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Panel II Discussion: The Anatomy of 1983 Litigation: Best Practices in Successful Civil Rights Litigation

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PANEL II Discussion:
The Anatomy of §1983 Litigation: Best Practices in Successful Civil Rights Litigation

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Hyperlink to presentation: https://www.youtube.com/watch?v=7mm-Wb8WsGo

TRANSCRIPTION:

Gary Bledsoe

Today, we have a very important topic for this second session. I know that I look at 1983 litigation is almost like a minefield, like you're on a battlefield. And it's a little bit different from other types of litigation because there are difficulties that you might encounter all along the way. Whether it's a pre-trial issues and judicial-made obstacles that one has got to overcome. Or the difficulties in a courtroom and litigating against someone that provides for public safety. So, there are some lawyers out there that have found a way to get around those minefields and have been able to provide for good success. You know, the civil arena is where you can go when the administrative arena fails, and officers don't suffer consequences. Or when the criminal arena fails, and the officers, they don't suffer consequences. Individuals have rights to, to bring lawsuits. But I think we realize if we look at federal court, at about 87% of plaintiffs, I think, end up losing cases or what have you, these issues are particularly fraught. So, we've tried to design this in a way where we could provide the kind of assistance and guidance that might allow for more success, because I think the more success that we find in these cases, we'll probably find that there will be better policing, around the state and the nation, because these, these cases actually are kind of, all public interest cases, intending to address, poor conduct. We've got three tremendous presenters on this panel, and I will, introduce them in the order that they will, present. We have, Bhavani Raveendran, who is a senior associate with Romanucci & Blandin in Chicago. She'll be our first speaker. I will introduce her in a second. Brian Dunn, who is with the Cochran Firm, will be our second speaker and Honorable Kenneth Hoyt, an alumnus of Thurgood Marshall School of Law, will be our third speaker on the topic.

Now, let me say a little bit about, Bhavani. I've had the pleasure of meeting her and I've seen where she's actually published articles for AAJ seeking to help others in the field. She's a nationally

renowned litigator, despite her young age. And her firm represents the family of George Floyd, and she's just around the country in Missouri, Texas, and all around and litigating cases and trying to provide assistance to others. In terms of 1983 litigation and police litigation, she heads the unit for AAJ in that regard around the country and tries to guide other lawyers, into having good success. She's published. She's done a great range of litigation. She has some great stories in terms of litigation and her own experiences. And so, we want her to emphasize the pre-trial issues. Whether we're talking about motions to dismiss, motions for summary judgment, getting your case prepared, your pre-case fact investigation, what you need to plead that maybe indeed, some guidance in terms of just notice based pleading may not be adequate. She's got great, information and can provide really good guidance on that. So, with that, let me turn it over to our first panelist. I think they'll each speak for about 15 to 18 minutes, and then we'll go to some Q&A. I may have a few Q&A for the group, and then we'll go to Q&A for the whole group. But I'm really honored to be here with this panel, and Ms. Raveendran?

Bhavani Raveendran

Thank you, Dean Bledsoe. It's really an honor to be included in this company of attorneys today. I have had the honor to work with Tony Romanucci. He is my boss, and he has found a way to include his huge civil rights practice in a personal injury firm. And I am the Senior Associate on the Civil Rights Team. So, I get to work on cases across the country in different areas of §1983.[1] But the bulk of what I do is police misconduct issues. So, thanks to Dean Bledsoe, he gave me some pointers of what he thought would be most helpful to hear. So, I'd like to start just discussing some of the pre-suit and pretrial things you can do to strengthen your case and gear yourself up for those motions to dismiss, motions for summary judgment, and other obstacles you may face on the road to trial, and how a lot of preparation at the early onset of the case or during discovery is really what's going to assist you once you get to those motions. I believe other attorneys will be handling, trial, and other aspects, of §1983 Litigation. And then at the end, I'm just going to talk a bit about some of the intimidation you may face as an attorney who litigates this kind of case, especially being a young woman who goes across the country. I guess I'm not as young as I look, but I certainly appear to be someone that can be intimidated. So, I have some weird stories that could probably tell you that things haven't changed as much as we'd like them to have, when it comes to litigating these issues.

So, man, I used about two minutes right there just on that explanation. So let me get into it. So, tell me about pre-suit cases. You know, a lot of times in these cases, you don't have as much information as you would in say, a medical malpractice case where you might be able to get all the medical records for your client if the injury happened some time ago. Sometimes you're starting at square one with no information besides hopefully your client's story. And a lot of times in wrongful death cases, we don't have that much information. Things have changed in the last couple of years where body cam footage and other video footage has been made available quickly by police departments based on a lot of advocacy and-- by a lot of groups that don't include just lawyers. And that has made it a lot easier to get more information quickly. But in the past, we had to do a lot of digging. Different states have different FOIA laws, and FOIA is the federal statute

[1] 42 U.S. Code § 1983.

that allows us to demand transparency from our municipal actors at the state level.[2] Um, but each state has its own different kind of FOIA[3] laws. So, if you're here in Illinois, we have a lot more FOIA litigation, and so people are more forthright. They might send you a bit more of the file, the police department on a FOIA. But, in other places, they won't do that. So, the question is, what do you do if you're denied all of your public requests? How do you investigate? So, there's a lot of really simple things that you can investigate the outset of a case. And the reasons you want to do that is to avoid any malpractice issues, but certainly to get as much information as humanly possible before you put the case into suit.

So, the things you want to assess, research, and investigate at the beginning of the case include the deadlines that you might have, any notice requirements in the state that you're filing. That means that you might have to send a letter to state entities to inform them that you're going to file. You want to research the immunities that you might face in the case and try to investigate specific to those immunities. That includes qualified immunity, that I think, you know, would take a whole day on its own to explain, but and other statewide immunities like for instance, in Illinois, there's a Police Protective Power Immunities. If the police are protecting you, they're immune from suit for that conduct. So, you have to target your investigation knowing what the immunities are in the future. You also want to do investigation into damages. That means, if your client or your-- is a family member who lost somebody, you want to find out who it is you represent, and what kind of damages you'll be able to seek in the future. If you represent someone who survived a police encounter, then you want to get to know them, and you want to find out what has changed in their life. So, you can do a good assessment of how much can I spend on this case, and still give my client a decent return if we're successful at settlement or trial? And finally, you just want to look for witnesses and other people. So, a lot of that's just boots on the groundwork, calling witnesses, calling family members talking to as many people as you can. Um, sometimes, we get a private investigator involved who can go out and find information that an attorney just may not be as savvy to figure out on their own. We also use the good old-fashioned internet. I can't tell you how many times, especially in a case where I want to say that the institution itself has done something wrong repeatedly in the past. Just googling will give you a lot of information. You know, looking at news reporting and other sources can be very helpful when you're figuring out what your allegations are going to be or where you should be sending your investigation. Because at the complaint writing stage, you don't need to necessarily have the physical evidence, but you need to be reasonably able to allege that that's something you may find in discovery.

So, you know, you kind of look anywhere you can, leave no stone unturned, and be a little creative with, where you look for that information. The whole purpose of this is to ensure that you're putting a case into suit that's not going to create bad case law if you know that at the outset. But you also don't want to drag someone through the traumatic process of litigation, if you don't believe that there is, something that might benefit them at the end.

