The Bridge: Interdisciplinary Perspectives on Legal & Social Policy

Volume 6
Issue 2 *Re-Imagining "We the People" Part Two: Transcripts from the AAJ Education's Civil Rights and Police Misconduct Litigation Seminar*

Article 5

2021

Civil Rights and Protective Orders

Michael P. Doyle
Doyle LLP, Mdoyle@doylelawfirm.com

Erin Brockway
Doyle LLP, Ebrockway@doylelawfirm.com

Criminal Rights and Protective Orders

Michael P. Doyle

Emma Brockway

Transcription:

So, I want to rip a little bit on what Larry was talking about, and that is tools. As a relative latecomer to civil rights litigation – I think the first case I was involved in was up in North Carolina for a trooper, about six years ago—I recognized, or at least it seemed to me, that there was a tool that trial lawyers have used that helps not just their client in that case, but build for the community what we need to know, and that's the knowledge base about misconduct by government and particularly police, and that's a sharing provision. How many of y'all know what a sharing provision is, a protective order or even heard of that? Not a lot. And I get it, and my sense is, I'll give you the take away, but what I want to share with you at the very beginning, and that's this: sharing provisions are simply nothing more than a protective order that follows the law … that doesn't allow a defendant, particularly a government defendant—a police department or a municipality—to silo off all their bad misdeeds over time, again and again, and keep it sealed unless it happened to come out at trial and prevent folks that encounter police misconduct again and again and again from knowing about what about happened before. About all the hard work of a particular trial lawyer or team of trial lawyers and having to fight that same battle every time they follow a case. And the reason why that's so important is something similar to what I also recognize in civil rights law. When you think about desegregation, when you think about *Plessy v. Ferguson*, 1896, when the Supreme Court blessed it and there was one justice, John Marshall Harlan, a former slave owner in Kentucky, who said No.[1] And he actually used words like, we have a colorblind society. There is no caste system here in America. And what he was speaking from was not just in that case, but the fact that segregation on public accommodations railroads had been fought by lawyers and their clients since 1843 in Massachusetts.[2]

And so when you think about under-utilized tools —when you talk about Thurgood Marshall and all the good he did—what it really built on is not just the hard work he did, not just the bright dissent that Justice Harlan used. But also, the work of other lawyers who built the law, who built the facts, who built the record, to make it possible almost a hundred years or more than a hundred years later. So, this tool of protective order is something, nothing more than what you're going to face in every case. But it's particularly important, at least from my view, in civil rights cases that when you talk about a protective order, when you talk about the case you have, that you recognize this is a tool that protects not just your client, but also you.

So, it starts with a civil rights case. It may appear fairly straightforward. [video] So, doesn't that look like— to the lawyer that doesn't practice civil rights—a clear violation of civil rights, that

[1] *Plessy v. Ferguson* , 163 U.S. 537, 552-564 (1896) (Harlan, J., dissenting).
[2] Id at 559.

somebody needs to pay: the city or the county or whoever is responsible for those troopers, needs to be responsible. But the reality is, what you'll hear in every civil rights case, is lawyers like Tony and Ben…all you'll ever really hear is this is a one-off, this is just a bad apple, or maybe one or two bad apples. And that's just not a defense, that's a theme that runs through civil rights litigation. And there's a lot of reasons, some of which we talked about legally. But also, if it's a bad apple, you don't have to fix the system, and that's why you'll see this again and again and again. [video] There is already bad apples. And for those of you who live here in Houston, it's not surprising that you'll hear the same thing. We don't need to fix the problem; this is just bad apples. [video]

So why is it now? You don't just have to not fix it, but there's obviously consequences for a civil rights case. But now, if you don't have the data [video] and, it's kind of like, if you've ever had a dog bite case, actually had a dog bite case, the theory is you get one free dog bite. If you have a vicious dog, you should get one free. And unfortunately, in civil rights law, all we've heard about is this Monell[3] decision that basically says systematic custom practice authorized or it is implicitly blessed by the chief or the highest authority. It's a freebie. There's no liability, you might have a judgment against the police officers involved, but that's it. And really, at the end of the day what is that worth? And so, in these cases, as opposed to do they know so well, it's all about the custom or practice. In other words, how many times have there been justified shootings? It may surprise you to learn, those who live here in Houston, at least for the past twenty-eight years. At least reported, there is yet to have been an unjustified shooting of an unarmed civilian in Houston. That includes one that sticks out my mind — a double amputee armed veteran in a wheelchair who allegedly was threatening two armed officers with a ballpoint pen.[4] So where is that data, all that information about that bad misconduct? All the information about how they investigate. All the information about whether or not shooting unarmed or shooting in violation of constitutional rights really matters, whether it's actually dealt with as opposed to a blind eye. Where is all that?

