultimately, the primary objective for any criminal defense lawyer is securing the most positive outcome possible in relation to the offense for which the client stands charged, be that the withdrawal of the charges by the prosecuting authority, an acquittal at trial or negotiating a favorable resolution. Crucial in this process is assessing the strengths and weaknesses of the case against your client. Does the evidence, for example, disclose a defense based on police conduct? Frequently, the quality of the evidence marshaled against your client is inextricably tied to the quality and competence of the investigation that has led to the charge or charges in question. Are there holes in that investigation? Has the investigative process left the evidence susceptible to attacks based on credibility or reliability? In short, is there a reasonable doubt in relation to your client's potential liability and, if so, how does one go about convincing others, such as a judge or jury in the event of a trial, or a prosecutor during the course of plea negotiations.

By Gareth Jones and Barry Nolan

Of course, none of this is particularly groundbreaking or earth shattering. These are just the normal, run-of-the-mill questions and considerations that all criminal lawyers confront on a daily basis in the defense of clients. What may be new to some, or even many criminal lawyers, however, is addressing these questions in the context of the circumstances described above, that is, where one's client is at the same time an alleged *victim*, as having been injured by police officers, and *accused*, having been charged with respect to the same incident giving rise to the injury. These situations present their own peculiar dynamic which give rise to unique challenges and considerations for the criminal defense attorney. Even the most experienced and knowledgeable defense attorneys need expert assistance guiding them through some of the complexities of these types of cases. Drawing on our experience, we hope to lay bare some of these "unique challenges and considerations" and impart some of the less than obvious insights that will be of practical benefit to you as a criminal lawyer.²

Background

We have conducted criminal investigations into hundreds of incidents into the circumstances of deaths or serious incidents involving police officers, including police shootings, police involved motor vehicle collisions and pursuits, custody deaths and sexual assaults. These investigations were conducted in the field, as members of one of the few civilian investigative agencies in the world with a legislated mandate to exclusively criminally investigate the actions of police officers in these circumstances. What follows are some of the "lessons learned" from our work. Our approach is anecdotal for the most part, drawing on our experience in particular cases to illustrate some of the avenues of inquiry that a criminal lawyer will want to consider in defending a client involved in a police shooting or similar incident.

Although our experience is primarily Canadian, we believe much of what we propose is applicable to many jurisdictions within the United States. The principles underlying our respective systems of justice are, after all, essentially the same. Such elements as the presumption of innocence, guilt beyond a reasonable doubt, the right to full answer and defense and the importance of objective and thorough investigations are common to us both.

Finally, forgive us if some of the terminology we use is not exactly *ad idem*

with that employed in your neck of the woods, though we are confident that context will make our meaning clear.

At the outset, the we wish to make it very clear that the vast majority of law enforcement officers we have had contact with are decent, honorable professionals entrusted with a difficult and often dangerous task. We are both former police officers, and proud of it. Law enforcement officers are not perfect and make errors of judgment, just like the rest of us. In some cases, they are culpable errors. Some are lazy or incompetent. And as in any other profession, there are genuinely bad apples.

A practical approach

Imagine what would have happened to Rodney King if there had not been a video camera at the scene? What offences would he have been charged with? Would he have been convicted? What would have happened to any complaint he made against the officers? How seriously would it have been taken? How thoroughly would it have been investigated? Would a serious investigation have even been conducted? We will never know.

The point is, unless your client has a guardian angel with a video camera, the chances are that you will need time, tenacity, resources and good luck to successfully substantiate an allegation of wrongdoing against police officers. In some instances, your client will be unsympathetic, as may be any witnesses that support their account of the event. He or she may have a criminal record. Credibility will be a hurdle. Moreover, your client is unlikely to have the resources to permit a full investigation, conduct forensic testing or retain expert witnesses.

In contrast, police services, perceiving their reputations to be at stake, will bring the full power of their impressive resources to bear to investigate incidents involving a death or serious injury allegedly caused by one of their own. Normally, their most experienced detectives will be assigned to investigate your client. Experienced prosecutors will likely be assigned to the case. The case may have wider implications. There may be allegations that the incident is symptomatic of systemic failings within the department. There may be public criticism of the departmental chain of command and/or police policies and procedures. The police union will likely enter into the debate, and may hire investigators and lawyers on behalf of their mem-

ber. The case will likely have a high profile in the community. There will be intense media coverage. There may be racial or cultural issues alleged or apparent. Public policy issues may arise. Politicians may take positions, as may special interest groups on all sides of the issue. Communities may become polarized. In the worst case scenarios, the issues may boil over into public disorder, as we have seen in Cincinnati.