Now, that could be different for different clients. And something I like to assess at the beginning is if you have, in my mind, there are many different varieties of clients, of course, but client goals

[2] See, Freedom of Information Act Improvement Act of 2016 (Public Law No. 114-185)

[3] The Freedom of Information Act is also known as The Public Information Act in Texas.

tend to be in a couple of different camps. And one of those is a client who wants closure, who wants litigation, because they need the financial support or have some other need from litigation. And then, you sometimes have clients, if you're lucky, that their goal is change the system--do anything you can to fight the injustice. And I have, multiple clients in that regard who want to get the best justice for their loved one or make a real change. And so, if you have that kind of client, and, you know, you can't necessarily guarantee a positive outcome for them at the end of the day, that may not matter to them. And if you work for someone who's gracious enough to want to change the law like I do, then you might have that opportunity. But sometimes, you have to be realistic with a client. If what they need is someone to pay for their medical bills, and you can't foresee a way to get them there, then that's something I like to be upfront with, in the investigation stage, so that there's no false expectations down the line.

Another thing to consider at the beginning of the case is how to get funding? How to get resources to learn how to do a case? One of the best resources for me has been all the organizations I'm part of. I'm part of the American Association of Justice. We have a Police Misconduct Litigation Group. Tons of friend attorneys who will give me guidance at the drop of a hat even if they've never met me. I'm also part of the National Police Accountability Project, another group of phenomenal attorneys who really care about the work and are willing to share because they want to make the world better.

Another thing to consider at the beginning of the case, and I know I'm talking so quickly, as I'm trying to get through so much of this is, whether media attention is going to help or hurt your case. Some of these cases garner their own media attention. You don't really have a choice at that point. But sometimes, you do have small choices. Do I want my client to speak out at the beginning of this? Do I want there to be a narrative that can be used to impeach them later? There are a whole bunch of things you need to think about before you go to the media. But, a lot of times media attention, as I'm sure everyone on this call is aware, can help a case resolve or to get real reform added to a case settlement.

So that's always something to explore. I think I'm just going to talk generally about drafting a complaint since I don't have that much time left. And then I will hopefully jump into some pointers for discovery. When you're drafting your complaint, it's a great idea to read jury instructions from your circuit or your county court, common special interrogatories or questions that are posed to the juries such as was the officers conduct reasonable, which happens. You know, in Illinois, that's something that sometimes happens. And that's a very simplified version of a special verdict or a special question that might be asked to a jury in a federal case for qualified immunity.

And also looking at verdict forms that you may face down the road, and that's because your complaint needs to have allegations that kind of hit all of those elements you might be required to prove at trial. And that's to garner support in your complaint against a potential motion to dismiss where they're basically stating that you haven't alleged enough to show a basic showing that you can overcome the hurdles of the law or the facts. Another thing you want to think about when you're filing such a big topic, is where you want to file? Do you want to file federally or in the state courts? And that's going to depend a lot on your state law. Are there caps? You know, Texas has caps. That's one thing I know about Texas. So sometimes federal court is better because there

may not be caps on the law, but then again, you're not going to face exactly qualified immunity in the state court. So, there's always a give and take and something to consider before you look at where you're going to file. A big consideration is the jury pool you're going to get. For us here in Cook County, Illinois, Cook County is primarily the city and some of the suburbs. And then if we file in the Northern District of Illinois, the Federal Court, we end up getting a bigger swath of the suburbs that kind of equals out the population we get from the city. So, there's a big consideration there if you know your jury pool well.

I think I'm going to-- there's a lot you can do to look at qualified immunity and whether it's likely to apply. But that's kind of its own topic. So, one thing you want to make sure you're doing when you get into discovery, and discovery is, of course, interrogatories that you send to the defendants and requests for production and your depositions themselves. You basically want to target the right discovery. The way I look at every interrogatory, request for production and deposition is what are the facts that I need to get over MSJ or to prove a fact in my complaint? And, you know, our cases aren't necessarily the same as others where you might get a deposition where every answer is helpful. You might struggle with a really combative deponent. For instance, you know, an officer that you're accusing of misconduct may not be super-friendly with you at the deposition. So, the way I like to think about it is if I can get one fact or 20 facts that are going to help on my motion for summary judgment, then I'm doing it right. And that's why pinpointing those facts before you get to depositions is really important so that you can seek those facts out in your deposition.

A really good way to do this is--in qualified immunity, art of the approach is whether the officers conduct was reasonable; whether a reasonable officer would know that the clearly established law existed in that form at that time. It's a lot about what do other officers think, what did the officer that you're going after think. So going into the officer's history, other situations they face that are similar to the case at hand, what they learned in training, those are the things that you really want to go after to get over qualified immunity. And that's not just for your defendant officer. For any officer you talk to, you want to discuss with them what they would have done in the situation, but in a veiled way. You want to talk about other similar situations so that you can get information that you can maybe apply to the one you're talking to them about. You want to question them about the policies, their familiarity with it, what they've been trained to do, both formally and informally, what's in writing, what do they learn from sergeants that train them or their field training officer. Those are all very good places to look for those facts to get overqualified immunity.

Another thing you can do in discovery is consult with experts early on who know police practices. Retired police officer, retired use of force investigators, retired state police troopers, and even academics who just study police misconduct for a living. Those are great resources. If you have, you know, the financial ability to get them on board, to let you know what you should be looking for in discovery, they tend to know the types of documents you should be considering. They know what kind of training should be given, whether or not it is being given. So, they kind of tell you where to look.

Then just speaking about experts in general, how to assess whether you or not you need an expert. A great way to do that is to brainstorm the different kinds of experts you would want. And then just do a little research on Westlaw or Lexis to find out if your judge and your court system is

really friendly with those experts. Are they likely to get past a Daubert Motion or a motion to bar them? So, it's all about, you know, pre-empting the case so that when you get to those big questions, you're ready for them. And that helps you with your decision making. If, for instance, there's a judge in the Northern District that's not crazy about having use of force experts, meaning she doesn't want a retired police officer to stand up and say, "This force was appropriate under national standards or inappropriate for national standards of policing." She doesn't think, believe that that's helpful. So, if I have that particular judge, I may not seek a use of force expert unless I think it's absolutely necessary because there's a high risk that she's going to bar that expert. So, I said a lot in that time. And I know I promised to talk about intimidation, but maybe we can circle back to it because I definitely used 16 minutes.

Gary Bledsoe

Yeah. Why don't you go ahead and use a couple of more? I think we can do that. We have enough time, I believe.

Bhavani Raveendran

Okay, I'm going to take a breath for a second because I just tried to get all of it out as fast as possible. Okay, so regarding intimidation, I just-- I do want to touch on this as mean-- Dean Bledsoe talked a lot about it. And I was telling him a story and then he told me a story from, I forgot when exactly you said it was, but it was long enough ago that it's kind of shocking that the stories had so many similarities, you know? And that's something that, you know, I'm an Indian person who grew up in, here in America, and, you know, I faced a very strange kind of curiosity when I go outside curiosity, when I go to the small towns, I do a lot of this work. So, I've had in the same week-long trial, I've had a judge threaten to hold me in criminal contempt and put me in jail for smiling at the jury, and then have the same judge while the jury was deliberating asked to see my wedding pictures because he heard that Indian people wear a lot of gold when they got married. So, I have-- that's why I call it a strange curiosity. So, on the one hand, you're being intimidated. On the other hand, you're dealing with curiosity of someone who maybe hasn't met someone who has been to India as much as I have.

But I've kind of dealt with the gamut of things. I've had attorneys come to depositions, and allow their police officer, defendant to sit across from my plaintiffs when she was hit upside the head with the gun that's on his belt, and he refuses to remove it despite her PTSD[4] diagnosis. So, your client has to take the entire deposition facing the other side because the attorneys and the officer refuse to cover the weapon that is the source of her PTSD. And in that same deposition, when you make-- us think about it as you will, because you'll be an aggressive defender of your client, they say something like it's Oklahoma. We all have guns. And you find out there isn't just one gun in the room as you assumed, but there are multiple. So, you know, a lot of times you've just got to kind of steel yourself somehow. And if you're a nervous Nelly like I am, that's a lot of, you know, weird reminders. I have pictures of Wangari Maathai and the Rock on my desk here that you can see because they remind me to steel myself and be prepared for those situations. I think it's just the idea a lot of us have is that things have changed a lot, and they have. They changed significantly.