Well, what it seems to be is clearly—to the extent that you have good lawyers working hard—stuck under a protective order, except for the few cases that you try. And there's what I would call a threshold question is 'why are so many of these cases done in secret? Why are all the evidence about misconduct, the systematic evidence, sealed away?' And that's because of protective orders. Now there's certainly an argument—and I'll go ahead and throw this out there—that particularly when you're dealing with public entities— the city, somebody getting our tax dollars—they ought not be able to hide how many people are getting shot and killed unjustifiably. They ought not be able to hide how they do an investigation, or in reality don't do an investigation, because the system they set up. But they do, and they do it with protective orders that are routinely issued by courts. And so, there's certainly a good basis for understanding that you shouldn't necessarily have protective orders at all. I will say this. There are things that likely should be protected, for example, gruesome crime scene photos may not necessarily be public fodder, or at least not before trial. There's going to be medical records, so at least from my view. Fighting a protective order and saying it should never happen is too tough a hill. But before I go on, if you all, I hope you have a

[3] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978).
[4] Janes Pinkerton, Crime scene photos contradict officer's account of shooting,Houston Chronicle, November 27, 2016 (Updated: Dec. 21, 2016), https://www.houstonchronicle.com/news/houston-texas/houston/article/Crime-scene-photos-contradict-officer-s-account-10639109.php#photo-3506585.

chance to read the paper by our newly licensed lawyer, Emma Brockway. Congratulations. And actually, that was supposed to be a surprise, but she actually saw it yesterday. So that was before she even passed the bar so thank you, but she did all the hard work putting together the legal authority, but there's very good authority. That really this is all public. If you're talking about police misconduct, why is any of it really not subject in open courts all the way through the process to the point knowing what's going on?

So your choice certainly is to fight a protective order at all but consistently, what we've found is that battle almost never wins, because the judge finds 'Hey look, there's some things that need to be entered, some things that need to be protected. Let's go ahead and do a protective order. So then you're often —and this is what we see over and over again—presented with a defense council saying look we have a protective order we've used in dozens and dozens of cases. Everybody agrees to this order. Go ahead and sign it. And by the way, we have all this records of misconduct just sitting from the other cases that we're going to deliver to you and a shared file in the next three weeks, if you just sign our order. It's just that easy, sign here. And there are certainly a lot of pressures. Wait a minute. I've got a client. I need to get to the bottom of this. Why don't I just sign their order? And the reality is, most lawyers will do that. It's just easier. I'll go ahead and sign their order. What I'm suggesting is that's a prison, and it's a prison not just to the cause of justice, to allowing this evidence to build a pattern of misconduct, but it's also prison for you and your case because if you can't compare what you've been provided to what's been provided in other cases. If you can't actually check to make sure you're getting everything and you're stuck in this jail where you can't reveal what they've shared with you, or more likely what they haven't shared with you, you've essentially boxed yourself in a prison for information where you're not going to get the whole thing. And what you hard work bill will never go beyond.

So there's another way to do it. And this, at least in the last thirty years, started in the auto product liability cases so I want to give credit where credit is due. Because certainly the process we've all seen, is you send your discovery request, you asked for disclosure in federal court. And they cough up whatever they are going to cough up. But they tell you look, we'll give you all this stuff, but we need a protective order, here is the one to sign. And let's just say you fight that order. What you end up doing is going to the judge and saying either we don't need that protective order, which is a difficult task with busy judges who think let's just get this taken care of, I've signed the same order ten times before. Why are you complaining about it? Or alternatively. Use their order and maybe tweak this phrase, or tweak this phrase, but whatever you get stays sealed off forever. And at the end of your case, it gets tossed away, or at least sealed away in a file that nobody ever knows how many times and the next case and the next case to the next case, you get the same argument. You can't really prove that there's a pattern of practice, no matter what was developed in these other cases. So here's … and I give a little bow to Tony Blair, who I'm not a big fan of. Here's a third way.

And it's the way they developed the ability to use it most effectively because what they found was in a rollover Bronco 2. Ford might tell a guy in Wisconsin about the rollovers, because he has six motions to compel, but there's still some guy in Wisconsin that there is nothing happening, they've never had anything like it at all. And they figured out that unless we could compare, unless we can

share, unless we can actually see whether or not they're giving us everything, by not sealing yourself off with a protective order, we will never catch them, and we'll never get the full story. And so the mechanism is very simple. If you have an order, there's always a protective order that says … Okay, your expert can do it or you simply include a sharing provision. As we see from Emma's paper, the law is in our favor. It's an abuse of a protective order to actually go ahead and say, destroy this stuff, you can't share it. Everybody has to work just as hard as you did to get the same evidence. You got to go through the same battles.