Undoubtedly, your client, and possibly his or her family and associates, will be put under a microscope, not only in relation to what happened during the incident, but also in respect of any antecedent history. No stone will be left unturned. There may be an attempt to demonize him or her and, in some cases, information detrimental to your client may be leaked to the media. You, as defense counsel, may find yourself subjected to unprecedented scrutiny, both professionally and personally.

The odds are stacked against you from the very beginning. But take heart, the investigation against your client will be imperfect. All investigations are imperfect. Some are grossly imperfect. Some are incompetent or negligent, others are conducted for an improper or malicious purpose. One thing is certain. There *will* be flaws in the very best investigation. In many cases, these imperfections, either on their own or cumulatively, may give you the ammunition you need to win an acquittal or negotiate a favorable resolution for your client. Much depends on your ability as a criminal defense lawyer to dissect the investigation thoroughly to discover and exploit these imperfections.

Dissecting an investigation

Step One: Assess your client

Normally, the first thing you do in any matter in which you are retained, is to obtain your client's story. These cases are no exception. Your assessment of the merits of his or her case and, crucially, his or her credibility, forms the bedrock upon which you will base your subsequent course of action.

Step Two: Decide if your client makes a formal complaint

If your client is injured, you will want to consider whether he or she has a basis for filing a complaint concerning the injury to an appropriate agency. You may also wish to complain on behalf of your client if he or she is alleging improper or unprofessional conduct on the part of law enforcement officers which is not directly related to any

injury. Is there an organization in your jurisdiction seized with the responsibility of investigating complaints of police misconduct? Consider whether you have confidence in the ability of that agency to conduct a full, fair and objective investigation of your client's complaint. If so, it may be advantageous to engage the investigative resources of these agencies on behalf of your client.

Especially where your client is of modest or meager means, public investigations conducted by law enforcement organizations may well be the best and sometimes only means of securing the type of information about the incident required to represent your client successfully. In the best case, the public investigation may conclude that there has been police misconduct, which may include anything from criminal conduct to misconduct subject to disciplinary sanction. Findings of this nature, in the form of convictions, disciplinary sanction or merely allegations which commence legal proceedings, are pure gold in the defense of a client who has been charged by police.

Particularly where your client stands charged with an offence, the proof of which requires a finding of lawful conduct on the part of a law enforcement officer or officers (who are often the complainants in these cases), such as *resisting arrest* or *obstructing an officer in the course of his or her duties*, evidence that the complainant officer or officers were acting unlawfully is fatal to the charge.

For example, a client charged with assaulting a police officer may successfully plead self-defense where there is evidence indicating that the complainant officer used excessive force. In a case in Ontario in which a police officer was charged with murder in relation to the shooting death of a man who intervened when that officer and several others attempted to arrest one of his sons on the front porch of their rural home, the son was charged with *assaulting a peace officer* and *resisting arrest*. During the course of the arrest, a struggle erupted in which three of the officers discharged their firearms, resulting in the death of the father of the family and the wounding of one of the sons. As part of its case against the officers, the prosecution argued that the officers' efforts to arrest the son were executed without warrant and, therefore, of dubious legality.³ While the officers were eventually acquitted of all charges, the position adopted by the prosecuting authority in that trial was clearly at odds with what the prosecution would be required to

prove in relation to the charges faced by the son, which were to be tried following the officers' trial. Though the individual with carriage of the prosecution against the son was someone other than the prosecutor at the officers' trial, this raised the specter of inconsistent verdicts, with attendant abuse of process motions by the defense, and clearly placed the former in a compromising position as all prosecutions in Ontario are conducted by the same prosecuting authority in the name of the Crown. The charges against the son were eventually withdrawn by the prosecution.

If your client is of more substantial means, and there is no law enforcement agency which can or will investigate your client's complaint, or you do not trust such an agency to conduct a fair and thorough investigation, consider conducting your own private investigation. Typically, this may involve retaining the services of a private investigator to conduct witness interviews and/or experts to conduct forensic examinations. The benefit of such an approach is, obviously, greater control over the information that is gathered. However, a private investigation of this nature may not be privy to all of the information that a public law enforcement agency may be able to compile.