[4] Post-Traumatic Stress Disorder

We won't be facing anything like your school's namesake Thurgood Marshall faced hopefully. But things can still get a little intimidating and scary. And that's me saying it as you know, someone who probably doesn't face nearly the kind of discrimination that others do.

You just have to figure out a way to calm yourself down, whether that means you sigh on the record which requires you to then apologize on the record to the judge because you were trying to collect yourself and they mistook it to be a sign of disrespect. You know, you just have to figure out what's going to do that for you. You need to go with trusted partners to your trials. You need to have people you can count on. I, for instance, have a phenomenal paralegal who, without me asking, took out hundreds of dollars in cash and kept it hidden in case you needed to pay bond for me, after the judge threatened to hold me in criminal contempt. Now, that is a good partner because I didn't even ask her. She just knew that she might need to protect me in that circumstance. So that's probably my best advice to anyone. You're going to face obstruction if you choose to do this line of work but it's so rewarding. The people and families that I've gotten to know that have been affected by police misconduct are some of the bravest and most wonderful human beings I've ever met. They keep you going. So, it's definitely worth it, but just be ready.

Gary Bledsoe

Okay, I can see that smiling is natural. I don't know why the judge is upset with it. I'm sure the jury liked it.

Bhavani Raveendran

It’s a nervous affect too, get nervous you smile. I mean?

Gary Bledsoe

Well, that's a good habit if you are nervous. Well, thank you. We're going to come back with a few more questions later. That was a tremendous presentation, and so instructive and the helpful hints in there were so much-- so much was there, and I'm hoping that, that will be a great guide to individuals in terms of getting your complaint prepared during your fact investigation and getting ready-- and getting ready for some of those things you're going to experience because, sadly, we still do in 2021.

Our next presenter is also an exceptionally capable lawyer. You know, there's so many AAJ litigators that do these cases. And so, when you are the litigator of the year, you know that you have actually shown quite well and are quite accomplished. And when you're the litigator of the year, that means you're able to avoid some of the pitfalls in this minefield that we talked about. So, I think that's really instructive. And one of the best ways to become an outstanding lawyer is to really model it and find the individuals who've had success, and to learn from their success. So, the way we divided this, we wanted Ms. Raveendran to talk about the pre-trial matters. We wanted Brian Dunn with the Cochran Firm, who's the AAJ 1983 litigator of the year, to talk about trial issues, because they can be somewhat contentious. Now, he goes around the country and will handle cases wherever they might arise, depending upon whether he's got the time and the availability. So, I think that's a good thing, and I know they sometimes partner with folks to work, like, I think Bhavani's firm does as well. So, let me introduce our next presenter. Looking forward

to getting remarks about, how to be successful, during the trial process, and that's Mr. Brian Dunn of the Cochran Firm.

Brian Dunn

Thank you so much, Dean Bledsoe, and to the faculty and staff at TSU, anyone who may have contributed, Larry Taylor, Brittany Armstrong. This is a wonderful panel, and it needs to be had right about now in terms of what's happening in our country. I'm in my 26th year of practice. I have, the unique distinction of having specialized in police misconduct cases for that entire 26-year period. We were doing these cases first. I was hired by Johnnie Cochran himself. For the first 10 years of my career, I was working directly in that office with Johnnie Cochran. One of the only things he told me is that you're going to go to trial a lot, and you have to have very thick skin. That's one of the things, and he could not have been more right. I was asked to compile some numbers recently, a couple of weeks ago, and I've had litigated over 200 separate civil rights cases. I have had over 50 civil trials that have actually gone to verdict, and several others that have settled mid-trial. There have been over 100 separate police shoot-- fatal police shooting cases, that I've handled. And, in 2019, we didn't have any trials last year. But in 2019, I was told by a mediator who watches these cases in the Central District of California that I had one 80% of the cases that I had brought in federal court over the last five-year period, and that record had been unprecedented, up to that point.

Uh, now, if you think about the timing, that was the last five years or so, I'd won 80%. I'd say maybe in the first 20 years, I might have lost 80%. There have been a lot of things that I'd like to pass on to you because I've lost a lot of cases, and I've won a lot of cases, and there's certain things, little things that may seem little, but they make a big difference. And when I've got an opportunity to talk just for kind of a limited amount of time to folks that really care about making this world a better place, I'm going to tell you the most I can in this little bit of time.

So, first of all, dismiss all your notions about being intimidated by federal court. We've had way better results in federal court recently. And by recently, I mean, in the last five years. You can dismiss all your notions about having problems with not being able to pick what voir dire, having problems with jury selection. We've gotten so many multimillion-dollar verdicts in federal court with all white juries, or predominantly white juries, black victims. There are a lot of things that can be done, even if you think you're in a hostile environment. Even if you think you're dealing with folks that are conservative. A lot of times you really don't have the opportunity to pick a jury that is of your peers. In fact, I don't know if in my 26 years, I've ever seen a jury that I would say is a jury of my peers and my client's peers. So, we've had to find ways to win in environments that may seem hostile.

So, one of the first things that you have to understand is that police misconduct cases go to trial at a higher rate than every other case, whether it be personal injury. I mean, I work at a law firm where there's employment, and there's personal injury, and then there's civil rights, and I'm the one that's always in trial and we had seven trials in 2019. That's a lot for a civil litigator. You know, you get out of trial, you're preparing books for the next one. And the reason is, for political reasons, a lot of city councils, police chiefs, and police unions just don't want to pay on these cases because

they just don't want to be seen as soft on crime. We're still dealing with a lot of inertia that blames the victim of police shooting for getting killed, and you have to understand that you're going to be in trial a lot. And it's not as intimidating as you may think. Dean Bledsoe talked about the concept of pitfalls, and the pitfalls, they're definitely there. But you have to figure out some tried and true methods. And I've had the wonderful opportunity to bring up some young lawyers. And I always tell them, "You'll never make nearly as many mistakes as I've made in my career. Just, you never will make them." And but you have to really have the mindset that you're doing something that is larger than yourself. And when you lose, a lot of times you lose for all the wrong reasons. Sometimes you lose because racism just nailed you. You can do the best you can to neutralize it, but sometimes, it's going to come in.

And the other thing is that when we start thinking about the concept of police misconduct cases, prejudice, I'm not necessarily talking about racial prejudice, but just prejudice is the number one problem. You're not going to have this type of prejudice and a personal injury case or an employment case. So, you have to look at it from the beginning of how are we going to neutralize it? And they come in four basic categories: gangs, drugs, criminal acts that have been in the person's past or criminal history, or bad acts or things that folks have done on the same day of the incident that the police weren't aware of. And when you look at the evolution of the Supreme Court law, of course, culminating in the seminal case of *Graham V Connor*[5], out of 1989, you-- whether it's that or it's a state law model, there's one common denominator that a lot of people aren't aware of. Everything is looked at from the perspective of what the officers saw. So, they're going to try to conceptualize this idea of what is a reasonable officer. And all of those components of perception are based on what the officers saw. So, if the officer is not aware of the horrible thing that your client did beforehand, you should not be having to deal with that in front of a jury. One of the reasons for our success at the firm is we have become masters at the Motion-In-Limine.

And Motion-In-Limine is a very effective tool. You got to flesh this out in discovery. In 90% of the cases, especially in big municipalities, it's 99% of the cases, the police have never had any contact with the person that winds up getting shot. And so along those lines, when you're taking the deposition of that officer, did you know this person? No. Did you have any idea that he was having a gang affiliation? No. Did you know that he may have been high on drugs or had a history of drug abuse? No. You're asking these questions to set up motions in Motion-In-Limine. And you set up the Motion-In-Limine saying this evidence is far more prejudicial than probative because it is getting into something that the officer did not know. And that is an amazing tool to keep out those horrible four things which really create problems. You can get really burned if you don't understand this because once their jury hears, you know, that your client, you know, drowned a cat or something that-- earlier that morning, you're finished. There's not a lot you can do with something like that. Even though it may not be relevant to the overall issue, you've got to keep this stuff out early. So, the gang membership is another one. It still is a very hot button, especially with white jurors. It's a very hot button issue.

