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The Calibre Column

7 keys to winning a use-of-force lawsuit

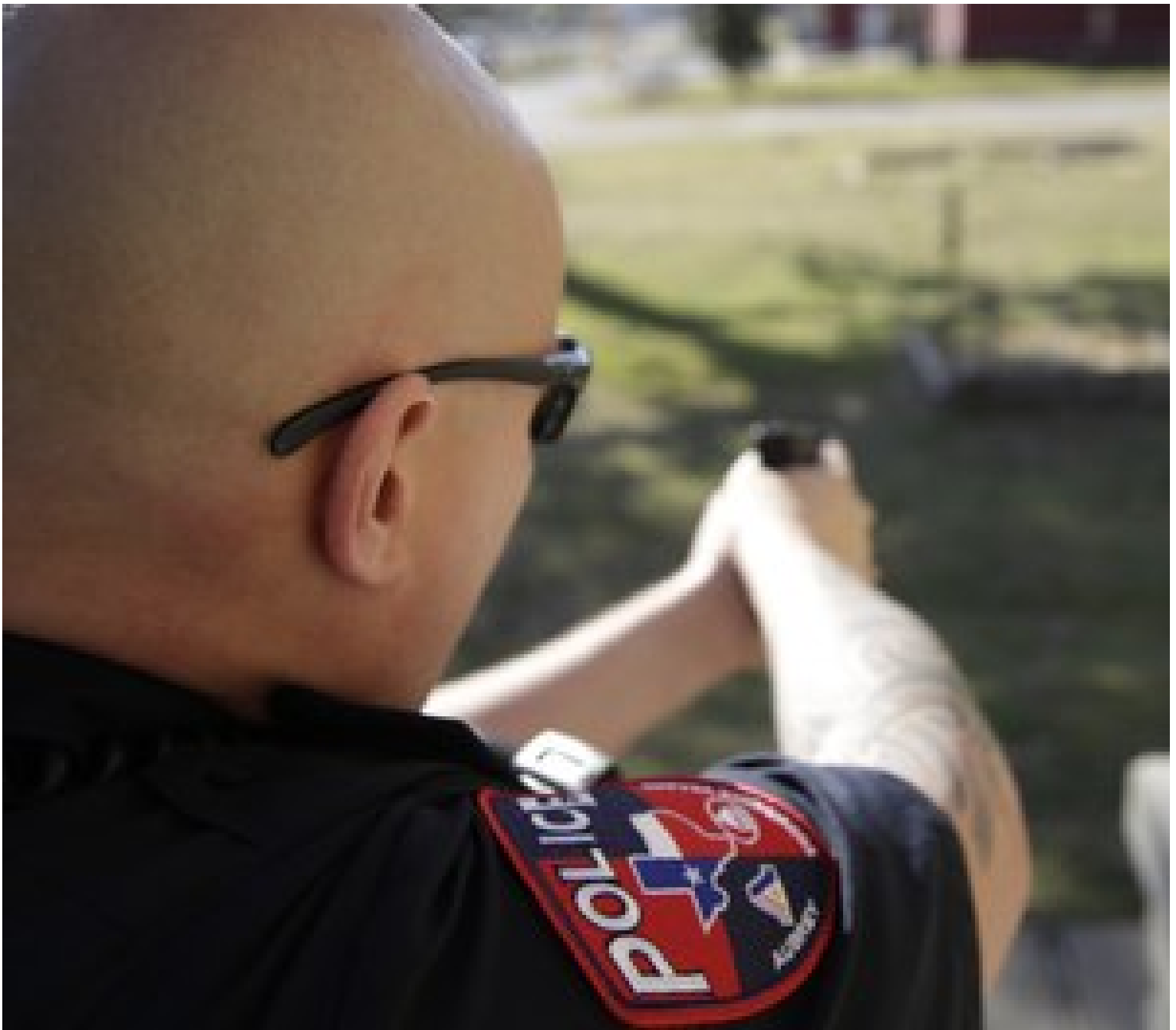
Plaintiffs' attorneys search for reasons to argue to a judge or jury that it was the officer, not the suspect, who unnecessarily turned the encounter deadly

Jan 7, 2020

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By Charles Remsberg

Once you've defended your life on the street, how do you now defend yourself in civil court – and *win* the lawsuit that customarily follows an [officer-involved shooting](#)?



Even when de-escalation fails, the plaintiff's attorney will likely argue that you could have used some less harmful method than your gun. (Photo/PoliceOne)

We put that question recently to veteran attorney Scott Wood, a former cop who's spent the last quarter-century representing officers and agencies against accusations of [excessive force](#) and other alleged wrongdoings.

He identified seven critical issues you and your attorney need to confer on before you give your official statement about a shooting and before you testify in any legal setting.