For example, some of these organizations are aided in their evidence collection by powers of subpoena to compel interviews or search warrants to seize evidence that are not available to the private individual. In these circumstances, the most prudent course may be to combine the best of both worlds and enlist a law enforcement agency, where available, to conduct the investigation with the services of a private investigator to supplement that investigation where required.

Whether the decision is made to invoke the investigative resources of the state in the service of your client's complaint, conduct an independent and private investigation or arrange for a combination of the two, you will want to carefully consider whether your client will provide a formal statement. Never lose sight of the fact that while your client is merely a "witness" from the perspective of these investigations, he or she stands in clear criminal jeopardy. Accordingly, be mindful of creating evidence, such as advising your client to provide a formal statement, that may come back to haunt your client in the form of incriminating evidence.

It has been our experience that investigations of serious injuries caused by the police are immensely assisted by

the cooperation of the complainant in the form of a statement. In fact, investigations of an initial allegation are at times frustrated and, on occasion, have been terminated when there was simply no way to proceed with the investigation in the absence of a statement from the complainant.

With this in mind, we suggest that the defense attorney inclined to advise his client to provide a statement, endeavor to protect the statement provided to the greatest extent possible. This will include making the provision of a statement by your client contingent on an assurance, on the record, that his or her statement will be held in confidence by that agency and will only be used by that agency in the investigation of your client's complaint (and possible prosecution that might result from that investigation), in the absence of your client's express consent to the contrary.

Prior to the commencement of the interview, consider making some prefatory remarks making the above conditions and understanding explicit on the record. Done correctly, you may well be in a position to assert that the statement was involuntary in the event that attempts are made to tender the statement in evidence against your client in the future.⁴ In our experience, investigative agencies charged with conducting investigations into allegations of police misconduct appreciate the necessity for such assurances and confidentiality and are more than willing to accommodate your requests. In fact, legislation establishing these bodies and setting out their investigative jurisdictions may itself contain immunity protections of the nature described above for statements provided to these authorities.

Step three: deal with the media issues

Our modern media age has left little, if any, sphere of human endeavor untouched. The world of law enforcement and criminal investigations are no different. Managed correctly, the media can be a powerful ally in the hands of the criminal lawyer.

The media can factor into an investigation in two principal ways.

First, as a source of evidence. In many instances, journalists are at the scene very shortly after an incident occurs, reporting and, crucial for your purposes, recording important information, whether it be a witness interview or video of the scene. The media often interview witnesses before investigators. We suggest you get copies of newspaper articles and videotape and/or transcripts

of media broadcasts. Compare them with whatever disclosure you have or will eventually receive. There are often inconsistencies between what a witness may have told the media and what he or she told investigators. These will serve nicely for impeachment purposes, should the need ever arise. Additionally, confirm that each witness identified by the media was interviewed by investigators. Any failure to do so may form the basis for impugning the thoroughness of the investigation, not to mention bringing to the attention of the investigating authorities a witness whose evidence is possibly exculpatory in relation to your client.

We also suggest you contact any media who were present at the scene, whether in the immediate aftermath of the incident or, occasionally (particularly in the case of police pursuits), at the time of the incident. Ask for their raw footage and/or negatives. These can contain the identities of witnesses, utterances made by involved parties, the position of vehicles, etc. It is rare that the media will provide non-broadcast or unpublished material when first asked. Journalists and media technicians who were at a scene tend to be reluctant witnesses. However, skillful persuasion, combined with the judicious hint of a subpoena, can often work wonders.

Second, the media is important to all parties involved in these cases from a public relations perspective, particularly in instances of police shootings. Examples of skillful media relations in the service of their clients abound in the United States, less so in Canada. In respect of some particularly high profile cases, one is more apt to find a criminal lawyer advocating on behalf of a client on the *Larry King Show* than in their office or at the courthouse. Whether one will deal with the media in the course of these cases is not really the question – the imperatives of today’s media age and the inevitable media attention that these incidents attract means that a media strategy is a necessity. The only real question is how proactive you will be in your dealings with them.