The law, starting the Supreme Court case regarding tobacco is, no—sharing with like situated players, other folks with civil rights cases—those folks are entitled to what you've already developed, and a protective order is intended to protect trade secrets or protect privacy rights. Those are all legitimate uses of protective orders. But, it is an abuse of a protective order to simply say everybody that comes down the pike with another civil rights case or another similar case, they have to fight the battle anew because we can do it with a protective order. And so, unlike a lot of the battles we have as trial lawyers in this battle, the law is on your side. The practice may not be. But the law is on your side. And what's actually much more appealing when you're presenting it, and this is what's kind of suggested from the auto product liability litigation is, instead of waiting for the defendant to file a motion of protective order, instead of waiting for them to say we'll give you everything as soon as we have a protective order. From the very beginning, file your motion of protective order that provides for the law, that keeps what secret and only was secret out of public view. And, more importantly, allows you to share and preserve for the future, all the evidence of pattern and practice or whatever else kind of misconduct you're dealing with, to be able to share with people in the same situation, their words. And what makes sense? Is that this evidence is what saved lives, knowing what happened before helps protect all of our citizens going forward.

There's a really interesting quote that says, 'There's nothing that's not happened before, except that which we've forgotten.' And if all we're doing is fighting the battle for us or our client, and saying well, I just need to get through this case. And we're forgetting that we're really as trial lawyers fighting for the community and our clients, we're doing less than we can do as trial lawyers. And so, it's certainly a suggestion, I have certainly heard this before, I understand these great goals. I Know we need to protect it. We need to get this done. I understand that maybe you won't allow other folks to get this evidence. But you know, my client just wants to get this case done with, they want to get this through all that they really care about the financial recovery at the end of the day. I think there's two points to that. And the first is very basic. That's not what I've seen in human beings that have been through something like this. I don't remember a client that has not told me at some point, 'I don't want this to happen to anybody else or their family. This is something that should never happen again.' So, I think you under settle. But here's what I would call a lagniappe. Those of you all know me on how I love this word it's like a bonus, a Cajun bonus. You're going to make a gumbo, you have shrimp but it turns out you have crab that's lagniappe. So here's a lagniappe -- something that I would throw in. You can actually, at the beginning of your representation, if you're thinking of this ahead of time, make it clear to your client, you're not going to participate in concealment of evidence that the public needs to know about. And it's nothing more important or nothing more difficult rather, than simply saying, Look, I will never sign a

confidentiality agreement. I will never agree, and you should not either, from the outset of our representation, that if it's something that's going to harm the public, we'll take the money and run.

And there's a very personal reason from my perspective why, as lawyers, we ought to fight this particular battle. Why we ought to grab this tool for a sharing protective order. And it dates back to asbestos. In 1929, having manufactured asbestos for about 60 years, Johns Manville, New Jersey, then and even now, the largest, the manufacture of asbestos products, had employees that were developing asbestosis. And in 1929, one lawyer, who— we still don't know the name because it's sealed—agreed on behalf of his eleven dying clients that he would seal all the evidence they already had about how this asbestos product kills people, and not just in a day but in years over time.[5] Relevantly short time. And so that lawyer, unnamed, and I'm going to say that it's a he because it probably was, went along with it. And those eleven clients maybe got a couple hundred dollars more, those eleven clients who died or were dying. And I think that was from something I read about that three of them died, their family got just a little bit more. But what did that do to our community?

In 2021, we now know that, that that asbestos harm, what that lawyer agreed to do by not sharing it and not protecting the public. At least half a million deaths just from cancers. There's tens of thousands of people every year, across the world, 3,000 in the U.S. alone, who are dying of asbestosis. It's still built into at least 30 million houses in America, where it wasn't there in 1929. And, having been through it with a close family member who recently had cancer and who had been exposed and had asbestosis, and you'll never know whether that in fact is why he passed away. But you know that this particular asbestos that somebody knew about, nearly 100 years ago, you know, and a lawyer and his clients agreed to seal it off. And directly resulted in all those deaths and all that harm and all that impact on family. You know, the question is, do you want to be that lawyer? Do you want to be that lawyer that helps police departments or municipalities or folks go ahead and bury along, with your client, the evidence of a pattern and practice? Or do you want to be the lawyer, and this is for right around the corner where I like to ride my bike at least once a week, who helps build justice with what you do?

And one of the simplest tools—one of the tools, that whether it's going to happen to be the standard now, or maybe after a hundred more have asked for it —is the simple step of asking for the law to be followed and that the evidence of pattern and practice is a sharing provision. It doesn't stay hidden in my files or the police files, but it's subject to the building that we do as trial lawyers for other trial lawyers and our clients. And I sure hope that lawyer, and not the lawyer that lets them bury that evidence. Thank you.

[5] Furuya, Sugio et al. "Global Asbestos Disaster." International Journal of Environmental Research and Public Health Vol. 15,5 1000. 16 May. 2018, doi:10.3390/ijerph15051000.