Drugs, usually, that's some component of drugs. Sometimes, if it's a deceiving, there's some drugs in his system. But it's a very difficult concept for the defendant to prove that the person acted a

[5] *Graham v. Connor*, 490 U.S. 386 (1989)

certain way because of the drug. So, the idea that you may have enough in your system, or you may have some coke in your system, and they're going to bring up all these experts to say that this person acted because of under the influence of that, it's a very difficult thing to do, and it should really be challenged, because all of the ways that we lose these cases have nothing to do with the facts. They have everything to do with prejudice and how they, they bloody up our clients by insinuating that the client brought this upon himself by breaking the law that he deserved to be shot, and the really insidious and really, aggravating-- the insidious thing that the almost evil is that they will try to profit the notion that the world is a better place without your client or without your client's loved one, so to speak. And if you're sitting at the table with a black woman who lost her son, and you actually go through that experience a few times you understand it's evil, because it really isn't.

And there's a few things that you can never forget about, which I wish someone had told me decades ago. I'm going to tell you now. The concept of deadly force, which has become my specialty is supposed to be a last resort. And people don't really understand that. With the most basic discovery, you can get a policy consideration into evidence which is going to say something along the lines of this. The use of deadly force as a last resort, to be used in the direst of circumstances, only when other means of control have failed or are not practicable. You set that standard really high, and you can start doing this as early as the officer's depositions. Reinforce this concept over and over again that this is a shooting, and a deadly force is being used here. Because we've gotten so far away. We've just accepted as a country and a society that police kill people. We've accepted that this is something that happens. And if you follow that out, you could have some very disturbing conversations which I had in the early years of my career with jurors who would say, "Well, why did he run?" And the law does not allow an officer to shoot someone in the back for running. But the juror would say, "Well, why did he run? I wouldn't run from a police officer." And I'm saying, "Well, why you shouldn't?" And the jury said, "Well, why did he run?" He brought that on himself. The psychological effect of all of this is that by breaking the law, which most of our folks did, breaking the law that they have invited any form of retribution up into the point of death, that they may get, for breaking that law, and that is wrong. It's not the law. It's absolutely something that you can't fall down that. You can't slip into that because it's wrong. And, and you can get every officer to admit this, if you know the right way to talk to them. You know, officer, surely you would agree that deadly force is the last resort. They're going to say, "Yes, it should only be used only in those instances in which you or another person is facing a significant death of imminent, that means happening right now, imminent bodily-injury."

And when you look at that, and you keep reinforcing that concept, you start saying, well, the fact that the person's in a gang doesn't give you a reason to shoot them. The fact that the person may have a criminal history five miles long does not give you a reason to shoot. The fact that the person may have even been in possession of a gun does not give you the reason to shoot him. And this is very effective with non-black jurors because they're not going to have the same life experiences that as people of color we have. They haven't seen the police do all of the cruel things that we've seen them do. But they can understand a rule. All people that sign up for jury duty can understand a rule. And if the rule is that you cannot use deadly force unless there is an imminent threat of death or serious bodily injury at that moment, and you keep hammering that doubt, and you keep

focusing on that, you start seeing different types of, of responses from jurors, because it's not about race. It's not about morality of, should police be prosecuted? It's, they have a rule. And every police department has a similar rule. And they violate that rule. So, when you start thinking about how we start turning the tide, it, it's about making the issue something different than they want to make that issue. It's about formulating the issue in terms of a shooting. And if you think about this, why do we give police guns? Because it's to protect their life. And the idea is if someone has to die, and there's a bad guy on the other side, the officer should be able to defend himself. And that's really the narrow circumstance that we have. We've gotten so far away from that, that police kill unarmed people, and they kill people when there's no danger by saying they were afraid of something. And that may be true, or it may be false. But I know-- I feel that gun armed men. I know I killed the person, but I thought he might have a gun. And I-- so it's no longer--- are you in self-defense, are you firing to protect yourself. It's you've, you made a mistake and you're trying to get us to understand the reasonableness of this mistake. Now, that's kind of far afield from why we give police guns in the first place. And you can't ever get away from this central thing. And if I say one thing that you hear, this is the most important thing, and we just forget about it.

But the job of the police officer is to apprehend a person and bring them to court. The job of the police is to apprehend, to catch the person. When they kill that person, the entire system of justice that we have, that our founding fathers have laid down for us is turned on its head because there's no jury. There is no judge. I have said this to juries that are not black with great effect. In our system, you're innocent until proven guilty. Everybody knows that. We forget about it, though. People forget about it so quickly that you're innocent until proven guilty. And whatever this person has done, whatever crime they committed, whatever horrible thing, even the most conservative juror will agree with the premise that they should have their day in court. They should be tried by a judge and a jury, and if there's going to be some form of punishment to be meted out, it should happen in an environment like this in front of a judge and a jury. And what you have in the concept of the federal officer involved shooting is none of that. And the thing about a death case, uh, is that you're usually representing minor children who have their initials, instead of their names, and they're totally blameless. So, you can turn and flip the tricks that they have been using for decades against us, simply by focusing on that old document called the Constitution. But you have to be very clear about how you address these issues. You have to get straight to the point. Uh, juries and that's why federal court, I like more than state court, because you can't waste any time. You've got a clock sometimes six hours to prove your whole case from opening statements to closing argument, including experts and everything. You think that's horrible. That's bad. It's actually quite good. Because if the jury gets accustomed to you getting straight to the point, every time you stand up, they're going to wake up, and they're going to pay attention. And these are some of the things that have really worked because I've tried a lot of different types of approaches in the state court. I used to prefer state court, and now I prefer federal court. But nobody can argue with winning is better than losing, and I've had a great dose of both in my career. And the way that we have started winning these cases is simply in a nutshell by framing the issue, in a way that supports our claims. How am I doing for time? I'm just talking off the cuff right now.

Gary Bledsoe

Oh, good. You're good. You might take a few more minutes, because now, this is just tremendous. So, take a few more minutes if you might?

Brian Dunn

Oh, okay, well, thank you very much, Dean Bledsoe. The only reason why I'm going into this detail is the concept of police misconduct litigation's popular now. But when we started, we were doing this in obscurity. Johnnie Cochran was the only game in town for many years in this type of litigation. And it was painful. It wasn't glamorous. We were losing a lot. We were having a lot of depressing, you know, lawyers only like to talk about their wins. Lawyers only like to talk about victories and at one time. They don't talk about that other six times, you know, when they got beat that, you know, in that two-year period. But we were dealing with that. And I can't think of very many people who are-- I'm 52 years old in my 26-year practice, and I really have a tremendous amount of trial experience. And it wasn't my choice, and these are cases that we had zero offer, zero in a death case or an offer that was so small that we had no choice but once you go to trial, and we've been actually turning the tables recently. And that's been something that I feel incredibly lucky to be able to see both sides of this.

But I also can't say that this is anything that I'm doing. The social consciousness has changed towards these cases. The work that is happening in the streets of this country have helped tremendously. The cell phone has helped tremendously. But at the end of the day, when you start getting in that inner sanctum of the courthouse, in the courtroom, it's a battlefield that has very strict rules of engagement. And we get hammered because we don't understand how those rules play out well enough. We get hammered because we are unconsciously letting information go to the jury and to the jury's psyche that they have no business hearing. And once that thing is out there, you can't get it back. So, the concept of having these issues heard before the jury gets to them is very important. And I think I've always said the case is won before you even start the trial if you've done your work right.