On the same theme, the control of information to the public is crucial to preserving investigative integrity in any investigation. Premature disclosure of investigative information from any source may taint witnesses who have yet to provide statements to investigators, and prejudice a possible jury pool in the event that the investigation leads to a charge or charges which lead to a trial. Public statements can be damaging to the integrity of investigations, and possible prosecutions,

of the police conduct in question.

Consider the propriety of any public statements made by any party. Those comments may provide you with fodder for impugning that person’s motives. We suggest you obtain copies of all press releases and, if possible, draft press releases, along with press clippings and videotape or transcripts of news broadcasts.

One final note on this topic. It is difficult to deal with quotes in the media that are attributed only to “police sources.” Almost invariably, the content of these quotes will be detrimental to your client’s case. Deliberate leaking of information by law enforcement officials that is intended or likely to undermine the integrity of an investigation, be it focused on the officers’ conduct or that of your client, is a possible obstruction of the judicial process which carries a criminal sanction in most jurisdictions. We recommended you fight fire with fire. In many cases, this will dictate that you make a formal and very public complaint to the police department and that you request a criminal investigation be undertaken into how the information came into the possession of the media.

Step Four: A proactive approach

We encourage a proactive approach when reviewing the investigation against your client, including direct intervention in an ongoing investigation to ensure that all evidence that supports your clients’ position is ultimately available to a court of law. We appreciate that many counsel may be reluctant to get directly involved at this stage in the process, and understandably so for a variety of reasons. It is a difficult call to make and one that needs to be carefully assessed on a case by case basis. You may think we are foolhardy for even suggesting becoming proactive at this point. However, in general, it is far better to get what you may need to vindicate your client while you can, particularly if you are reasonably confident it will assist your client down the road, as opposed to critiquing the investigative agency at some future date for conducting a poor investigation. Among the primary dangers of adopting a “wait and see” approach is the possible loss of evidence that may assist your client. Further, investigative agencies tend to be a lot more diligent if they aware they are being actively scrutinized by an involved party.

You will be dealing with some extremely experienced and talented opponents. Law enforcement agencies routinely assign their most competent investigators to an incident where there

has been a death or serious injury apparently caused by one of their members. In most cases, homicide squad or internal affairs officers will lead the investigation. Even if they are not directly responsible for the investigation into any offences your clients may be suspected of before or during the incident, much of their work product will have a direct bearing on what action is taken against your client. The investigation they undertake is likely to be voluminous, and, at least from their perspective, exhaustive. But there will be imperfections. The trick is to find them all, or at least enough of them to raise a reasonable doubt about your client’s guilt.⁵

In this proactive vein, you will want to seriously consider the possibility of personally visiting the scene. Most often, defense counsel will not be in a position to view the scene prior to it being released by the investigating agency. If you are, do so. Be careful not to enter the scene, however, until it has been released by the investigating agency, even if invited (you do not want to be a witness). You may want to consider asking the investigative agency to examine the scene for specific items or other evidence (tire marks, footwear imprints, etc) that you think may be of use, based on information your client has provided. Do not assume that the investigating agency has already done it. Police shooting and custody death scenes are most often processed and released without the benefit of detailed accounts from involved officers and civilians.

Frequently, evidence that becomes crucial at trial is overlooked or ignored during the processing of the scene. This is not necessarily through incompetence, negligence or malice, but may simply be because the investigators were unaware of the potential importance of a particular aspect of the scene. A frequent oversight in this regard is the failure of investigators to accurately record the lighting conditions at a scene as soon as possible after the incident occurs.

If you cannot attend the scene while it is being processed, visit it at the first opportunity. You will never know what has been left behind, so put on your detective’s hat and start detecting, or at least have someone do it on your behalf. As you do so, consider the following avenues of inquiry which are sometimes overlooked by police departments in their scene examinations. Are there videotaped recordings from premises overlooking the scene, such as banks or convenience stores? Has every occupant of every building that overlooked the

scene been contacted? Have the sewers, bushes and other places where items may have been deposited been checked? As an eminently important learning experience in the training of all lawyers, you will want to grace a law student or other trainee under your tutelage with all sewer examinations.

In a case we dealt with, we attended a scene a week after a shooting and recovered a considerable quantity of glass from a car window that had been shattered during the incident. Not only was this evidence potentially important (the glass may have proved useful in locating the point of impact of the bullet in the window), but the fact that it was still there was *prima facie* evidence of negligence on the part of the investigative agency.

