

4-1-1991

Litigating Police Misconduct Claims in North Carolina

Irving Joyner

Follow this and additional works at: <https://archives.law.nccu.edu/nclcr>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Joyner, Irving (1991) "Litigating Police Misconduct Claims in North Carolina," *North Carolina Central Law Review*: Vol. 19 : No. 2 , Article 2.

Available at: <https://archives.law.nccu.edu/nclcr/vol19/iss2/2>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

LITIGATING POLICE MISCONDUCT CLAIMS IN NORTH CAROLINA

PROFESSOR IRVING JOYNER†

I. INTRODUCTION

Police misconduct actions are designed to address grievances that citizens have against police officers for violating their constitutional rights or rights secured by federal statutes. Police misconduct litigation, however, is not the simplest area of constitutional or criminal law in which to practice. There are many pitfalls which an attorney may encounter and must avoid. Some of the pitfalls are caused by the victim, while others are created by the defendant and the nature of the litigation.

Perhaps the more predominant problem in police misconduct litigation is the adverse impact created by the victim's character. In too many instances, the victim of police misconduct is an individual who has an extensive criminal record or who is a suspect in illegal or questionable activities. This dilemma is to be expected since police misconduct cases arise most often from conflicts between the police and persons suspected of criminal activities. Some victims of police misconduct, however, are persons with outstanding backgrounds and credentials who simply have had the misfortune of having a conflict or disagreement with overzealous, brutal or sadistic police officers. The problem associated with the introduction of bad character evidence of the victim should not distract from the attorney's task of zealously and competently representing victims of police misconduct.

Blacks and other minorities are especially vulnerable to acts of police misconduct because of the widely held perception that some minorities are more likely to be involved in criminal activities. Although all cases of police misconduct do not involve persons of a particular racial or ethnic background, history has shown that Blacks and other minorities are more apt to be victims of police violence. Yet, Whites, women and gays

† J.D., Rutgers University School of Law. Irving Joyner was a partner in the firm of Currie, Pugh and Joyner in Raleigh, North Carolina before joining the faculty of North Carolina Central University School of Law, where he serves as Associate Dean and Assistant Professor of Law. Professor Joyner is a member of the North Carolina State Bar, the North Carolina Academy of Trial Lawyers, the Academy of Trial Lawyers and past president of the North Carolina Association of Black Lawyers. He is the author of *Criminal Procedure in North Carolina*, a Michie publication, and other articles and manuscripts for continuing legal education programs. Professor Joyner lectures extensively on trial practice and civil rights topics.

are also victimized particularly if they advocate unpopular causes or political points of view. The reasons for the misconduct make little difference. The crucial point is that those persons who are sworn and paid to protect all citizens are sometimes the perpetrators of violence against specific segments of the population.

The difficult task of litigating police misconduct claims is exacerbated by court protection of police officers. Historically, police officers have been expected to maintain and enforce the prevailing social order. In short, their job is to keep the peace, to arrest suspected wrongdoers and to prevent criminal activities. The judicial protection afforded police officers is based on the presumption that the use of force is necessary to maintain social order and to apprehend persons suspected of committing crimes.

More often than not, citizens will believe that the actions of police officers were appropriate, lawful and necessary under the circumstances. As a result of these presumptions, it is extremely difficult to convince a jury of twelve citizens that police officers have violated the rights of others.

II. THE CIVIL RIGHTS ACT OF 1871

Known originally as the Ku Klux Klan Act, the Civil Rights Act of 1871 was enacted to enforce the provisions of the fourteenth amendment to the United States Constitution. The Act established both civil and criminal penalties where deprivation of rights occurred under color of law. In enacting the Civil Rights Act of 1871, Congress stated its resolve to protect the rights of all people under the Constitution.

A. 42 U.S.C. 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.¹

Section 1983 is meant to be broad reaching. Any allegation of facts constituting a deprivation of a right guaranteed by the fourteenth amendment under color of law or state authority meets the requirements of section 1983.

Since the Supreme Court's decision in *Monroe v. Pape*,² section 1983

1. 42 U.S.C. § 1983 (1988).

2. 365 U.S. 167 (1961).

actions have emerged as the primary statutory basis for actions seeking to remedy police abuse. Section 1983 actions can be brought in federal as well as state court.³ Both courts are required to fully adjudicate the claims of victims and to punish the wrongdoer if the jury determines that the defendant has violated the constitutional and/or statutory rights of the victim.

If a deprivation of a constitutional right cannot be shown, there is no coverage under 42 U.S.C. section 1983. It is important to note that every illegal act by a police officer constituting a tort under state law does not necessarily establish a federal cause of action for violation of civil rights under section 1983. An example would be a simple assault and battery by a police officer against a citizen. Unless the assault and battery rises to the level of a constitutional violation, a claim to redress that grievance must be brought in state court. Another example is a police officer who negligently performs his duties and the negligent conduct causes some harm to the victim. In such a case, a section 1983 action is not necessarily authorized.⁴ In order to prevail under section 1983, the victim must prove that the act of the police officer amounted to more than mere negligence. There must be proof that the officer intended to commit an act that results in the harm to the victim. The key requirements of a section 1983 action are that the offending officer must have acted under color of state law and that he caused an injury to the defendant's constitutional or federal rights. It is not necessary that the officer acted with a specific intent to violate the constitutional or statutory right but only that the intended harm resulted in the violation of the constitutional or statutory right of the victim.⁵

Section 1983 actions usually involve claims that either the first, fourth, fifth, sixth, eighth or fourteenth amendments of the United States Constitution were violated. Each constitutional violation carries a different standard of proof, and it is essential that plaintiff's attorney specifically spell out the constitutional claim and theory so that the court can properly charge the jury.

In addition to the constitutional claims, various statutory claims can be raised under section 1983. Where actionable constitutional claims are involved, the victim's attorney may also bring pendant state tort claims. An example involves the typical situation where a citizen is beaten by a

3. See, *Snuggs v. Stanly County Dep't. of Pub. Health*, 310 N.C. 739, 314 S.E.2d 528 (1984) (state courts exercise concurrent jurisdiction over claims arising under 42 U.S.C. § 1983); see also *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 371 S.E.2d 503 (1988) (state court may grant injunctive relief for violations under § 1983).

4. See, e.g., *Parratt v. Taylor*, 451 U.S. 527 (1981) (negligent loss of mail did not violate 42 U.S.C. § 1983); see also *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoner could not claim under § 1983 for negligent medical treatment).

5. See, *Monroe v. Pape*, 365 U.S. 167 (1961) (one is responsible for the natural consequences of one's acts).

police officer and wrongfully arrested. Under the constitutional standard, claims under the fourth and eighth amendments are possible. Under state tort law, claims of assault and battery, wrongful arrest and malicious prosecution may also be available to the victim. These tort actions are inextricably linked to the constitutional claims but also establish separate tort claims that "but for" the constitutional claims could not be raised in a section 1983 action in federal court. It is the attorney's responsibility to clearly enumerate each constitutional, statutory and state law claim that arises from the illegal conduct of the officer.

Constitutional deprivations must be alleged if section 1983 is to apply. If the violation does not constitute a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws,"⁶ the litigant must choose another forum in which to seek redress.

The claimed deprivation under section 1983 must also be committed under color of any statute, ordinance, regulation, custom or usage, of any state or territory or of the District of Columbia. "Under color of law" is generally understood to mean acting under the authority of the state or at its direction. The person violating the constitutional right need not be a governmental official if the individual is acting under or at the direction of a government official.⁷ Acts committed by a police officer, while functioning in that capacity, are committed under color of law. "Misuse of power, possessed by the virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."⁸ An off-duty police officer may, under certain circumstances, act under color of law.⁹

Although most police misconduct cases are brought under section 1983, persons who have suffered harm at the hands of law enforcement officials may use other provisions of the Civil Rights Act of 1871.