Gary Bledsoe

Thank you, so much, Mr. Dunn. That was a tremendous bit of information that I think it will be extremely helpful. I think taking control of the litigation and trying to make sure that it's litigated appropriately, I think that's kind of a fundamental point that you're making, and I can really see the importance there because once you lose control, there's so many little things that might happen, and that one little thing will lead yours astray or the other way. And so, you've really got to be battling to make sure that the judge allows you to try the case in a way that it ought to be tried.

Brian Dunn

Yeah, that one little thing has caused me to drink more than I should over the course of my career ultimately. But you know, we're starting to witness it a little better. Oh, that one little thing, whoo-whoo. Anyway, bring back PTSD for me. Just kidding. No way.

Gary Bledsoe

We're going to have more questions later. So, thanks so much. I think that is the exact kind of thing that we want to hear and, and your honesty and about, about the pitfalls and losing cases. But learning from those, I think that's what we all should know, right? And very few lawyers have never lost cases. So, I think that's a great point. And you know, one thing you talked about that Mr. Benjamin talked about was the Constitution. So, our third panelist, is someone who is an embodiment of that. You know, I know when it's interesting that you say you prefer federal court now because I think many litigators would prefer state court for a number of reasons. But I think that sometimes you have a United States District Judge who actually believes in the Constitution where it's living and breathing in their courtrooms and who actually gives credence to the preamble. You know, the preamble says that our constitution really leans towards justice, right? That's one of the things that it says, and it's supposed to be a guide in interpreting it, but that's one of the little used portions.

But I know that our next guest, is the judge who's the living embodiment of that. And I know that Thurgood Marshall School of Law is very proud of him because he doesn't give advantages to any side. He gives advantages to the United States Constitution. And he also is someone who shows us that, you know, you don't have to be in a certain political party necessarily to provide justice. He's a throwback to the old school where really and truly the constitution meant something and the evolution of what occurs in the courtroom is not to be result-oriented, but simply to adhere to what is directed by the United States Constitution. So we want to welcome the United States District Judge, Kenneth Hoyt distinguished alum of Thurgood Marshall School of Law, the next presenter, and he's going to talk about all the things that he's seen kind of recommendations from a to-do list or a not-to-do list, things that he's seen litigators do around-- over the years, these cases, with a view towards, of course, obviously, what kind of guidance is provided by the appellate courts, and what kind of success one might expect from there. Let's please welcome, United States District Court Judge, Kenneth Hoyt. Judge Hoyt welcome.

Larry Taylor

Gary?

Gary Bledsoe

Yes.

Larry Taylor

This is Larry. Unfortunately, the judge sends his condolences right now. He is unable to attend. And so, saying that we will look at potentially getting a video recording from him at a later time and adding it to this presentation that will be saved on to this page, and so that people can come back and hear from him at a later time. But I think, both of our panelists kind of opened up the door for another part of this discussion because a lot of us have not had the opportunity to go to federal court, or to, deal with these cases. And we've already talked about the intimidation of a judge. And I think several of us would like to hear stories about, you know, jurors you know, trying to do Voir Dire, and the judge shuts you down on a key point in which a juror has opened the door

for you to really dig in and try to really get that particular juror who's a bad juror, let them talk themselves off. And so, if you guys could and we'll start with Bhavani, talk about some of-- give us some war stories, as far as what you guys have been through on these because I know Brian has some excellent, Brian and I have worked on a couple of cases together. He's flown in town, and we visited with clients, and so, and then, Brian, also, when, when it's-- when you're up, if you could talk about some of your experiences, with Mr. Cochran and dealing with some of these cases, and even maybe even talking about Geronimo and Bhavani?

Bhavani Raveendran

So I, I've only been trying cases for eight years so I don't-- I'm not going to pretend I have any understanding of what Brian, has experienced, you know, in the past. I'm sure, it's been, nothing I can imagine. I've had a couple experiences where judges, in the federal system don't really let us do Voir Dire. I've had multiple judges where you have to submit the questions before and they kind of pick and choose what they want to ask. And then, I've been allowed to do follow up with jurors after that. And the worst I think I've had is 10 minutes of Voir Dire, where the judge conducted all of it, and at the end, said that both sides could ask a single juror a single question. We ended up winning that trial. So, I'm not going to second guess whatever the judge did in those 10 minutes was glorious for us. But I've had the opposite experience where we've got extended Voir Dire where we could take individual jurors in the back because it was a sexual assault case. So, the issues we had to question on are a lot more sensitive. And we got all the time we needed. And in that case, we ended up not getting the verdict we wanted even though we had extra time. So, I've kind of had it all over the place.

And every judge has been a little different. In the Northern District of Illinois, we get to really Voir Dire our potential jurors, which is phenomenal in other places. I think the smallest amount of time I got was actually in the Southern District of Illinois, in a trial there. That was the 10 minutes. and again, we didn't even get to ask questions. So, I think it kind of runs the gamut. You prepare for the best Voir Dire you can and just hope that you're going to get that time. But there's no like specific rules for federal courts across the country to follow. So, you never really know what you're going to encounter with that judge.

Larry Taylor

Brian?

Brian Dunn

Oh, well, yeah, I have had a lot of run-ins with judges over the course of the 26 years, some good, some bad, but the one rule that I could always say to everyone that is a common denominator always, always is incredibly polite to a fault. Be conciliatory to a fault. You have to try to understand a few things about trials is you can make a lot of mistakes and still win. You just have to be ahead at the end. And a trial is an organic process. And a lot of times you will go home after a day thinking we're finished. We've lost that horrible thing. Oh my God, my clients said this. But it almost doesn't matter as much as you think it matters. And as lawyers, we're kind of

perfectionists. We want to win every day. We want to win every witness. We want everything we do to work. And it's not necessarily a realistic way of looking at things.

Now, when you're talking about judges and the judges' personalities, you have to get a read for what they're going to be--what they're going to allow you to do earlier. And when I was a young lawyer, not a young lawyer, in my first trimesters of practice, I should say, I used to try to push the envelope with judges, and I used to try to see how far I could go. And sometimes, it works. Sometimes, it didn't. But once, you know, the judge is visibly annoyed with you, you've got an uphill battle. It doesn't mean you can't still win because I have won in rare circumstances when it was clear the judge was not on my side. But the reality is a lot of the jurors that are there, they don't really know what the world they're in, is they're supposed to do. And they kind of take their cue from the judge. He's sitting up high. And if he picks a side that is not yours, you could have some problems down the line. So always be respectful. If you get admonished like, we heard the attorney talking about smiling in front of a jury and getting a slap down. I've done so many worse things than that, than smile in front of a jury and get smacked down. And one win, and they're like, yeah, man, you look like an idiot that day. We were all laughing at you back in the court in the jury room. And you know, you have to kind of drop your ego and develop, as Johnnie Cochran told me, develop the thickest skin that you can.

And Larry, you were talking about working for Johnnie, and Johnnie is a master, and he truly is a master. But that's a good thing and a bad thing for a young lawyer. And let me just try to explain this. You have to be you as a young lawyer, and part of the spirituality of what we do is you have to find your own voice and speak in the way that God wants you to speak with your voice. You can't speak with another person's voice. And Johnnie Cochran was like watching Muhammad Ali. And I was-- I literally, in some of my early trials, tried to do things Johnnie Cochran did and say things that Johnnie Cochran said, and I looked and felt like an idiot each time, because the reality is he is being Johnnie. I wish somebody had said, "You're never going to be Johnnie. Don't try that. Try to be Brian. Try to be the best you that you can be." And jurors have an awful lot of patience. If you flub, if you get something wrong, if you say something that is the diametrical opposite of what you meant to say, and-- but there's one thing that they don't have patience with at all, and that is if they get a sense that you're trying to pull a fast one. If the jury gets, you know, as a plaintiff, it's even harder, because you're going to be asking for millions of dollars at the end of this thing. If they even get a hint that you're duplicitous, or that you're trying to pull a fast one, that you're finished at that point. So, if there's something like you're reading a deposition, for example, in trials, and the other side says it's been taken out of context. And the judge says, yeah, you did take that out of context counsel. You say, "Oh, your Honor, I'm so sorry. I'm so sorry. Let me read--" make it look like it was such a mistake. And I'm going to read even more of this now just to let you guys know that I'm a straight shooter, and I'm going to be fair.