Visiting the scene will also give you an opportunity to observe witness vantage points, gauge distances and dimensions, and put witness statements and forensic reports in context. Again, speed is of the essence. Although the gross features of a scene rarely change significantly, other important factors, such as tree dimensions, fencing and street furniture often do. For example, we investigated a case where a police cruiser hit a civilian vehicle, injuring occupants of both vehicles. A hedge that may have obstructed the view of one of the drivers had been substantially altered by the time we were assigned to the case. Unfortunately, its dimensions at the time of the collision had not been properly documented, either by photograph or on a scale diagram. In this regard, we caution that you not rely exclusively on police department photographs and videotapes of the scene. Arrange to have your own taken, based on your client's account of the event.

Step Five: Assessing the investigation against your client

Regardless of when you become involved in these cases, you will want to consider the following three factors immediately. Do not wait for disclosure from the investigating agency:

Physical evidence

As far as possible, ensure that any item with possible bearing on your client's complaint is identified, located and preserved. This is particularly crucial with items that may be perishable, such as bodily fluids, gunshot residue, etc.

Although you may have limited access to items not under your control, it is very important that you identify any

potentially relevant item at the earliest possible juncture. For example, the uniforms and footwear of officers at a scene may not have been seized by the investigating agency. Consider calling the agency and requesting that it is done immediately. In a similar vein, consider requesting that the investigating agency not dispose of any evidence prior to you being given an opportunity to have your experts examine it. Any refusal or failure to comply with these reasonable requests is clearly derelict and may be frowned upon by a subsequent trier of fact. And, as any criminal defense lawyer knows, sometimes a lack of evidence is the best route to *reasonable doubt* in the defense of one's client, particularly where it might and ought to have been preserved with little effort.

Other areas you should consider encouraging investigating agencies to pursue if you are fortunate enough to get involved early enough, and where relevant, include:

- searching the lockers of involved officers;
- searching the cruisers operated by the involved officers;
- having all equipment from all officers present at the scene seized and secured;
- asking for involved officers to voluntarily give blood samples; and
- requesting that all potential e-mail and voicemail evidence is identified and preserved.

With respect to physical evidence that *is* under your client's control, take all steps necessary to ensure that it is preserved. It may be trite to say that "once it is gone, it is gone forever," but it is also true. Necessary steps may include:

- having your client's injuries photographed. You will likely need to have photographs taken on more than one occasion, depending on the nature of the injuries (some injuries only become more apparent over a period of days);
- requesting that your client provide a blood sample for possible future toxicological testing, especially where drug or alcohol use is or may be alleged against your client;
- arranging to have gunshot residue (GSR) tapings taken of your client, particularly where he or she is alleged to have handled a firearm, including an officer's gun.⁶ In our experience, allegations that an individual attempted to grab an officer's gun are sometimes offered in justification of an officer's

resort to force;

- considering a polygraph test;
- taking fingernail scrapings and hair combings, as appropriate;
- arranging a second autopsy if circumstances warrant; and
- securing your client's clothing and footwear, including retaining expert assistance to properly preserve any trace evidence that may be on or in the clothing and package and store the items, particularly if they are bloodstained and/or damp.

Of course, as with all of these possible interventions, you will want to avoid becoming directly involved in the process as the prospect of being called as a witness at a subsequent proceeding probably does not appeal too strongly. You will also undoubtedly consider any reverse disclosure onus that may exist in your jurisdiction and govern yourself accordingly.

Finally, be aware of potential ethical issues if you have possession or knowledge of evidence relating to an offence. Recently in Ontario, the case of a lawyer charged with obstructing justice when he failed to turn over particularly gruesome tapes depicting the rape and torture of several victims of his client has brought this issue to the forefront of the debate of legal ethics among the criminal bar.⁷ The lawyer was acquitted at trial when the judge, noting the ambiguity in this area of professional responsibility, concluded that there was a reasonable doubt in relation to whether the lawyer had the requisite mental state when he withheld the tapes from the investigating authorities.

