

1 **Civil Liability Update**

San Diego City Attorney's Office
Civil Division

2 **Presenters**

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 -
- Dan Andrews
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3 **Fact from Fiction**

- 2010 – Nov 1, 2017 ...Over 520 SDPD officers have been sued in 248+ lawsuits
- - 35 police lawsuits per year - average – declining
 - Now down to about 27 per year

- Over 10.6 million dollars in that 7 years, so far
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- Average lawsuit last 33 months (as of August 2017)

4 **Fact from Fiction...**

Until the advent of body worn cameras, the most common lawsuit circumstance was...?

5 **Believe it or not...**

6 **How About Shootings?**

- In the past 26 years (1990) 296 shootings have occurred in which people were hit

- Averaging 11 per year
- 53 Lawsuits resulted – or 18 % - 82% No Lawsuit

- 5 pending now in various stages
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- Past 6 years...52 shootings, 7 lawsuits – 13% - 87% No Lawsuit
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7 **Federal Court vs. State Court**

- Civil Law – BURDEN of PROOF???
- Preponderance of the Evidence
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- Federal Court = US Constitutional issues
- Search and seizure, arrests and detentions
- Uses of force
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- State Court
- Allegations of state law violations
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- Jury Issues –
- Fed unanimous vs. State (9-3)
- Fed - Voters vs. State – drivers or voters
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- Our attorneys can practice law in both courts

- Damages and *punitive* damages – is it possible?

8 **Now....**

Let's Look at the Nuts and Bolts

9 **Lawsuit Service**

10 **Life in a Lawsuit**

- Claim filed
 - Lawsuit filed
 - Discovery with documents
 - Discovery with depositions
 - Motions
 - *Trial*
- Plaintiff wants to impeach you*

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11 **Your Discovery Record**

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- What anyone wrote

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- What anyone did

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- What anyone said

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- What anyone recorded

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12 **Your Discovery Record**

- What was recorded

- Police Body Cameras

- ABLE

- Audio

- Dash Cameras

- AVL

- Cell phones

- MCT

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13 **Diaz v COSD, Pursuit on AVL Recording**

14 **Diaz v COSD, Pursuit on AVL Recording**

15 **Diaz v COSD: Pursuit on Dash Cam Recording**

16 **CHP Dash Camera Recording**

17 **Depositions**

- You must PREPARE!

- With the Deputy City Attorney

- Under Oath

- Court Reporter

- Video/Audio Recorded

- Used extensively at trial

What can they ask?

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18 **After Discovery...**

- We evaluate the entire case record
YOURS, the City, the Plaintiff, Witnesses
Settlement

Or

Trial

19 **The Issue of:**

"Qualified Immunity"

20 **Prong #1: Is There a Constitutional Violation?**

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law."

- *Ashcroft vs al-Kidd* – U.S. Supreme Court, 2011

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22 **Prong #2: Is the Law Clearly Established?**

"Defendant officers may be shielded from liability if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." -

Hope v Pelzer - 536 US 730, U.S. Supreme Court, 2002

23 **Let's Look at a Potential "Qualified Immunity" Case**

...an OIS from Southeastern

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25 26  **Status: Victory for the Officers**

- September 30, 2015 – Judge Houston Ruled:
 - Prong #1 – No constitutional violations
- Specific Issues
 - Exclude Haag (Ballistics) Expert Testimony
 - Car Stopped – Threat Over – All Shots were Afterwards
 -
- “The video shows...”

27  **What Does the Video Show?**

- “The car was stopped but the engine was still revving; the tires were spinning; the threat was still active.”
- “Their response to the threat was reasonable under the 4th Amendment regardless of where the bullets ended up.”
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- “The officers had no time for deliberation.”
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- “The officers acted on instinct and not upon reflective thinking.”
 -
- “They did not have time to consider less drastic alternatives.”

28  **9th Circuit Appeal?**

- Alvin Gomez appealed – nothing to lose at this point
 - Already lost 3 years.
 - What’s 80 more hours? (and costs)
 - We appeared at the 9th Circuit - it went well, 3 judge panel agreed with “immunity”

29  **This case finally ends in 2017....**

- The 9th Circuit affirmed that the 3 officers from a Southeastern OIS are “immune” from the lawsuit
- Shooting – Jan 2013
- First award of Immunity – Sep 2015
- Appeal - Oral arguments 9th – April 12, 2017
- Affirmation Immunity – April 19, 2017
 -
- 50 months
 - for a motion to dismiss

30 **U.S. Supreme Court:**

2 Key decisions in 2015

31 **Use of Force**

32 **Nov. 9, 2015...**

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Case #3

White v Pauly

January 9, 2017...