And the other thing that really helps you with juries is not wasting their time. If you've ever sat on jury duty, you've ever done it, it's arduous. You spend a lot of time waiting. And if you're not wasting their time on day one, they're going to notice it day two, they're going to notice it, but by day three, they're really going to be on your side unconsciously because you're not BSing them. And that goes such a long way. You don't have to be that eloquent. You don't have to be someone

that blows people away with your oratory. You don't have to be someone who is not fumbling around with papers. And you have those types of screw ups. But the juror will give you so much leeway, and it doesn't matter what color the juror is. But if you or your client are trying to cheat, in their mind, you're going to fall so quickly as a plaintiff, and you're going to try to remember that. No matter-- I used to get really depressed mid-trial thinking that I had screwed up and all this, and none of that stuff, I was ever depressed about almost ever mattered. So just try to understand that, I would say, to a lawyer going through trials.

Gary Bledsoe

You know, one, there's a related issue, I think that maybe we haven't talked much about, and, and I'm curious. I've always thought this was such a huge issue in 1983 litigation. I know there's been so much discussion about and rightfully so about the qualified immunity issue. But you know, there's the, the *Monell*[6] problem, right, the custom pattern policy and practice and moving force, you know, the being able to establish that to get municipal liability. I know that, a lot of litigators say, "Well, the, this conduct will be more likely to stop if government entities, for example, were actually hitting." The government entities, uh, have to pay now. We know they pay if there is an individual officer that is-- that is held to be liable in anyway, but I think that the, the consequence of *Monell* seemed to me to be somewhat significant. And so how do you guys get around *Monell*, or is *Monell* a problem in your minds in terms of what's required for proof when you're trying to establish government liability?

Brian Dunn

Well, I'm going to say something that may be somewhat unpopular in response to that. And the first thing is our clients are paying us to get a certain result, and how we go out. Without paying us, they-- we don't get paid at all unless we win, but they're picking us to get a certain result. And *Monell* is not going to get any more money for the client. It's just not unless you're in a jurisdiction where they don't indemnify, and most jurisdictions are going to indemnify a judgment against a police officer. So, when you start talking about custom in practice, you have to understand that this is not something that many judges are going to let you spend a lot of time with at trial because you have to prove a constitutional violation first. You have to prove, like for example, an excessive force occurred or there was a cruel and unusual punishment within the facility. And that is a prerequisite to the establishment of municipal liability.

Now, for those of you who may not know what *Monell* is, *Monell versus [inaudible] County of Social Services*[7], it is the case where the Supreme Court basically said, that there's no vicarious liability for civil rights. In other words, if you drive a truck, and you get into an accident, your employer is liable or if you do something, the respondeat's superior is going to make the employer liable. That is not so in the case of civil rights because they're individual. The only way a municipality can violate your civil rights is through certain ways. Failing to train, for example, when there's a deliberate need or a deliberate indifference to a train protocol, custom and policy and practice, ratification of an unconstitutional theory. The *Monell* weapon is most useful if you're

[6] *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978)

[7] *Id* at 682.

really trying to focus on something that is novel. We have, for example, the emergence of sheriff's gangs in LA, where these are actual tattooed members of the sheriff's department that are engaged in these egregious acts of horrible force. We've-- I brought *Monell's* case in my sheriff's case-- in my sheriff's cases now because I want to be able to do pre-trial discovery on these gangs and how to get these, you know, these issues hammered. But *Monell* is something usually that happens before a trial. It's going to be a function of pre-trial discovery. I've seen lawyers with boxes and boxes and boxes and boxes of documents, in a room in their office. I say, "What is all that for?" They're like, "Well, we just got our *Monell* discovery from the city of Long Beach." That's every shooting since 19, you know, some, something. Actually, a lot is destroyed there, so that's probably a bad example. But say Culver City, but that type of work and that type of effort, all of those things, that's a different way of thinking than getting in and out for trial. When I was talking about trial, speed is key. Efficiency is key.

Talking about the municipality after you've already established the Fourth Amendment violation and trial, it's not going to elevate the damages anymore. So, you got to think about while you're doing that, but if it is to be done, the best way to do it is to force a settlement because this is something I've seen a couple of lawyers do very effectively, especially in these jail cases. Get all of this discovery together, force a settlement and say, look, the judge has already defeated your summary judgment motion on *Monell*. You're going to have a major problem. If this evidence comes in, and that is a lever, that is incredibly useful. But again, it's kind of an unpopular concept if you're trying seven cases a year and you're doing discovery, and you're doing a lot of things to try to get the cases ready. You have to ask yourself practically speaking is *Monell* really something that we want to be doing? But it does have its utility.

Gary Bledsoe

Uh, Bhavani, do you have any, any insights to add to that?

Bhavani Raveendran

Sure. So, I totally agree. *Monell*. It's very difficult to try a *Monell* case. What I like to do is include it in the complaint and to start the discovery process if I think there's a good basis for it. And if we don't come up with what we need, you can-- it's not accepting defeat to withdraw account if you have to. If you get an MSJ against your *Monell* and you're like, "Yeah, I can't beat this because I didn't get what I needed," you know, you save yourself some time. And if it's true, it's true. You might have to concede sometimes. I think it's really helpful, in the city of Chicago to include them because we know so much about what they've done from other cases, that it's really quite simple to lay out that history, and then you have to see if you can make it the moving force behind your incident, right? So that, that becomes the difficult part, that linchpin right there. And the last thing I'll say is, our firm has, I think, right now the biggest *Monell* verdict in the country on a shooting case of an off-duty officer. And I think one of the reasons that that was successful is because the decision was made to go after the city and their customs. And the officer was not at trial. He was not part of that trial at all.

So, the-there are times when you get this situation where it's clear to you that the reason behind this isn't necessarily this person's action alone. It is this thing that's been happening for a long time.

So that sometimes is very-- I think it becomes clear if you have that option. So that's something to be looking for throughout. And the last thing I'll say is, if you are one of those, you got one of those lottery clients where all they care about is making a change, that might be the time you get to try to push a *Monell* case with all your mind. I've got a client like that right now, and I'm working on a *Monell* case that I think might have the teeth it needs. Um, so we'll see. If discovery gives us what we need, we're going to go all the way with it. If not, we're going to have to be open to reconsidering at some point.

Brian Dunn

It should also be said that the-- their custom policy and practice is not the only way to establish municipal liability under *Monell*. We have had a lot more success with failure to train. And the components are done they realize that there was a need for training? This comes up in foot pursuits. It really comes up in mentally-- in mental health cases where mentally ill individuals are getting killed by the police because they haven't established any protocol of dealing with people that are mentally ill. So, the failure to train component of *Monell* is much easier in terms of discovery. It has all the punch you need going to trial. You have the component of making a difference, because if they really get hit hard at *Monell*, we did this in a taser case back in 2016. You start seeing different training because that means that anybody with a taser case, once you've established the taser case, they have an unconstitutional, deliberate indifference to training. That municipality is on notice that they've got a problem. So other cases can come after. But when people think of *Monell*—

Gary Bledsoe

Oh, no, go ahead. No, please finish.