"These are areas plaintiffs' attorneys tend to home in on in their attacks," Wood explains. "They'll be searching for reasons to argue to a judge or jury that it was *you*, not the suspect, who unnecessarily turned the encounter deadly.

"Obviously, you need to be truthful in your statements and testimony. But anticipation and thoughtful contemplation of these potential traps can help you deliver the truth with the greatest impact.

“And don’t be complacent just because your shooting is cleared of any *criminal* violations,” Wood warns. “Civil law can be a treacherous bramble patch of its own, with high stakes that can seriously impact your career.”

1. FUNDAMENTAL REASONABLENESS

First and foremost, refresh yourself on the two landmark Supreme Court use-of-force decisions, [Tennessee v Garner](#) and [Graham v Connor](#). In all your statements and testimony, you want to emphasize how the factors that these cases associate with a reasonable use of force relate to your incident.

You’ll need *detailed* answers to questions such as:

- Was the confrontation “tense, uncertain and rapidly evolving?”
- When and why did you suspect or know the subject might be armed or violent (body language, prior contact, etc.)? What training or experience led you to these conclusions?
- Did the suspect actively resist arrest or compliance or attempt to evade arrest by fleeing?
- At or near the point you used deadly force, in what way(s) did the suspect pose an immediate threat of death or serious injury to you, to other officers, or to civilians? Just stating that you were in fear of your life, without elaboration, will likely be insufficient. “Details about the suspect’s *movements* may be extremely important here,” Wood says. “If you can’t recall his actions with any particularity, you need to explain the reasons why, like tunnel vision or your strong attentional focus elsewhere.”
- At or near the point you decided to shoot, what crime was the suspect was committing? (This may be more severe than the offense that brought you in contact with him initially.)
- Despite being in fear of your life, were you in full control of your emotions at the time you fired? “Plaintiff’s attorneys may try to use an officer’s emotional reaction *after* a shooting to suggest that he or she was out of control *before* the use of deadly force,” Wood explains.
- Can you justify each shot you fired?

2. DE-ESCALATION

“In the fantasy world of plaintiffs, virtually every police shooting could have been peacefully resolved if only the involved officer had used the right calming words and tactics,” Wood says. “But in the real world, the chaos of the typical confrontation does not always lend itself to successful verbal persuasion.”

After establishing whatever training you’ve received in [de-escalation techniques](#), you may bring reality to the table with detailed answers to these questions:

- Before you used deadly force, was there enough time and a suitable atmosphere to attempt de-escalation of the situation? If not, describe why.
- If circumstances permitted, what specific verbal and nonverbal efforts did you make toward de-escalation? Were you able to establish sustained communication?
- What was the suspect's reaction to your efforts? Did he/she escalate the scenario? How?
- Was it feasible to move behind cover and continue discussion/persuasion from there?
- If de-escalation was failing, was retreat tactically feasible? "Keep in mind the dangers of retreating from an immediate threat since doing so requires a division of your focus of attention," Wood says.

3. NARROWED OPTIONS

Even when de-escalation fails, the plaintiff's attorney will likely argue that you could have used some less harmful method than your gun to control the suspect, like a TASER or physical restraint. To establish that your options were narrowed by the circumstances – and especially by the suspect's behavior – be ready to explain in detail:

- When did you draw your gun and why?
- What made you decide to use deadly force?
- Why wasn't a tactical repositioning or some lesser level of control practical or available?
- If you used a shotgun or rifle rather than your pistol, why?
- Did the suspect look at you and were you easily recognizable as an LEO? If because of time or other urgent constraint it was not feasible to give a verbal warning before firing, as courts prefer, your attorney can argue that "when a suspect sees an identifiable officer pointing a gun at him and giving commands that are not obeyed, the warning of imminent deadly force is implicit," Wood says.

4. CAMERA CONSIDERATIONS

"Video from your body-worn camera or dash cam will often be a determining factor when a judge or jury considers how your shooting evolved. So properly preserving and interpreting this powerful evidence is critical," Wood says.

A good defense of your actions begins, of course, with your maintaining "camera awareness" regarding your language and behavior during and after the incident so your professional image is sustained throughout any recording.

Immediately after the shooting, you or your attorney should formally request in writing that all digital evidence be "preserved in full in its raw, native format, with the chain of custody carefully documented" to counter any later claims of editing or tampering.

Beyond that, anticipate questions such as:

- Did you follow your agency's policy regarding the use of cameras? If not, why?
- Was your camera activated at the time of the incident? If not, why?
- Why didn't you activate it sooner or deactivate it later?
- Why do the first 30 seconds of the recording have no sound? (In the technological design of most body cam platforms, there's a slight lag between the activation of picture and sound.)
- Does the recording fairly and accurately reflect what happened?