B. 42 U.S.C. section 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

6. 42 U.S.C. § 1983 (1988).

7. See, e.g., *Adicks v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (white woman in company of black students denied service in restaurant); see also *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93 (5th Cir. 1975) (plaintiffs were wrongfully detained and charged with shoplifting by store employees).

8. *United States v. Classic*, 313 U.S. 299, 326 (1941) (citations omitted).

9. See, e.g., *Belcher v. Stengel*, 429 U.S. 118 (1976) (off-duty officer shot and killed bar patrons); *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968) (status of being on duty or off-duty does not determine whether the officer has acted under color of law).

In order to state a claim under section 1981, the plaintiff must allege that he was the victim of racial discrimination.¹⁰ Section 1981 requires a showing that the officer's wrongful conduct was motivated by impermissible racial considerations and an intent to discriminate.¹¹

C. *42 U.S.C. section 1985 allows a private cause of action for conspiracies to violate constitutional rights and provides:*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of

10. See, e.g., *Masel v. Industrial Comm'n*, 541 F. Supp. 342, 344 (N.D. Ill. 1982).

11. See, e.g., *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982); see also *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1438 (9th Cir. 1984).

any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.¹²

To allege a violation of section 1985, the plaintiff must satisfy four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.¹³ The conspiracy must have as its purpose the deprivation of equal protection of the laws, or of equal privileges and immunities under the laws, but there must also be motivation by "some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action."¹⁴

If more than one officer is involved in the incident, the plaintiff's attorney should consider raising a violation of section 1985 conspiracy claim in the complaint. In doing so, it is important to understand what facts must be presented in order to state a colorable claim that a conspiracy exists. If a conspiracy is alleged, the plaintiff must present facts that show an agreement between two or more persons to commit harm to the plaintiff and that an overt act was committed by one of the defendants in furtherance of that conspiracy.¹⁵ The mere presence of another officer at the scene is not sufficient to make out a conspiracy.¹⁶

The attorney should carefully consider all available facts when assessing the appropriate civil rights sections to be raised in the complaint. The complaint should raise every possible claim. If the claims are not raised in the complaint, the cause of action is waived. While it is possible, under some circumstances, to amend a complaint at a later date, the better practice is to initially allege each possible claim. Initially alleging the claim gives the defense attorney the burden of researching the law and arguing motions to dismiss the claim rather than having plaintiff's attorney attempt to convince a judge that there is a sufficient justification

12. 42 U.S.C. § 1985 (1988).

13. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

14. *Id.*

15. *See Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979).

16. *See Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968).

to amend the complaint at some later point after the statute of limitation has expired.

The plaintiff's discovery focus is shaped by the legal claims raised in the complaint. Discovery will reveal whether plaintiff has sufficient evidence to survive a motion for summary judgment; however, that issue is moot if the cause of action has been dismissed because of an insufficiency in the pleading.

III. JURISDICTION

The jurisdictional basis to support plaintiff's causes of action must be specifically stated in the federal complaint; failure to include a proper jurisdictional statement will be fatal to the plaintiff's case. It is not necessary to exhaust either state or administrative remedies prior to filing an action under the Civil Rights Act. A state requirement that citizens file a notice-of-claim with an administrative agency does not bar civil rights claims in federal or state court.¹⁷ A plaintiff cannot be forced to litigate civil rights claims in state court merely because state law provides the same cause of action, unless the claims are not of constitutional magnitude.¹⁸

A. *Jurisdictional Statutes*

1. Section 1343

(a). The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b). For purposes of this section—

17. See *Felder v. Casey*, 487 U.S. 131, 140 (1988).

18. See *Hudson v. Palmer*, 468 U.S. 517 (1984); see also *Parratt v. Taylor*, 451 U.S. 527 (1981).

- (1) The District of Columbia shall be considered to be a State; and
- (2) [A]ny Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹⁹

2. Section 1331. Federal Question; Amount in Controversy; Costs.

- a. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.²⁰

3. Section 1332.

- (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between -

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

. . .

- (b). Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

- (c). For the purpose of this section and section 1441 of this title, . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business[.]

. . .

- (d). The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.²¹

19. 28 U.S.C. § 1343 (1988).

20. 28 U.S.C. § 1331 (1988).

21. 28 U.S.C. § 1332 (1988).

IV. CAUSES OF ACTION

A. *False Arrest and Detention*

A claim that a person has been wrongfully arrested and detained is actionable under section 1983 and is a violation of the fourth and fourteenth amendments. For a false arrest to be actionable under the fourth and fourteenth amendments, the plaintiff must show a warrantless arrest without probable cause.²² If a warrant was issued by a neutral and detached magistrate prior to the arrest, probable cause is generally not at issue, and a constitutional violation does not exist.²³ If the magistrate's determination that probable cause existed was incorrect, however, a cause of action for false arrest may lie, but the officer's action will probably be justified by "good faith immunity."²⁴ A police officer can be held liable in a civil rights action where he has altered an otherwise valid arrest warrant, and that act results in the illegal arrest of a third party.²⁵

Usually, false arrest, and false imprisonment and detention are state law torts. Plaintiff's attorney should always raise every state law tort in the complaint as a pendant claim. An action lies in North Carolina for false arrest, or for false imprisonment and detention if there is an illegal arrest by a law enforcement officer.²⁶

The fourth amendment prohibits the arrest of a citizen by a police officer without a warrant or without probable cause to believe that a crime has been committed and that the person seized has committed that crime. For fourth amendment purposes, a seizure occurs when an officer restrains the freedom of a person to walk away.²⁷

B. *Use of Excessive Force*

A police officer's excessive use of force where the officer is exercising his authority gives rise to a cause of action under section 1983. The excessive use of force may violate fourth, eighth and fourteenth amendment rights and also contravene North Carolina General Statute section 15A-401(d) (1988).

22. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967).

23. See *Baker v. McCollan*, 443 U.S. 137 (1979) (arrest pursuant to mistaken identity).

24. See *United States v. Leon*, 468 U.S. 897 (1984) (search pursuant to facially valid but defective warrant).

25. Compare *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989) (officer altered the name and other information on the warrant resulting in wrongful arrest) with *Baker*, 443 U.S. 137 (wrong name on the warrant due to mistaken identity).

26. See *Melton v. Rickman*, 225 N.C. 700, 36 S.E.2d 276 (1946); *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492 (1988); *Robinson v. City of Winston-Salem*, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

27. See *Brown v. Texas*, 443 U.S. 47, 50 (1979); accord *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

Under the eighth and fourteenth amendments, excessive force means force that is so disproportionate to the need presented and so inspired by malice or sadism as to shock the conscience of the court.²⁸ Courts have made it clear that officers are privileged to use a certain degree of force to arrest suspects and to prevent their escape.²⁹ To find an officer liable for excessive use of force, the force used must have exceeded the bounds of the privilege.

The United States Supreme Court held in *Graham v. Conner*,³⁰ that a civil rights plaintiff in a fourth amendment excessive force claim does not have to prove that the conduct was carried out "maliciously and sadistically for the very purpose of causing harm."³¹ Excessive force claims brought under the eighth amendment are governed by the more difficult cruel and unusual standard, but fourth amendment claims involving excessive or deadly force are to be analyzed under the "reasonableness" standard.³²

A different standard exists for liability under the fourth amendment. The use of excessive force by an officer must be viewed as an assault upon the person and, as such, implicates the fourth amendment. Under the fourth amendment, the plaintiff is required to show that the force used exceeded that which was reasonably necessary under the circumstances.³³ What is reasonably necessary under the circumstances is a jury question, which should be easier to prove than the "shocking the conscience" standard of the eighth and fourteenth amendments.