Brian Dunn

Oh, I get a lot of times that people think of *Monell*-- [crosstalk]. Oh, I was just talking about failure to train, I think, is a very good thing. Also training-- focusing on the training is a good aspect to approach municipal liability.

Gary Bledsoe

Another area, I was going to ask you both that you might, really have great insights on, to help individuals is this. I think you both-- you kind of mentioned it the whole idea about the clearly established rights, right? In other words, one of the areas- one of the other pitfalls is being able to pin down, that there is a clearly established right that's actually involved. And, you know, not every case goes to United States Supreme Court. And there may be different ways that circuit courts have gone in around the country. And so, you may have three or four circuits one way and a couple of different way and the others may be a different way. So, it seems to me that it's kind of-- it's almost like a moving target in some ways that clearly establish a rights idea. I think you guys might provide some guidance in terms of how you try to establish clearly established rights when those issues come up in these cases in regard to qualified immunity.

Brian Dunn

I can tell you that those words "clearly establish" have made me want to jump out-- jump out of a window more than any other two words in the-- in the English language. You got to understand one thing. Qualified immunity does not attack your state law claims. So always have a backup. You have to have a backup state law claim that is attached to your lawsuit because you can get knocked out of qualified immunity on a whim of a judge so easily. And what Dean Bledsoe is talking about is you have to establish, in some cases, that before your incident happened, there was a similar incident, that was litigated usually on the circuit court level that involved facts that are so similar to your incident, that it put the police quote "on notice" that what they were doing was unconstitutional. Now that is a serious, serious problem. It didn't used to be a problem because the standard was so broad that clearly established could be anything that, for example, in a shooting case, *Tennessee v. Garner*[8] was a case that we used, Thurgood Marshall's Shooting case. We used that to establish a lot of issues regarding the constitutionality of shooting. Then, they said, no, it's got to be more and more specific. It's got to be more and more specific. So, what happens is you have a different component of constitutional jurisprudence that was never contemplated. The framers of the Constitution did not say, we will make it illegal for unconstitutional searches and seizures if it has happened before, under very similar circumstances in that jurisdiction. If, you look at a fundamental right, it's being-- it's being blurred just by the concept of qualified immunity. But what you have to do is scour the entire circuit for cases that are similar to that. And when I'm in a jurisdiction that is not my home-- in California, I know what they all are off the top of my head. I could tell you any type of case, I know how to get past it. But in Mississippi, I've got a case, I really have spent an awful lot of time looking at this before I even filed because I know they're going to come at me with qualified immunity. And if you really dig, a lot of times, you can find some cases that are going to get past that. So, it's a--it's a very daunting issue because you're still subject to the whims of the federal judge. And if he doesn't like your case, he's going to find something different about it. The-- you can distinguish anything to say, "Well, that was during the daytime. Well, that was in a rural area, that person was mentally ill, and this person is not mentally ill." And you can whittle it down so much to where they can just say, well, this is a really nice case, sorry, but it just wasn't established. And if you have untraditional like a dog bite case or a beanbag case, or a guy who got his eye shot out with a-- with a non-lethal projectile, these are the kinds of things that you might run into a problem with, but at least you can tell your client, "Look, it's going to take a little longer, but we're still alive in state court." So, you know, fear not, because we've gotten some good verdicts in state court after we've been kicked out of court completely on the federal level based on qualified immunity, but I think--I'm being optimistic, Dean. I think we're going to see a change in that, with this new democratic house. I really do. And there's some bills that are on the floor that I'm being told about that are going to address this issue.

Gary Bledsoe

Hopefully, they'll be--

[8] *Tennessee v. Garner*, 471 U.S. 1 (1985).

Bhavani Raveendran

I would just--

Gary Bledsoe

--addressed with Mr. [inaudible]. Yes.

Bhavani Raveendran

Just, I wanted to jump in just a little bit on one thing that kind of boggled my mind the last time I wrote an appellate brief. And it was that I had always kind of smushed qualified immunity into two elements. And what courts have started to do is parse it apart. So, you're clearly established is you have to show that the laws clearly established and show that a reasonable officer would know it was clearly established. So, it's like they turned it into two elements. And there was a case called *Kisela v. Hughes*[9] that happened in 2019 the Supreme Court heard, and then after that, the Supreme Court had 8 QI (Qualified Immunity) potential cases up in front of them this last cycle, and they didn't look at any of them. So those standing law firm--

Brian Dunn

Because it was-- it was Sonia Sotomayer's Dissent----it was Sonia Sotomayer's Dissent in that *Kisela*[10] case, that scared the rest of those judges away for good. Read her dissent. It is just-- she just dropped the hammer in that dissent, and I think that they haven't taken a cue like this since then. I'm sorry. I just had to bring that up.

Bhavani Raveendran

No worries.

Yeah, so the rule that they come up with in *Kisela* is that officers are entitled to qualified immunity unless existing precedent-- and I'm reading it because I like had it my notes. I just knew we'd talked about it. Officers are entitled to qualified immunity unless existing precedence squarely governs the specific facts that issue[11], but at [Dori?], it doesn't require a case directly on point to be clearly established. So, what, you know, in different circuits, you're looking at a complaint like I had a case in the Fourth Circuit where we had, a prisoner, a female prisoner who was having her medicine withheld unless she did sexual acts on a guard. And in the Fourth Circuit, it isn't clearly established to be a violation of your Eighth Amendment rights if a guard requires you to have non-consensual sex. I mean, that's crazy, right? There's so many circumstances.

Gary Bledsoe

Unbelievable.

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[9] *Kisela v. Hughes* - 138 S. Ct. 1148 (2018)

[10] *Id* at 1155.

[11] *Id* at 1152.

Bhavani Raveendran

--totally, this is totally a violation of the Eighth Amendment circuit after circuit. But the Fourth Circuit and the Virginia Supreme Court had not made that decision, so the court threw a case on qualified immunity. And this isn't a case where we were able to allege that an additional guard was listening and could hear the whole thing and could see it, and we had video of him turning his face and looking at the cell. And even with those facts, the court was like, well-- and you know, these people, these guards, they don't have that high end of education. So how could you even train them to know that that was a violation?

Brian Dunn

Well, have you thought about how backwards that is? How backwards that is that you're wrecking your brain when this is clearly, this is every type of Eighth Amendment problem you could ever have? And you're wrecking your brain to try to find something similar. It says-- none of these cops are reading judicial opinions before they go to bed at night. They don't understand like, what the law. They're not Alexas doing searches, oh, I could shoot this guy. Here, I can't shoot him. It is an absolute perversion of, of constitutional jurisprudence, and it's done intentionally to deprive people of rights that are-- the segment of the population that needs them the most, and it's intentional. And it this is the-- we're in the dark ages on this. I'm just telling you.

Gary Bledsoe

That, that really is truly incredible. There's, there's another issues kind of related, I'd like to bring up with, with you both. This whole idea about reasonable officer, I think you know, becomes part of the law. And we know the, the *Graham*[12] opinion that you guys have talked about. And you know, you've got this permutation of whatever about any objectively reasonable officer. And I know that even in *Graham*, I think Thurgood Marshall concurred. And it seemed to me that, that what he was propounding was a different standard, a way of evaluating or coming about determining how an officer is reasonable. How do you guys interpret what, what it is that you're trying to prove and, and are you running into judges that will allow a proof to go forward that since one other officer would, would simply do it the way this officer did it that, that means, that, that officers entitled defenses as being a reasonable officer or what's actually required in your interpretation? What are the courts are doing with that?