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White v Estate of Samuel Pauly USSC, Decided Jan. 9, 2017

Clearly Established Law

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**Case #4 – The 9th Circuit
(post - White v Pauly)**

S.B. v County of San Diego

May 12, 2017...

51 **S.B. (minor) v County of San Diego**

- SD Sheriff's case – shooting of a suspect in 2013
 - 5150 armed with knives
 - Lethal and taser ready until suspect was seen with many knives
 - Ignored commands, reached for a knife
- Deputy was sued and was DENIED qualified immunity
- SDSD/County Counsel appealed to the 9th Circuit
 - in light of *White v Pauly*
-
- *"We disagree...In this case, the district court did not have the benefit of White v. Pauly, and the cases that plaintiffs cite do not satisfy White's exacting standard; nor does this case involve an obvious or run-of-the-mill violation. Therefore, the deputy was immune from liability under section 1983 for his use of deadly force."*

52 **Case #5**

**Covert v City of San Diego
(post - White v Pauly)**

53 **Mark Covert v SDPD – March 2017**

- Use of force
 - Northern
 - 5150 former Navy seal, despondent, resists, then feigns some compliance
 - Then the fight is on
 - Fight plus Taser
- BWC on both officers – knocked off and cut out
 - Regained and switched back on after it was Code 4
- DCA Pam Chalk submits Motion to Dismiss using *Pauly* and *Mullenix*
- Federal Judge Anthony Battaglia sides with SDPD
 - even w/ the BWC footage switched off

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Case #6 – Local Federal Court

Estate of Nehad v SDPD

Final Ruling December 2017

- 56 **Estate of Fridoon Nehad v City of San Diego, et al**
Incident: April 30, 2015, 0005 hours
Hi Lite Book Store
3203 Hancock Street, San Diego

57 **The Suspect**

58 **April 30, 2015 around mid-night**

59 **April 30, 2015 around mid-night**

60 **“Drop the knife! Stop.”**

61 **The Aftermath.....**

62 **The Investigation revealed...**

- 63 **The Investigation revealed...**
- 64 **The Aftermath.....Lawsuit Filed**
- 65 **The Aftermath.....Criminal**
- 66 **The Aftermath.....Civil**
- 67 **The Aftermath.....Civil**
- 68 **The Aftermath.....Civil**
- 69 **The Aftermath.....Civil**
- 70 **The Aftermath.....Civil**
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Case #7 – U. S. Supreme Court

D.C. et al v. Wesby et al

Final Ruling January 22, 2018

- 72 **District of Columbia et al v
Wesby et al**
- 73 **Incident**
- 74 **Aftermath**
- 75 **Conclusion**
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Case #8 – U. S. Supreme Court

Kisela v Hughes

Final Ruling: April 2, 2018

- 77 ***Kisela v Hughes – Univ of Az PD (Tucson)***
 - Shooting a knife-wielding suspect
 - Woman acting irrationally with a knife generated 911 calls

- Roommate nearby, suspect approached roommate
- Officer gave warnings and fired at the suspect in defense of the roommate bystander
- Roommate later testified she was not afraid of suspect, these episodes “were just for attention”
- Immunity granted by the trial court judge – Hughes appeals
- Reversed by the 9th Circuit – no immunity for Kisela
- USSC reinstates the immunity without arguments -
 - Writes a scathing opinion of the 9th Circuit
 - Sotomayor and Ginsburg dissent – 7 to 2

78  **Keys to winning a lawsuit:**

Fight it? Settle it?

- Things that help us
 - Your training and actions related to reasonableness and policy and procedure
 - Your recall, attention to detail, demeanor, and professionalism, your responsiveness to the lawsuit
 - Body camera footage, any other videos, any audio
 - Pre-trial investigation and tactics to get you out of the case
 - Experts: MDs, PHDs, reconstructionists, police procedures
 - Exhibits and evidence
 - A San Diego Jury’s common sense – we win

79  **Q and A**

80  **Civil Liability Update**

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