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake. . . . Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight'.³⁴

The state law tort of assault on the other hand and prohibition on the use of force as specified in section 15A-401(d), require that the force used by the police officer cannot exceed the force felt by an officer to be rea-

28. See *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970).

29. See, e.g., *Justice v. Dennis*, 793 F.2d 573, *reh'g denied*, 802 F.2d 1486 (4th Cir. 1988).

30. 490 U.S. 386 (1989).

31. *Id.* at 397.

32. *Id.* at 394.

33. *Id.* at 397.

34. *Id.* at 396. See also *Tennessee v. Garner*, 471 U.S. 1 (1985).

sonably necessary under the circumstances. This subjective test focuses on the mind-set of the officer rather than on an objective test that is used under the fourth amendment analysis. While the use of force to arrest is allowed in North Carolina, willful, malicious, or criminally negligent conduct or unreasonable force is prohibited.³⁵

A police officer in North Carolina cannot be held liable for assault damages where he acted in substantial conformity with prescribed procedure if there is no evidence of undue force.³⁶ If the officer acts maliciously in wantonly abusing his authority or by using unnecessary and excessive force, a proper cause of action exists.³⁷

The legality of the arrest is not at issue in an excessive force claim.³⁸ An illegal arrest may make an excessive force claim stronger, but the focus of the claim is that more force was used to arrest or restrain the plaintiff than was necessary under the circumstances. If force is not necessary to make an arrest, any force used by the officer is excessive.³⁹ The state law claim should always be raised by the plaintiff's attorney.

C. Use of Deadly Force

The illegal use of deadly force by a police officer against a citizen is actionable under section 1983 as a violation of the fourth and fourteenth amendments. In *Tennessee v. Garner*,⁴⁰ the United States Supreme Court declared that the use of deadly force to apprehend an unarmed, fleeing felon violated the decedent's fourth and fourteenth amendment rights.⁴¹ The Court held that deadly force could only be used by police when the life or safety of the officer or an innocent third party was in immediate danger.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him

35. 490 U.S. 386. See also *Myrick v. Cooley*, 91 N.C. App. 299, 371 S.E.2d 492 (1988).

36. See *Perry v. Hurdle*, 229 N.C. 216, 49 S.E.2d 400 (1948).

37. See *Todd v. Creech*, 23 N.C. App. 537, 209 S.E.2d 293, cert. denied, 286 N.C. 341, 211 S.E.2d 216 (1974).

38. See *Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980).

39. See *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115 (1986).

40. 471 U.S. 1 (1985).

41. *Id.* at 21.

dead.⁴²

North Carolina law provides that an officer is justified in using deadly physical force when it appears to be reasonably necessary to (1) defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly force; or (2) effect the arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who indicates an imminent threat of death or serious physical injury to others; or (3) prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.⁴³ A police officer is never authorized to shoot at a fleeing misdemeanor who does not pose a threat to the life or safety of others.⁴⁴ The North Carolina law probably leaves too much discretion to the police officer in determining how much force to use and when it is to be used. As a result, the North Carolina statute is vulnerable to a constitutional challenge.

Some courts have determined that the accidental or negligent shooting of a person by a police officer is not actionable under section 1983 as a fourteenth amendment violation.⁴⁵ Where an accidental or negligent shooting is involved, there is not the type of intentional, unjustified, unprovoked, and brutal conduct that the court finds sufficient to constitute a section 1983 claim.⁴⁶ The negligent shooting by a police officer constitutes a state tort and a section 1983 violation is not made out unless the officer's misconduct can be shown to be intentional, unjustified, brutal and offensive to human dignity.⁴⁷

D. *Illegal Search and Seizure; Invasion of Privacy*

Searches and seizures that violate the fourth and fourteenth amendments are actionable under section 1983.⁴⁸ Illegal searches also involve an invasion of privacy and the deprivation of property without due process of law.⁴⁹

42. *Id.* at 11.

43. N.C. Gen. Stat. § 15A-401(d)(2) (1988).

44. *Sossamon v. Cruse*, 133 N.C. 470, 475, 45 S.E. 757, 759 (1903).

45. *See Rinker v. County of Napa*, 831 F.2d 829 (9th Cir. 1987); *see also Mills v. Smith*, 656 F.2d 337 (8th Cir. 1981).

46. *Rinker*, 831 F.2d at 832.

47. *Id.*; *See also Daniels v. Williams*, 474 U.S. 327 (1986) (mere negligent conduct may not be enough to support a § 1983 claim); *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986) (section 1983 claim upheld when plaintiff alleged an unprovoked assault and battery because police officers threw him on the ground and kicked him repeatedly).

48. *See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961) (allegation of unreasonable search or seizure in violation of the fourth and fourteenth amendments satisfies the requirement under section 1979); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (the district court erred by not issuing an injunction prohibiting police from conducting unreasonable searches).

49. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (in holding that the Connecticut statute forbidding the use of contraceptives was invalid, the Court also recognized that the fourth

The liability of a police officer for conducting an illegal search without a warrant or exigent circumstance is clearer than the situation presented when a neutral and detached magistrate issues a facially valid warrant.⁵⁰ Generally, a facially valid search warrant authorizes an officer to search the designated premises. If the warrant is later determined to be invalid, the officer will be protected by the good faith defense.⁵¹ Section 1983 liability does attach if it can be shown that the officer deliberately or recklessly presented false information to the magistrate to obtain the search warrant; that the invalidity of the search warrant was apparent from the face of the warrant even though issued by a magistrate; or that the magistrate served as a rubber stamp for the conclusory allegations of the officer and that the officer's reliance on the magistrate's probable cause determination and on the warrant's technical sufficiency is not objectively reasonable.⁵² If an officer recklessly prepares a search warrant affidavit, he cannot have an objective good faith reliance on its validity.⁵³

The North Carolina Supreme Court announced in *State v. Carter*,⁵⁴ that the "good faith" exception articulated in *Leon* does not apply under the North Carolina Constitution or statutes.⁵⁵ The court reasoned that North Carolina's exclusionary rule is statutorily based and provides more protection for North Carolina citizens than does the fourth amendment to the United States Constitution.⁵⁶ As such, the good faith defense should not be available to police officers in civil rights actions if claims are raised under the statute or the North Carolina Constitution. Clearly, there is no basis for a good faith defense under the North Carolina Constitution although the North Carolina Supreme Court has relied on federal decisions in the past to interpret the substantive protection offered by article 1, section 20 of the North Carolina Constitution.⁵⁷

By definition, illegal searches and seizures can implicate the state torts of trespass, invasion of privacy, abuse of process, conversion and intentional infliction of emotional distress. Where facts make out these state torts, the attorney should incorporate them in the plaintiff's complaint under the pendant jurisdiction of the court if the complaint is filed in federal court. The remainder of this section is devoted to a general discussion of each of these state tort claims.

amendment involves an aspect of privacy); *Fisher v. Volz*, 496 F.2d 333 (3rd Cir. 1974) (right of privacy recognized); *York v. Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

50. *See* *Mapp v. Ohio*, 367 U.S. 643 (1966).

51. *See, e.g., Malley v. Briggs*, 475 U.S. 335 (1986); *United States v. Leon*, 468 U.S. 897 (1984).

52. *See Leon*, 468 U.S. 897.

53. *United States v. Boyce*, 601 F. Supp. 947, 954 (D. Minn. 1985).

54. 322 N.C. 709, 370 S.E.2d 553 (1988).

55. *Id.*

56. *Id.*

57. *See e.g., State v. Hyleman*, 324 N.C. 506, 379 S.E.2d 830 (1989); *State v. Hendricks*, 43 N.C. App. 245, 258 S.E.2d 872 (1979), *cert. denied*, 299 N.C. 123, 262 S.E.2d 6 (1980).