Witnesses

You may (or may not) be astounded by how often important witnesses are overlooked or ignored in incidents involving police officers who have used force or have otherwise caused injury or death to a citizen. Finding witnesses often requires a concentrated, diligent effort. It can be resource intensive and boring, with no guarantee of success. It is also, in our view, essential. You should consider arranging for a canvass for witnesses, regardless of whether the investigating agency has done so. You never know what may emerge. To return to the Rodney King case, imagine what would have happened if the man with the video camera had not come forward. An exhaustive canvass may have located him and his videotape.

In one case, a police pursuit traveled over three miles through an inner city residential/commercial neighborhood just

after the morning rush hour. The pursuit ended when the pursued vehicle struck and killed an elderly civilian on a bicycle. In the course of our investigation we knocked on the door of every single building on that route, including each apartment in two twenty-four floor apartment blocks that overlooked the route, as well as two schools, a seniors home, a supermarket and five churches. We left flyers at premises where we got no response. We posted witness request posters on virtually every light standard along the route.⁸ We used local media, including the community TV channel, to request that witnesses come forward. The campaign was enormously successful. A large number of witnesses, none of whom likely would have come forward otherwise, were identified and provided important information to the investigation.

Documentation

Investigators generate enormous quantities of paper and computer records during police-related major investigations. The trick is identifying what is produced and knowing exactly what to demand.

Disclosure requirements in criminal cases vary from jurisdiction to jurisdiction. As a general statement, defense counsel in Canada are entitled to all material in the possession of the investigating agency and prosecuting authority relating to the offence for which his or her client has been charged.⁹

Most criminal defense lawyers know what records law enforcement agencies in their jurisdictions normally create in the course of an investigation, and anything that may be a fruit thereof. You will know if there are glaring deficiencies in the material you have received.

It is our practice to review all the material we receive with a fine toothcomb. We then itemize everything. Make no mistake, this can be a staggeringly tedious process. However, it often pays dividends. We create a checklist of persons involved in the incident, which we use to cross-reference with the materials disclosed. This process often yields the identities of other witnesses, including police officers whose notes and statements are then requested from the police department. The goal is to identify every person involved in the investigation, however peripheral, and ensure that all relevant information generated by those persons is obtained. Thus, for example, it has been our experience that chiefs of police are apt to meet with police personnel involved in serious incidents. In these cases, we have considered the chief

of police a witness and requested a copy of his or her statement and/or notes. Who knows, there may be a useful utterance recorded therein.

Not infrequently, crucial information is buried somewhere in the middle of a mountain of paper, inadvertently or otherwise. Equally, information that should be included is sometimes missing. As you make your way through these materials, bear in mind the following items which, are commonly missed:

- any drafts of every relevant document. (These may contain useful information that was excised from the finalized document, as well as possibly providing insight into how the investigators' theories were created and developed. The seeds of any 'tunnel vision' may be apparent in draft documents.);
- data from global positioning system scene diagram technology, usually on a computer disc;
- forensic analysts' working notes and photographs¹⁰;
- notes, memos, etc. prepared by police officers acting in their capacity as officials of police associations or unions, in so far as they reflect dealings with involved officers;
- phone records;
- e-mails;
- negatives of all photographs taken;
- briefing records;
- anything reduced to writing by police management, including the investigative team's direct supervisors;
- minutes of any meetings relating to the investigation;
- Mobile Data Terminal (MDT) print outs;¹¹
- press releases by involved agencies;
- training records of all involved officers;
- lesson plans and course marks from all relevant training done by the involved officers;
- medical records from any involved officer relating to the incident, including notes made during the course of any counseling he or she may have received;
- transcripts of applications for search warrants or other judicial processes;
- and applicable policies and procedures of the involved police force.

This is by no means an exhaustive list. Indeed these are just a few of the sources that may provide the nugget or nuggets of information that you may need to defend your client successfully. There will undoubtedly be many other

sources of information, depending on the circumstances of your particular case. You may want to retain an expert to review the case on your behalf, and assist you prioritize which source is most likely to produce the most useful information.

Increasingly, police agencies record and organize their investigative work product on computer disc or CD-ROM. Be particularly vigilant if materials have been provided to you in this format, as items may have been overlooked or forgotten in the copying or scanning process. If materials have been provided to you in the traditional documentary form, inquire about the possible existence of an electronic "master file." If it exists, demand a copy of it.