Brian Dunn

Well, essentially, the courts give a lot of direction as to what a reasonable officer should do in the jury instructions. Every circuit is going to have a model jury instruction about what constitutes objective reasonableness and in the use of force, there's going to be a litany of factors that they go by. In state court, it's the wild, wild west. It's anybody's game. But in federal court, they're going to say, okay, what was the nature of the crime, that issue? Did the suspect try to fly, flight? Was the person-- Did they pose an imminent threat? What was the nature of the threat they pose? That's a big one. Sometimes they take into consideration whether the person is mentally ill, whether there

[12] *Graham v. Connor*, 490 U.S. 386, 399 (1989).

were other protocols. But the federal court system, it's so interesting that you brought that up Dean Bledsoe, because the federal courts have understood that there is a lot of ambiguity there, and that there's some problems, and they have done a lot to delineate exactly what a jury should talk about when determining objective reasonableness, and that did not exist when I started practicing in the early '90s.

Bhavani Raveendran

And I'll just add to that, so what my experience has been that you might have some officers that agree with how the situation ended up, and they might say they would have done the same thing. But sometimes you get some that say the opposite. So, what I try to do is give them scenarios that run them through any-- you know, if you have a case where someone had a firearm, and they dropped it, and then a deadly force was used. You know, ask them, have you ever encountered another person with a firearm before. Or you're a police officer? Did you shoot them once they dropped the gun? You know, get those scenarios that are similar to your case, and build on those. And get as many of those as you can from the other officers, get, you know, what they-- um, sorry, get what they learned in training from them, get the defendant officer to tell you stories of all the times he didn't use deadly force so that you can kind of stack up as many facts as you can against, you know, the fellow brother officers are going to say, yeah, I do the same thing. I was in fear for my life, too. I mean, they're all going to stick together. So, for me, I just try to give the judge as many other facts as I can, to, you know, counteract that. You can use your expert in that way. You can throw scenarios at the defense expert and say, what about this? What about that? Right? Now, and just keep changing the scenario by one little fact to get as many yeses as you can that that wouldn't? What is it a little thing that would have made it a little unreasonable here? And then you, you kind of add all that up together and you give-- you make it a question of fact, whether this was reasonable or not? Give the judge enough so that they can't just turn you out on those, the fact that all the officers agree that this was the right thing to do in this circumstance.

Gary Bledsoe

Hey, Larry, I think you have-- you have the questions ready, I guess, those are really informative answers.

Larry Taylor

I do, Gary. Okay, guys aside-- one of the first question is aside from what you've shared, are there any best practices which lead to successful outcomes in relation to the pre-trial process?

Brian Dunn

I'll go second on this one.

Bhavani Raveendran

Well, I, in the interest of time, I know that the article that I co-wrote with my boss, Tony Romanucci, was sent out, and it has a list of ideas for pre-suit cases, um, pre-suit investigation. So, for things that I missed, they would be explained in more detail there. So, I would definitely look at that list. And I think just given the time, I'd like to hear what Brian has to say.

Brian Dunn

Well, I think that establishing rules is very important, and I was hearing what you were saying about when a--person has a gun, because we've had a lot of gun cases. And, I have found that just the idea of a rule is something that is very important to establish. Now, where did the rules come from? Usually, they come from a combination of, the officers' training manual because there's really some wonderful things in those training guidelines and training manuals about sanctity of human life. And, using deadly force only as the last resort when everything else-- those aren't going to be in the jury instructions. But if you can establish that this is the rule, okay, and every officer admits it, most people really don't realize that just the mere possession of a handgun does not entitle an officer to use deadly force. Even if they tell the person to drop it, and they don't drop it, those facts alone. And you can establish in deposition, the rules that you think you're going to be needing at trial. And it helps if you've seen the same thing over and over and over again. So, if it's a case with somebody with a gun, you can establish through every police officer witness, you would agree that just the mere possession of a gun does not entail that you use deadly force, you have to be doing something provocative with that gun. And if you get every single witness to admit that it's amazing how it starts to seal this, this concept in the eyes of the jury. There's this thing, if you say it three times, or whatever, if you get every witness to agree that this is the rule, then when you're in closing argument, your work is already done for you. But you want to have that kind of thing hammered down as early as the deposition stage. So, you got to start thinking. Don't think the case is going to settle. Think it's going to go to trial and think that you're going to have to set up the case for trial as early as--The first major event in discovery that requires, I think, expertise is the deposition of the defendant officers. And the best way to set yourself up for a great victory later is to try to figure out: What rules can I lock this person into that are going to be universal rules. And I found that to be incredibly effective. And it also takes some of the fear and stress out of trial prep because if you could say, okay, I don't know what I'm going to do, and then, I don't know what's going to happen. I don't know who's going to be on that jury. But I know that I could show that there's a rule, and that officer violated that rule. And you don't need a whole lot of points to carry the day. So, let's--

Larry Taylor

Next question. Uh, for some young-- for a young attorney who is looking to get into the practice of police misconduct or civil rights cases, what can I expect as far as case expenses or costs or an average of?

Bhavani Raveendran

I'd say it's a hard question. It just depends like what kind of experts you need. I'd say on the-- on the cheap end, if you're just doing depositions, you can just assume that depositions fall in the range of $500 to $1,000 per deposition transcript, which is absurd, but that's kind of the, the general rule of thumb there. If you take 15 depos, that's already potentially $15,000 right there. So that's just to give you an idea of the expense involved. That's not including experts, demonstrative exhibits, consults that you might need. You might need to hire like people to make copies. The world, there's no end to the number of vendors you might have to include. So, I'd say at your low

end, no experts, you're looking at potentially $30,000 to $50,000, just right there. And then on your high end, when you're looking at a case that, for instance, I have a shooting case that Scott might need in the future, I haven't decided yet, might need eight experts. You know, you got DNA, gunshot residue, fingerprints, you need all these different experts potentially. So, when you're looking at the high end of cases, the sky is kind of a limit on how much you can spend if you end up hiring 10 experts. If you have a medical case that's really complicated and the causation on the medical is really complicated, then you have to hire a medical expert. Those guys run $500 to $1,000 an hour. I mean, it's, it's just like the sky is the limit on the amount you can spend. And sometimes, you need to spend the money to get the good verdict. So, it's-- that's a difficult question, I'd say, but, maybe Brian can answer it a bit better.

Brian Dunn

We spend considerably less, considerably less than those numbers. But we go into trial all the time. Usually only have in a police shooting case, the average police shooting case, if it's a fatal case, you know, the best thing is to have the coroner who performed the autopsy, testify because it's free, the person's unbiased, and they have to show up when you tell them to show up. And if you take their deposition, you're going to know what they say. Police practices expert is usually the one I'll rock with. If there is a trajectory issue, or an issue about the physical, physicality of the trajectory of the gunshots and how the deceased body was positioned, there will sometimes be one of those experts. But I work with the same guys over and over again, usually. So, you know, they, they don't ream me, like those numbers you're talking about? I have a-- if we're going to settle it pre-trial, I usually can get out for 25 grand or less. And if we have to go--? Yeah.

Larry Taylor

Thank you. Closing out, I would like to remind, our guests or our attendees, that there will be a 30-minute video on the John Crawford shooting in which we will hear from their family members as well as the attorneys on the case. It's very interesting that the shooting case had happened in Ohio. What you need to do is you'll need to go back to the platform screen. If you have jumped out, into the Zoom link, you need to go back to the platform and hit the John Crawford. That video will play at the break. And then we will go into our keynote speaker. We will definitely be operating on time. So, if you have any further questions, please go into the comment section and place those, and we'll do our best to answer those, where you'll be able to go back and look at them at a later date.

Larry Taylor

Dean Bledsoe, attorney Bhavani, my brother Brian, thank you all for your participation. And if you need those resources that Bhavani talked about, you can always join AAJ. It's a Trial Lawyers Association that provides a ton of benefits as far as experts and other resources and vendors that both of these fine lawyers have talked about. And to Dean Bledsoe, my mentor, and my friend, thank you for moderating this section. And we look forward to seeing all of you guys in the next session.