Any unauthorized entry upon the property or land of another, without legal authorization, constitutes a trespass.⁵⁸ The essence of trespass is the disturbing of the possession of a person's property rights and every unauthorized entry on the land of another constitutes trespass irrespective of whether actual damage is done.⁵⁹

Invasion of privacy has generally been accepted by the North Carolina courts as tortious conduct. Our courts have not explicitly held that a tort is committed when a person intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns. The Restatement (Second) of Torts section 652 B (1977) does recognize this offense, and there is no reason to believe that the illegal entry by a police officer into the home of a citizen or an invasion of the citizen's person will not be recognized as an invasion of privacy.

Under North Carolina law, an abuse of process consists of the misuse of the valid process of the law, after it has been issued, to compel a person to do some collateral act not within the normal scope of the process, or for some purpose of oppression or annoyance.⁶⁰ Securing an arrest warrant to be used as a bargaining tool to obtain a release from civil liability from a person who has been the target of an illegal search or seizure is an abuse of process.

Conversion, under North Carolina law, is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.⁶¹ The two essential elements in a conversion claim are ownership by the plaintiff and a wrongful conversion by the defendant.⁶² It is not necessary to show that the taker possessed a wrongful intent at the time of the conversion.⁶³ A police officer can be liable for conversion since public officials enjoy no special immunity for unauthorized acts outside their official duty.⁶⁴

The intentional infliction of mental distress, a recently recognized cause of action in North Carolina, arises when a defendant's conduct exceeds all bounds usually tolerated by decent society and that conduct causes serious mental distress.⁶⁵ The Restatement (Second) of Torts section 46 (1977) makes actionable the reckless infliction of severe emotional distress if bodily harm results from it. In North Carolina, a

58. *Academy of Dance Arts, Inc. v. Bates*, 1 N.C. App. 333, 336, 161 S.E.2d 762, 764 (1968).

59. *See Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952).

60. *See Stanback v. Stanback*, 297 N.C. 181, 200-01, 254 S.E.2d 611, 624 (1979).

61. *Spinks v. Taylor*, 303 N.C. 256, 264-65, 278 S.E.2d 501, 506 (1981) (quoting *Peed v. Burlelson, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)).

62. *Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E.2d 181, 183 (1975).

63. *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

64. *Gallimore*, 27 N.C. App. at 68, 218 S.E.2d at 183.

65. *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979).

plaintiff must show (1) extreme and outrageous conduct by the defendant, (2) which is intended to cause and does cause (3) severe emotional distress to another.

E. *Violations of First Amendment Rights*

Conduct by police officers that interferes with the free exercise of speech, press, association or religion gives rise to causes of action under section 1983.⁶⁶ Legal actions involving violations of first amendment rights are often associated with political and labor demonstrations and activities. Police officers are supposed to maintain a neutral presence when faced with unpopular political activities such as labor conflicts or religious expressions. However, officers often overstep their authority. The overstepping of police authority is best exemplified in *Dellums v. Powell*,⁶⁷ where police officers used physical force to disrupt anti-war demonstrations, and in *Glasson v. City of Louisville*,⁶⁸ where police officers prevented the plaintiff from displaying her poster at a public rally that criticized the President.

Article 1, sections 12 and 14 of the North Carolina Constitution guarantees to North Carolina citizens the rights to assemble together to consult for their common good, to petition their grievances against the government, and to freedom of speech and of the press. Such activities may be subject to reasonable time, place and manner restrictions but they cannot be denied.⁶⁹

F. *Violation of Fifth Amendment and Illegal Interrogation*

A section 1983 action is available to a victim who has been forced by police officers to confess to crimes that he may have committed.⁷⁰ Such actions violate the fifth and fourteenth amendments' prohibition against self-incrimination secured by fear of physical injury, torture, exhaustion, or any other type of undue coercion.⁷¹

Courts have held that the mere failure to adhere to the dictates of *Miranda v. Arizona*,⁷² does not violate section 1983. The violation of self-

66. See, e.g., *Hague v. Commission for Indus. Org.*, 307 U.S. 496 (1939); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) (holding that police violated a person's freedom of speech); *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973) (police officers held liable for violation of first amendment right of freedom of speech).

67. 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).

68. 518 F.2d 899 (6th Cir. 1975).

69. See, e.g., *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981); *State v. Frinks*, 284 N.C. 472, 201 S.E.2d 858 (1974).

70. *Duncan v. Nelson*, 466 F.2d 939 (7th Cir.), cert. denied, 409 U.S. 894 (1972).

71. *Culombe v. Connecticut*, 367 U.S. 568 (1961).

72. 384 U.S. 436 (1966).

incrimination privileges flows from physical or emotional force or threats by police officers that force a person to confess.

G. Violation of Fifth and Sixth Amendment Right to Counsel

Any effort by a police officer that infringes upon the person's right to counsel is actionable under section 1983.⁷³ However, the plaintiff must show actual harm in order to recover.⁷⁴ Under the fifth and sixth amendments, the state is obligated to inform a defendant of the right to counsel and any deliberate effort by an official to deprive a person of this right is actionable.⁷⁵

Article 1, section 19 of the North Carolina Constitution guarantees citizens the right to counsel. Unlike the federal right, the right to counsel in North Carolina is activated as soon as practical after a person is arrested.⁷⁶ Purposeful conduct by police officers that results in the denial of the right to counsel to a claimant is actionable through the pendant jurisdiction of the court.

H. Denial of Right to Medical Attention

Police officers' deliberate denial of necessary medical treatment or the intentional failure to treat serious medical conditions of incarcerated persons is actionable under section 1983 and is a violation of the eighth amendment.⁷⁷ The denial must involve more than negligent malpractice and rise to the level of deliberate indifference.⁷⁸

[The] deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors . . . or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under 1983. This conclusion does not mean, however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment. An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.⁷⁹

73. See *Wounded Knee Legal Defense/Offense Comm. v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974).

74. See *Weatherford v. Bursey*, 429 U.S. 545 (1977).

75. See *United States v. Morrison*, 449 U.S. 361 (1981).

76. N.C. Gen. Stat. § 15A-401 (1988).

77. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

78. *Id.* at 106.

79. *Id.*; see also *Bell v. Wolfish*, 441 U.S. 520 (1979); *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987).

I. *Failure to Provide Police Protection*

As a general rule, police officers are obligated to provide protection to citizens against unlawful acts. Courts have held that the Equal Protection Clause of the fourteenth amendment prohibits the discriminatory failure to provide police protection on account of race, sex or creed.⁸⁰ It is clear that police officers cannot protect every citizen from crime, and the law does not require such protection even for racial minorities or women. There is simply no duty owed to the general citizenry to provide individual police protection.⁸¹

There is, however, a duty to protect a specific individual or class of persons if a special relationship exists between the injured party and the police. Where police officers are informed of a particular danger to a citizen and they fail to respond, a section 1983 claim is raised. For example, in *Delong v. Erie County*,⁸² the plaintiff called the police emergency number about physical attacks on her person. The police dispatcher indicated that help would be sent right away, but it never arrived. Subsequently, the caller was stabbed to death. Another example is the failure of police officers to enforce a restraining order against a violent husband.⁸³ In each of these situations, liability against the police officers was established.

The North Carolina Court of Appeals has concluded that merely acquiring a domestic violence order from a district court judge does not create a special relationship that requires police officers to provide individual protection to a person who has been the victim of domestic violence.⁸⁴ North Carolina General Statute section 50B-5(b) absolves police officers of liability for their failure to protect holders of domestic violence orders. Individual police protection is not required by the statute, and the failure to provide protection does not make out a viable claim under the Civil Rights Act.⁸⁵

In North Carolina, the general rule is that "ordinarily law enforcement officers have no duty to protect individuals from criminal attack, their duty being only to the public at large."⁸⁶ The general rule is subject to two time-honored exceptions:

The first . . . is based on the special relationship that exists between an undercover agent, informant or a State's witness and the police when a person dangerous to the cooperating person is being investigated or pros-

80. See, e.g., *Reiff v. City of Philadelphia*, 471 F. Supp. 1262 (E.D. Pa. 1979).

81. *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983).