"Discrepancies between what the camera shows and what you remember or witnessed at the time might be related to certain technical qualities of current recording equipment," Wood says. Human factors that impact memory and perception also may be involved.

Wood adds that you and your attorney should be permitted to see any video recordings before you give any formal accounts of your shooting.

5. AFTER-CARE

"What you did *after* the suspect went down can go a long way toward dispelling the image of you as a callous, killer cop," Wood says. "Once you stopped his threat to innocent lives, what did you do in an effort to keep the suspect alive?"

Be able to describe:

- Your [first-aid training](#), the potentially life-saving equipment you carry, your prompt summoning of EMS, and the specific medical measures you attempted for resuscitating the suspect, even if his condition appeared hopeless.
- If you did not administer first aid, why? "Currently, there is no well-established federal case law that requires an officer to do anything other than summon medical aid for a suspect who has been shot," Wood explains. "But as a practical matter, think ahead to sitting in a courtroom in front of a jury watching your bodycam recording and listening to the death gurgle of the suspect while you do something else. Even just kneeling and trying to get a pulse looks better than not doing anything."

6. DOCUMENTING DAMAGE

At the time of the shooting, thoroughly document with photographs, written descriptions, and medical records any damage to you, your uniform, or your gear during struggles or assaults by your assailant.

"Several years may pass before a civil suit comes to trial," Wood explains. "Your physical injuries hopefully will be healed by then. Contemporaneous records will help reestablish the stress and

violence you faced at the time.”

Collect and preserve:

- Photographs of your injuries taken each day they are still visible since the incident. The appearance of bruises and contusions may worsen as they age.
- Data downloaded and secured from any personal device (Apple Watch/Fitbit, etc.) that would have monitored and recorded your heart rate at the time of the shooting.
- X-rays and other medical records involved in your assessment and treatment at a treatment facility promptly after the shooting.
- Close-up photos of damage to your uniform, shoes, vest, duty belt and equipment. If the damage is significant, ask investigators to collect the items as evidence.

7. PROFESSIONAL CHOICES

For most officers, being sued over an OIS is, like the shooting itself, a once-in-a-career ordeal. You don't want your attorney to be a first-timer, too, at this critical juncture in your life. Defending LEOs is a legal specialty, requiring more than a generalist's expertise.

A case-hardened lawyer can properly guide you in how to assure that you're rested and ready before giving any detailed statements, how to invoke your rights in both civil and criminal venues, how to handle plaintiffs' interrogations, how to ensure that the record for your defense is complete, and other matters essential to your fair treatment and your winning against unwarranted accusations.

If you don't have union representation or don't know personally of skilled legal counsel, consult the website of the [Fraternal Order of Police Legal Defense Plan](#). There, without charge or obligation, you can access approved attorneys by state.

“Depending on the nature of your shooting, you and your counsel may want to confer with an expert in human performance under stress,” Wood suggests. Often highly controversial uses of deadly force turn on very complex issues – shooting an unarmed suspect, mistaking a cellphone for a gun, delivering an “excessive” number of rounds, sending shots into an assailant's back, firing at an oncoming vehicle despite policy restrictions, to name a few. A human factors expert may be able to provide scientific research and interpretations involving physiological, biological, and/or psychological dynamics that can help you counter a plaintiff's claim of malicious intent.

Wood estimates that at least 75% of officer-involved shootings end up in civil litigation. “As an officer, you've trained for hundreds of hours to ensure your competency in making deadly force decisions,” he says. “Don't risk all that – and your career – by not thinking ahead to a legal challenge that may hit you in the future.

“Decide today what you will do and who you will contact for representation in the event you're involved in an OIS.”

Scott Wood, with the law firm Wood Puhl & Wood in Tulsa, Oklahoma, can be reached at okcoplaw@aol.com. In addition to his legal work, Wood is a popular law enforcement presenter.

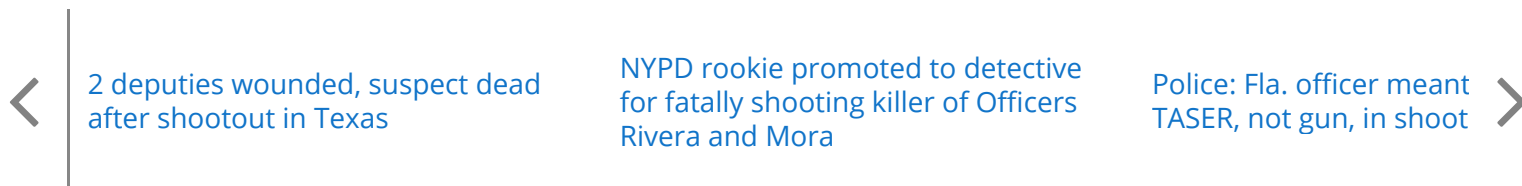
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