Of particular note are police communications tapes. In most police departments, all emergency call related communications are recorded. In some departments, some or all in-coming and out-going calls are recorded. These tapes can be a defense lawyer's best friend, unless, of course, they have been tampered with, which itself leads to a goldmine of possibilities. Assuming you are in possession of the real thing, these tapes contain an abundance of information that is not subject to the vagaries and biases of witness recollection. Better still, they contain information recorded in real time. So, when an officer offers the justification that it all happened in a "split second," you may be in a position to show that it perhaps took a little longer.

Step Six: Ask to review the files in person

An effective tactic to encourage the investigating agency to provide you with everything you are entitled to is asking to attend the investigative agency's offices in order to review all their material in its original form. One method is to turn up at the agency's front door and note the excuses. At a bare minimum, the agency may have to subsequently justify any refusal to co-operate with this request to a judge or jury.

Step Seven: Put it in writing

Always itemize every single document or item you have received in painstaking detail. Send a letter confirming exactly what you have to the investigating agency or prosecuting authority. Demand any other material concerning the case. This usually leads to fewer misunderstandings later in the process. Additionally, such attention to detail puts the prosecution on notice that you are serious about the case.

Step Eight: Interview the investigators

Finally, an often overlooked but very effective tactic is interviewing the investigators involved in the investigation prior to deposition or trial. They can often provide you with a wealth of valuable information. At a bare minimum, you will have an opportunity to assess the investigators' credibility as potential prosecution witnesses against your client. In our jurisdiction in Ontario, pre-trial interviews of this nature cannot be compelled and we suspect the same is true where you practice. In our experience, however, many investigators are willing to meet voluntarily with counsel if requested, for a variety of reasons. The same applies to the opposing side's experts and witnesses. Investigators who no longer work for the investigating agency are often a particularly fruitful source of useful information, provided you put whatever disgruntlement they may exhibit in context. At best, these interviews can furnish you with important information that you would otherwise not have had. At worst, any refusals to meet with you can be effectively cross-examined in the event the individual is later a witness at trial.

And so . . .

You've been proactive. You've got what you need, or at least you are reasonably confident you can demonstrate to a court that the prosecution has failed to give you everything that they should have. In Part Two, we will move on the next phase — analyzing what you have, and how to use it to your clients' best advantage.

Notes

1. *The authors wish to make it clear that any views or positions expressed here are not necessarily the views or positions of the SIU.*
2. We do not propose to deal directly with issues relating to the defense of police officers charged with offence(s) arising from their duty. These have their own dynamic, though, in our view, many of the steps we suggest are equally applicable in such cases.
3. In Canada, the offences of *resisting arrest* and *assaulting a peace officer* contain as essential elements of their proof the requirement that the officer or officers in question were acting in the lawful discharge of their duties at the time of the impugned conduct.
4. Finally, when considering whether your client should provide an investigative agency with a statement, it will be prudent to draw a distinction between testimonial evidence of the nature described above, in

the form of statements during the course of an investigation, and real, physical evidence. "Real"; "physical" or "tangible" evidence may also be of vital importance to an investigative agency charged with investigating the police.

However, unlike testimonial evidence in the form of statements which are readily susceptible to a claim of privilege cloaked in a right to remain silent, protecting physical evidence which exists apart from the witness' cooperation and is not created by that cooperation, is arguably more difficult to protect on a privileged basis. This is not to suggest that you as advocate should not insist on a similar confidentiality assurance in relation to this type of evidence. And, in fact, doing so will bolster any claims of privilege in the event the matter is litigated at some future date.

5. We understand that the FBI and/or Department of Justice may conduct investigations into police related death or serious injury incidents. The same premise applies.

6. The test must be done within hours of the incident, in order to be of any evidential value.

7. Regina v. Murray (2000), 144 CCC(3rd) 289.

8. One local police officer threatened to charge us under a bylaw that prohibited attaching posters to municipal property. We were not sure if he was joking. Regrettably, he did not follow through. We would have relished the publicity, which

may have led to even more witnesses coming forward.

9. Regina v Stinchcombe (1991), 68 CCC (3rd) 1.

10. Many laboratory forensic technicians and analysts take photographs of exhibits to assist in their analysis. They may reveal evidence that was overlooked or not readily apparent to the police department forensic technicians.

11. For those of you in jurisdictions where police agencies are equipped with Mobile Data Terminals (MDT), these can provide a cornucopia of information. Officers tend to have unguarded conversations on the MDT. ■

About the Authors

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