82. 60 N.Y.2d 296, 457 N.E.2d 717 (1983).

83. See, e.g., *Gardner v. Village of Chicago Ridge*, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966); *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983).

84. *Braswell v. Braswell*, 98 N.C. App. 231, 236, 390 S.E.2d 752, 755 (1990).

85. See, *Id.* at 236-37, 390 S.E.2d at 755-56.

86. *Id.* at 235, 390 S.E.2d at 754.

ecuted. The other exception, a 'special relationship' exception of another type, arises when (1) police protection is promised to an individual; (2) the protection is not forthcoming; and (3) the individual's reliance on the promise of protection is causally related to the injury suffered. This exception to the general rule was adopted because it is unjust to deny redress when a victim of violence is lulled into not taking steps for his or her own safety by voluntary assurances of protection by the police.⁸⁷

The North Carolina Court of Appeals held in *Braswell v. Braswell*,⁸⁸ that a prima facie case was established where sheriff deputies promised a domestic violence victim that she would be protected from her husband while she went back and forth to work and travelled around town. The wife relied upon these promises but was killed by her husband, a deputy sheriff, when deputies failed to provide the anticipated protection.⁸⁹

In *White v. Rochford*,⁹⁰ the Seventh Circuit Court of Appeals concluded that a section 1983 claim was stated where police officers deliberately left the plaintiff's young children in a car along a highway after the plaintiff was arrested for drag racing. The circuit court held that the officers had a special duty to protect the children, and that the failure to properly assist them caused the children extreme physical discomfort and fear for their safety and thereby violated the children's due process rights.⁹¹ The court concluded that the callous treatment by the police officers "shocked the conscience" of the court.⁹²

Statistical evidence showing a disproportionately low rate of arrests in domestic assault cases has been held to state a section 1983 claim against a police department. Because the police department established a policy that persons who physically abused their spouses would be arrested only as a last resort, the victim stated an actionable claim of a "policy or custom" that discriminated against domestic violence victims.⁹³ The applicable standard to be considered in a failure to protect action is whether the intentional acts of a police officer put a particular person in danger and thus make it necessary to protect that person from any incremental risk of harm. The failure to protect under this circumstance constitutes a due process violation. The Due Process Clause does not impose an affirmative duty on the state to protect persons who are not in state custody from harm by third parties.⁹⁴

Citizens who are peacefully engaged in protest activities are owed a

87. *Id.*; see also, *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

88. 98 N.C. App. 231, 235, 390 S.E.2d 752, 755 (1990).

89. *Id.* at 235, 390 S.E.2d at 755.

90. 592 F.2d 381 (7th Cir. 1979).

91. *Id.* at 383.

92. *Id.* at 385.

93. See *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988).

94. *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189 (1989).

duty of protection as long as they are not in violation of the law.⁹⁵ "One charged with the duty of keeping the peace . . . must stand on the side of law and order or be counted among the mob."⁹⁶

J. *Other Claims*

Other claims are possible under section 1983 as long as the attorney can show a substantial constitutional violation. Claims of harassment or verbal abuse have been held to be actionable if the offending conduct is based on the person's sex, race, ethnic background or sexual orientation.⁹⁷ Psychological or mental abuse committed by a governmental official have been held to be actionable under section 1983.⁹⁸ The acts of police officers who forced a plaintiff to undress, took photographs of her in indecent positions and then circulated the pictures to other officers violated the plaintiff's right of privacy.⁹⁹ Unjustified and unreasonable strip searches also violate the right of privacy and should be vigorously pursued under section 1983.¹⁰⁰

V. ESTABLISHMENT OF LIABILITY

A. *Individual Liability*

All officers who, under the color of state law, commit an act which results in a constitutional deprivation are liable for damages under section 1983. Other officers who are present when the violation occurs, but merely stand by and watch, are also liable because police officers have an affirmative duty to protect citizens from violators of the law.¹⁰¹ Governmental officers who stand idly by while private citizens are illegally attacked by others are also liable under section 1983 for not protecting the

95. See *Glasson v. City of Louisville*, 518 F.2d 899, (6th Cir. 1975) (case involved a policeman who destroyed a sign held by a person protesting on a route to be traveled by the President's motorcade; the police were liable for violation of protestor's first amendment rights); see also *Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951) (willful or purposeful failure of the police to keep order and peace and protect right to peacefully assemble amounted to police acquiescence in the mob's action).

96. See *Downie v. Powers*, 193 F.2d 760, 764 (10th Cir. 1951); accord *Belknap v. Leary*, 427 F.2d 496 (2d Cir. 1970) (New York construction workers attack anti-war demonstrators); see also *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965) (demonstrators, peacefully marching along a public highway in Alabama in protest of discriminatory voter registration, were attacked rather than protected by police officers).

97. See *Carter v. Cuyler*, 415 F. Supp. 852 (E.D. Pa. 1976); see also *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

98. See *Hudspeth v. Figgins*, 584 F.2d 1345 (4th Cir. 1978).

99. *York*, 324 F.2d at 452.

100. See, e.g., *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979) (the court stated a person should not be subject to a strip search for drugs unless the authorities have a reasonable factual basis to believe the person was in possession of drugs).

101. See *Ware v. Reed*, 709 F.2d 345 (5th Cir. 1983).

plaintiff's rights.¹⁰²

42 U.S.C. § § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹⁰³

B. *Supervisory Officials*

The respondeat superior doctrine does not apply to section 1983 claims when monetary damages are sought.¹⁰⁴ To be liable under section 1983, supervisory officials must be personal participants in the wrongful acts directed against a plaintiff. The supervisory official need not be on the scene at the time of the incident, but if he contributed to the act by doing something or by failing to do something, liability can attach.¹⁰⁵ Section 1983 allows actions against supervisors as long as a sufficient causal connection is present and the plaintiff is deprived of a federally secured right under color of law.¹⁰⁶ A section 1983 cause of action against supervisory personnel exists for the failure to establish proper procedures or to adequately train or supervise officers when that failure leads to the deprivation of the person's constitutional rights.¹⁰⁷ The mere showing by a plaintiff that an individual officer violated a person's constitutional rights on an isolated occasion is not sufficient to raise an issue of fact as to whether adequate training and procedures were provided. "Supervisors cannot automatically be held liable for a subordinate straying from the established path."¹⁰⁸

Supervisors can be found liable under section 1983 when they are in a position of responsibility, knew or should have known of the misconduct, and yet failed to act to prevent further harm.¹⁰⁹ In order to establish a supervisory breach, plaintiff must show that the supervising defendant

102. See, e.g., *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1085 (E.D. Pa. 1980) (liability of prosecutor who watched police officers beat a prisoner).

103. 42 U.S.C. § 1983 (1988). See *Hampton v. Hanrahan*, 600 F.2d 600, 627, (7th Cir. 1979) (detailed discussion of liability under section 1983).

104. See *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

105. See *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981).

106. See *McClelland v. Facticeau*, 610 F.2d 693 (10th Cir. 1979); see also *Rizzo v. Goode*, 423 U.S. 362 (1976).

107. *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974).

108. *McClelland*, 610 F.2d at 697.

109. *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976).

was adequately put on notice of the officer's prior misbehavior.¹¹⁰ A plaintiff must show more than "mere negligence" in the failure of the supervisor to train the officers in order to recover under section 1983.¹¹¹ To be liable, a supervisor must demonstrate at least gross negligence amounting to deliberate indifference, and this conduct must be causally linked to the subordinate's violation of the plaintiff's rights.¹¹² The issue is whether the supervisor caused the constitutional violation to be committed by the subordinate officer and not whether the supervisor participated directly in the unconstitutional act of the subordinate.¹¹³

Supervisory liability is clearly recognized under the following facts:

1. The supervisor is present on the scene or in some manner directs the actions of officers on the scene.¹¹⁴
2. The supervisor acquiesces in the unlawful behavior of the subordinates.¹¹⁵
3. The supervisor has failed to properly train subordinates.¹¹⁶
4. The supervisor knew of problems, but failed to correct them or to supervise subordinates.¹¹⁷
5. The supervisor violated a statutory duty which permitted the violation.¹¹⁸

C. Municipalities

The landmark decision in *Monell v. Department of Social Services*¹¹⁹ authorized actions against municipal defendants. The Court in *Monell* concluded that when a municipal policy is the cause of unconstitutional actions taken by municipal employees, the municipality can be held liable under section 1983.¹²⁰ "Liability will exist where the unconstitutional action 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated' by municipal officers, or where the constitutional deprivation is visited pursuant to governmental 'custom' even though such a custom has not received formal

110. *McClelland*, 610 F.2d at 697.

111. *Voutour v. Vitale*, 761 F.2d 812, 820 (1st Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986).

112. *Id.* at 820.

113. *McClelland*, 610 F.2d at 696.

114. *See Dellums v. Powell*, 566 F.2d 216 (D.C. Cir. 1977) (police chief held liable for first amendment violations based on his control over and supervision of policemen's conduct); *see also* *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974).

115. *See Commonwealth v. Porter*, 659 F.2d 306 (3d Cir. 1981).

116. *See Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974).

117. *See Orpiano v. Johnson*, 632 F.2d 1096 (4th Cir. 1980).

118. *See Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969).

119. 436 U.S. 658 (1978).

120. *Id.* at 694.

approval.”¹²¹

Neither a state nor its officials acting in their official capacities are persons under section 1983 and may not be sued for depriving a citizen of constitutional or statutory rights while acting under color of law. The United States Supreme Court concluded that Congress’ intent to provide a remedy to citizens for deprivations caused by the state differs from the ability to hold a municipality and its officials liable for civil rights violations.

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, . . . or unless Congress has exercised its undoubted power under [section] 5 of the Fourteenth Amendment to override that immunity.¹²²

A policy or custom need not be made by the city’s lawmakers, but can be set “by those whose edicts or acts may fairly be said to represent official policy.”¹²³ If the conduct of the municipality is the cause of the action against the plaintiff, liability attaches.¹²⁴

In *Owen v. City of Independence, Mo.*,¹²⁵ the United States Supreme Court held that qualified immunity could not protect a municipality and municipal defendants would be liable for constitutional violations even where the actions complained of were taken in good faith. The Supreme Court declared in *Owens*:

[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those ‘systemic’ injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.¹²⁶

In *Pembaur v. City of Cincinnati*,¹²⁷ the Supreme Court made clear that a municipality can be liable under section 1983 for a single wrongful

121. Avery & Rudosky, *Police Misconduct Law and Litigation*, § 3.5(a), at 3-28 (1990).

122. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 66 (1990).

123. *Monell*, 436 U.S. at 694.

124. *Id.* at 692.

125. 445 U.S. 622 (1980).

126. *Id.* at 651-52.

127. 475 U.S. 469 (1986).

act as long as the act results from a decision by municipal policymakers as well as by duly elected officials.

The power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy" [cite omitted], and whose decisions therefore may give rise to municipal liability under [section] 1983 . . . If the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of [section] 1983.¹²⁸

The decision makers referred to in *Pembaur* were those persons who possessed final authority to establish municipal policy with respect to the action ordered, thus every decision by a municipal executive subjects the municipality to section 1983 liability.¹²⁹ "The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable."¹³⁰ Municipal liability attaches "where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."¹³¹

Courts have held that municipalities can be held liable in the following situations:

1. The municipality has enacted an unconstitutional statute that results in the violation of the plaintiff's rights.¹³²
2. The municipality has established an affirmative policy that violates the plaintiff's rights.¹³³
3. The municipality has impliedly or tacitly authorized, approved, or encouraged the harassment of the plaintiff.¹³⁴
4. The municipality has failed to correct unconstitutional condi-

128. *Id.* at 480.

129. *Id.* at 481-83.

130. *Id.* at 482-83.

131. *Id.* at 483-84.

132. *See* *Citizens for a Better Env't v. City of Chicago Heights*, 480 F. Supp. 188 (N.D. Ill. 1979).

133. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1984) (the strip searches of women who were arrested on misdemeanor charges pursuant to established city policy was held to be violative of the plaintiff's rights).

134. *See, e.g., Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980) (insufficient evidence to prove "official policy" resulted in reversal for City).

tions and has tolerated a pattern and practice of misconduct so widespread that it may be considered the unofficial custom or policy of the city to engage in the misconduct in question.¹³⁵

5. The municipality has failed to properly train and supervise its officers.¹³⁶

The inadequacy of police training can serve as the basis for municipal liability under 42 U.S.C. § 1983 if the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contact and the deficiency identified in the municipality's training program is closely related to the ultimate injury incurred.¹³⁷ "Only where [the] failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under section 1983."¹³⁸ North Carolina General Statute section 17C-10 requires all law enforcement personnel in North Carolina to satisfy specific training standards in order to remain employed as a police officer.¹³⁹ The municipality can not be held liable for the mere negligent hiring of a police officer unless the employment process rises to the level of gross negligence.¹⁴⁰

VI. QUALIFIED IMMUNITY

A. General Consideration

A police officer is protected by qualified immunity if he can show that his otherwise unlawful conduct did not violate clearly established statutory or constitutional rights of which a reasonably competent police officer would have known.¹⁴¹ As interpreted by the Court, the qualified immunity defense provides protection to all but the plainly incompetent officers or those who knowingly violate the law.¹⁴² To be entitled to good faith or qualified immunity, the officer must have acted in an objectively

135. *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982) (the court affirmed liability against the municipality in a suit by a police officer who was wrongfully fired for violating an unofficial but standard code of silence).

136. *See City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (the inadequacy of police training can serve as the basis for municipal liability under 42 U.S.C. § 1983). *See also Tuttle v. City of Oklahoma City*, 728 F.2d 456 (10th Cir. 1984); *Chestnut v. City of Quincy*, 513 F.2d 91 (5th Cir. 1975).

137. *Harris*, 489 U.S. at 387.

138. *Id.* at 389.

139. N.C. Gen. Stat. § 17C-10 (1983).

140. *See, e.g., Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988) (failure of city to fully investigate police applicants' arrest history and background did not amount to gross negligence or conscious indifference to public welfare).

141. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity standard applies for official acts and discretionary acts).

142. *See, e.g., Malley v. Briggs*, 475 U.S. 335 (1986) (officer will not be immune unless there is a reasonable objective basis for an arrest warrant).

reasonable manner.¹⁴³

Qualified or “good faith” immunity is an affirmative defense that must be pleaded by a defendant official.¹⁴⁴ If not raised by a defendant, the defense is lost. The plaintiff need not allege in the complaint that the defendant was acting in “bad faith” when the wrongful conduct was committed. The burden of proving the existence of good faith rests with the defendant.¹⁴⁵

[T]he judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.¹⁴⁶

B. *Fourth Amendment Considerations*

In the fourth amendment context, the Supreme Court established that good faith immunity protects a police officer who conducts a search or makes an arrest pursuant to a facially valid warrant that is later determined to be defective.¹⁴⁷ The fourth amendment “good faith” immunity defense was incorporated into civil rights actions in *Malley v. Briggs*,¹⁴⁸ where the court announced:

As the qualified immunity has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law . . . Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.¹⁴⁹

. . .

143. See, e.g., *United States v. Fuccillo*, 808 F.2d 173 (1st Cir. 1987) (motion to suppress upheld).

144. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

145. See, e.g., *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) (private parties jointly engaged with public officials are not entitled to judicial immunity).

146. 457 U.S. at 818-19.

147. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (exclusionary rule should not apply to evidence found while searching pursuant to a facially valid warrant).

148. 475 U.S. 335 (1986).

149. *Id.* at 341.

[I]t would be incongruous to test police behavior by the “objective reasonableness” standard in a suppression hearing, (cite omitted), while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a [section 1983] damages action . . .¹⁵⁰

A reasonably competent police officer is expected “to have a reasonable knowledge of what the law prohibits.”¹⁵¹ Implicit in the Court’s reasoning is the requirement that an officer receive some training in order to know the law, but they are not expected to know more than the magistrate who issues the warrant.¹⁵²

The officer who searches or arrests pursuant to a facially valid warrant will be protected by the “good faith” defense unless:

1. The officer knowingly or recklessly used false evidence to obtain the warrant.¹⁵³
2. The magistrate abandoned his neutral and detached role and served as a rubber stamp for the police.¹⁵⁴
3. The officer’s search or arrest exceeds the scope of the warrant’s authorization.¹⁵⁵

The “good faith” exception is never available if the police “officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.”¹⁵⁶ A police “officer . . . cannot excuse his own default by pointing to the greater incompetence of the magistrate.”¹⁵⁷

In the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient. “[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law”. . . Nevertheless, the officer’s reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.¹⁵⁸

The mere existence of a search warrant is not fatal to a section 1983 claim and illegal conduct by a police officer should still be challenged. A good faith immunity defense is not necessarily fatal to a section 1983

150. *Id.* at 344.

151. *Leon*, 468 U.S. 897, 920 n.20.

152. *Id.* at 912 n.9.

153. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

154. *Aquilar v. Texas*, 378 U.S. 108, 111 (1964).

155. *Leon*, 468 U.S. at 923.

156. *Id.* at 926.

157. *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986).

158. *Leon*, 468 U.S. at 921-23 (citation omitted).

claim for illegal search or arrest but the case is certainly complicated by it.

It is refreshing to know that the North Carolina Supreme Court has refused to recognize the good faith exception to the exclusionary rule under the state constitution and statute.¹⁵⁹ *State v. Carter* involved an illegal search conducted pursuant to a non-testimonial identification order for an in-custody defendant rather than upon a properly issued search warrant. Whether this rejection of the “good faith” exception will be incorporated into civil rights actions brought under the state constitution is an open question.

C. Procedural Considerations

The more significant problem with “good faith immunity” as applied to civil rights actions is the procedural hurdles that lie in the path of the plaintiff’s attorney. “Good faith” immunity is really treated as a bar to suit rather than as a mere affirmative defense to be resolved at trial.

In *Mitchell v. Forsyth*,¹⁶⁰ the Court concluded that good faith immunity entitled the officer “not to stand trial or [to] face the other burdens of litigation,”¹⁶¹ if the officer did not violate clearly established law. This entitlement, the court declared, is “lost if a case is erroneously permitted to go to trial.”¹⁶²

Unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff’s complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.¹⁶³

If the defendant’s claim of good faith immunity is lost at any stage of the proceeding, an appeal of right to the court of appeals and the United States Supreme Court is available to the defendant. The good faith defense can be asserted in a motion to dismiss on the pleading,¹⁶⁴ in a motion for summary judgment,¹⁶⁵ or even after the plaintiff has been granted a judgment as to liability.¹⁶⁶

The effect of the entitlement not to go to trial and the immediate appealability of the denial of the good faith defense is to allow defendant

159. See *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

160. 472 U.S. 511 (1985).

161. *Id.* at 526.

162. *Id.*

163. *Id.*

164. *Anderson v. Creighton*, 483 U.S. 635 (1987).

165. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

166. *Stevens v. Corbell*, 798 F.2d 120 (5th Cir. 1986).

officers to draw out police misconduct litigation for years. Police misconduct actions can simply be "piece-mealed to death" by repeated appeal through the appellate process before a plaintiff can get to trial.¹⁶⁷ The cost in time and expenses will be enormous to the plaintiff.

VII. DAMAGES

The calculation or estimation of damages in a section 1983 action is always difficult. This is especially true when an attorney is confronted with constitutional violations which are not accompanied by treatable or articulable physical injuries. The better practice is to plead damages in excess of \$10,000 and attempt to present the violations to the jury in the most egregious manner possible.

Damages available to the plaintiff are:

1. Compensatory damages which are designed to provide fair and reasonable compensation for loss, harm, or injury suffered.
2. Nominal damages which are awarded where a constitutional violation occurs but no measurable monetary damages can be proven.
3. Special damages which compensate the victim for specific pecuniary losses.
4. Medical expenses to compensate for the reasonable value of the cost of treatment.
5. General damages for the pain and suffering experienced by the victim. Included are damages for physical pain, discomfort, loss of use of bodily function, disfigurement, and psychological injuries including stigma, humiliation, fright, and emotional trauma.
6. Punitive or exemplary damages against individual defendants are authorized to punish the defendant for outrageous conduct. Municipalities, however, are immune from punitive damage awards.¹⁶⁸

VIII. ATTORNEY'S FEES

42 U.S.C. § 1988 (1988) provides, in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964 (citation omitted), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Civil Rights Attorney's Fees Award bestows upon the prevailing party in specified civil rights actions, usually the plaintiff, a statutory eligibility to a discretionary award of attorney fees. Section 1988, as

167. See *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), *overruled*, *Unwin v. Campbell* 863 F.2d 124, 132 (1st Cir. 1988).

168. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981).

amended, allows reasonable attorney fees in any action or proceeding to enforce the provisions of sections 1981, 1982, 1983, 1985 and 1986.¹⁶⁹

The attorney's fee entitlement of section 1988 is designed to attract competent counsel to represent citizens deprived of their civil rights.¹⁷⁰ In many respects the award of attorney fees can be more significant than the award of damages to the victim in a civil rights case. In *Rivera v. City of Riverside*,¹⁷¹ the city was ordered to pay victorious civil rights plaintiffs \$245,456.25 in attorney fees following a trial in which the plaintiffs recovered a total of \$33,350 in damages. In *Cunningham v. City of McKeesport*,¹⁷² the city was ordered to pay \$35,000 in attorney fees in a case in which judgment for the plaintiff was entered in the amount of \$17,000. In another case, *Copeland v. Marshall*,¹⁷³ \$160,000 in attorney fees was awarded for obtaining a \$33,000 judgment for the plaintiff. In *Skoda v. Fontani*,¹⁷⁴ an attorney's fee award of \$6,068.12 was ordered where the plaintiff recovered \$1.00.

The Supreme Court made it clear in *North Carolina Department of Transportation v. Crest Street Community Council*,¹⁷⁵ that the legislative history of section 1988 envisioned the award of attorney fees only for proceedings that were part of or followed by a lawsuit. Parties who merely use administrative proceedings to secure rights protected by the statutes enumerated in section 1988 or the Constitution are not entitled to an attorney's fees award and may not bring a separate action for that purpose.¹⁷⁶

Attorney fees are available only to the prevailing party. A prevailing party is one who obtains favorable relief by way of jury verdict or judgment or by a settlement of the claim outside of court *but* after an action has been filed. Attorney fees are not dependent upon whether the plaintiff prevailed on the "central issue" in the case as long as the plaintiff prevails on "any significant issue" that materially alters the legal relationship between the parties.¹⁷⁷ Attorney's fees are also available where the prevailing party obtains injunctive relief that causes the defendant to change its policies or procedures,¹⁷⁸ where *pendente lite* relief is granted,¹⁷⁹ or where the substantial rights of the parties have been deter-

169. See *Evans v. Jeff D.*, 475 U.S. 717, 730 n.19 (1986).

170. *Id.*

171. 763 F.2d 1580 (9th Cir. 1985), *aff'd*, 477 U.S. 561 (1986).

172. 753 F.2d 262 (3rd Cir. 1985).

173. 641 F.2d 880 (D.C. Cir. 1980) (en banc).

174. 519 F. Supp. 309 (N.D. Ill. 1981).

175. 479 U.S. 6 (1986).

176. See also *Webb v. Board of Educ.*, 471 U.S. 234 (1985).

177. *Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); see also *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

178. *Disabled In Action v. Mayor of Baltimore*, 685 F.2d 881 (4th Cir. 1982).

179. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

mined. A favorable result on a pendant claim, that is part and parcel of a larger constitutional claim, if the court chose to dispose of the action on non-constitutional grounds, will also result in an attorney's fees award.¹⁸⁰ Attorney fees are not available where a jury rules against the plaintiff on the constitutional claims but grants relief only on the pendant claims.¹⁸¹

No set formula to determine attorney fees has been established, but a trial judge can award only an amount that is reasonable in relation to the results obtained.¹⁸² To determine the appropriate grant of attorney fees, courts generally utilize the twelve factor test articulated in *Johnson v. Georgia Highway Express, Inc.*¹⁸³ These factors are:

(1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to properly perform the legal service, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. The legislative history also states that attorneys' fees should not be reduced because the rights involved may be pecuniary in nature.¹⁸⁴

Attorney fees are recoverable when actions are brought in either the federal or state courts,¹⁸⁵ if the action is pursuant to the enumerated civil rights sections specified in section 1988. Attorney fees are recoverable against the state and the federal government and are not barred by the states' immunity to suit.¹⁸⁶

The plaintiff may be obligated to pay the defendant's attorney's fees where the litigation is found to be frivolous, unreasonable, or without foundation.¹⁸⁷ Attorneys should carefully screen each case to determine if there is a factual basis for the action. Carefully screening the case obviously involves some investigation to confirm the critical allegations made by the plaintiff and thorough research of the legal basis for the action. Merely losing a section 1983 case does not subject the plaintiff to a court order requiring the payment of the defendant's attorney fees.

The plaintiff's attorney must keep meticulous records of the time spent on the case and the out-of-pocket expenses incurred during the litigation.

180. *Kirchberg v. Feenstra*, 708 F.2d 991 (5th Cir. 1983).

181. *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981).

182. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

183. 488 F.2d 714 (5th Cir. 1974).

184. *Id.* at 717-19.

185. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

186. *Hutto v. Finney*, 437 U.S. 678 (1978).

187. *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978).

The attorney should not be afraid to record and claim every minute used on the case including the preparation of letters; conferences with clients or witnesses; telephone conversations with parties, opposing attorneys, paralegals or student researchers; and the search for witnesses or other sources of evidence. In determining attorney's fees, the court is required to make a detailed finding of fact that explains the method used to compute the attorney fee award. Appropriate factors, as set out in *Johnson*,¹⁸⁸ must be considered and articulated.

IX OTHER LITIGATION CONCERNS

The litigation of police misconduct claims is a tedious but rewarding enterprise. These cases take time, patience, energy and some money. The attorney should choose his cases carefully; if not, burnout occurs early on in the legal career. Bad case choices can also be very costly to the attorney.

The cost of police misconduct litigation is of paramount concern to all attorneys. In most cases, the victim will be unable or unwilling to pay litigation expenses and most victims cannot afford to pay attorney's fees. The attorney, therefore, should be prepared to "front" the litigation costs. The inability to "front" the costs causes many attorneys to refuse to accept police misconduct cases. This problem can be minimized by associating with another attorney and sharing the litigation costs.

If possible, the attorney should attempt to obtain an "advance" from the client to cover the initial litigation costs, i.e. filing fee, and depositions. Clients who invest in their cases are more interested in working with the attorney in the investigation and preparation of the case.

The attorney should always engage in an open and frank discussion with the client about litigation costs. Clients should be encouraged to contribute to the cost of the litigation and a payment plan should be arranged. The simple problem is that too often the client will be poor and unable to pay anything. Where finances are a real problem, the attorney should be reluctant not to associate another attorney in the case. Once you are the attorney of record in the case, it is difficult to withdraw from it. An innovative attorney can minimize some of the costs associated with investigation and discovery, however.

One method of reducing costs is to maximize the use of interrogatories and requests for the production of documents and other items of evidence under Rules 33 and 34 of the Federal Rules of Civil Procedure. Interrogatories may be a less effective discovery device than the taking of depositions but you don't have to pay a court reporter or be personally present when the defendants are answering the questions. One may pre-

188. 488 F.2d 714, 717-19.

pare and serve a first set of interrogatories on the defendant(s) along with the complaint. Non-party witnesses can be interviewed rather than deposed; by doing so, plaintiff's attorney may be able to hide a witness or two from the defendant.

Another cost cutting technique is for the plaintiff's attorney to tape-record depositions rather than to order a transcript from a certified court reporter. There are certainly disadvantages, but those are not fatal since the court file in federal court will have a transcribed copy of the depositions anyway. Let the defense depose the witnesses and you can "piggy-back" on the insurance company's "deep pockets." A different situation exists in North Carolina because depositions are not filed and kept by the court. Yet it is still cheaper to obtain a copy of the original deposition and to duplicate it at a commercial facility or at the attorney's office.

A. *State or Federal Court*

There is no reason to avoid the litigation of civil rights cases in the state forum. This is particularly true in North Carolina where the quality of judges has improved tremendously over the years and the court has become more philosophically amenable to civil rights claims. The state court's record in civil rights cases has not been extensive because litigants automatically file their actions in federal court and deny the state court the opportunity to apply North Carolina law and procedures.

The discovery rules in state court are now very similar, if not identical, to the rules in federal court. Thus, there is no significant advantage gained by utilizing the federal rather than the state forum. In light of changes in the local federal rules regarding discovery, the state discovery rules in many instances may be more advantageous.

In the state forum, the plaintiff is not out of court if the constitutional claims are not proven. State law claims in the federal forum are brought under the pendant jurisdiction of the court. In the federal forum, if the plaintiff is unsuccessful on the constitutional claims, the pendant claims are lost even if the jury returns a verdict in plaintiff's favor. This result can be avoided in the state forum where state tort claims can be separately litigated.

It is true that federal judges have more experience with civil rights claims than do state court judges. However, this does not mean that federal judges are necessarily more receptive to civil rights claims. Many people have lost civil rights cases because antagonistic federal judges have misread or misapplied the law.¹⁸⁹

The substantive law in state court is probably better in North Carolina

189. See *Thornburg v. Gingles*, 478 U.S. 30 (1986). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). This comment is not directed at the quality of the federal court judges in North Carolina who have issued some major civil rights decisions over the years.

where the court has refused to endorse the “good faith” exception to the exclusionary rule in fourth amendment cases. “Good faith” immunity is a major hurdle for a civil rights claimant to counter in court. Not having to deal with the “good faith” defense will make litigation easier and less expensive. This statement is predicated upon the view that the North Carolina court will not apply the “good faith” defense in civil rights cases.

For a long time it was felt that North Carolina jurors would not be receptive to civil rights claims. This is not a real concern because you get North Carolina jurors in federal court also. In fact, state law allows for a broader selection of persons to serve on jury panels in state court than are available in federal court. There is a better racial mix among jurors in state court, particularly in eastern North Carolina, than you have in federal court. It is more likely that jurors from a particular county will be more familiar with the tendencies of local police departments. This familiarity cuts both ways, however. A big advantage in state court is that the attorney is able to question each prospective juror as to their ability and willingness to be fair to the civil rights plaintiff.

The North Carolina courts should be challenged to develop their own extensive civil rights record and philosophy. The minimum protection has already been established by the federal court interpretation of the Constitution and federal Civil Rights Laws. In some instances, those protections are not adequate and state law and the North Carolina Constitution must be relied upon to maximize the protection that citizens have against police misconduct.