SUMMARY: Summit on Investigation and Prosecution of Police Misconduct

November 19–20, 2015

***Introduction***

In the wake of increased national attention on use of excessive force allegations following the deaths of Michael Brown, Jr. (Ferguson, MO) and Sandra Bland (Hempstead, TX) (among others), the Texas District and County Attorneys Association hosted a two-day summit of Texas prosecutors experienced in investigating and prosecuting those cases to discuss their practices and challenges. This is a summary reflecting the discussions of the group and suggesting possible action items for improving the ability of prosecutors to achieve justice in these cases.

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***I. Overview***

Attendees recognized that three key components of justice are the substantive criminal laws, due process, and public perception. It is not enough that an investigation be conducted fairly or that the procedures be properly followed; a case’s resolution must also appear to be just if prosecutors and the criminal justice system are to enjoy public support.

After a review of contemporary excessive force cases, including a detailed case study of a successful investigation, prosecution, and conviction for manslaughter arising from the use of excessive force in Texas, participants observed that these cases differ from other criminal investigations and prosecutions for a variety of reasons, including:

* Peace officers have a duty to respond to crime that other citizens do not
* Peace officers have a right to rely on standard legal principles such as self-defense
* Peace officers may have unique privileges when being investigated (such as “cool down” periods before questioning or the right to review scene videos before giving a statement)
* Peace officers have specialized training and experience in the use of force and their adherence to those standards often involves a “battle of the experts” at trial
* Peace officers work for local communities whose members sit on their juries and may be inclined to give officers the benefit of any doubts about intent or malice
* Prosecutors and peace officers often have a pre-existing relationship that can complicate the investigation of an officer
* The 24/7 news cycle and social media give the public greater access to information and videos about these cases, but the information is still frequently inaccurate or incomplete, and prosecutors may be legally or ethically prohibited from correcting those misconceptions publicly
* Disparate results in high-publicity cases can create public confusion, especially when grand jury proceedings are secret

These and other factors may explain why there are few indictments—and even fewer convictions—in use-of-force cases. They also tend to be the focus of legislative proposals seeking to reduce use-of-force incidents and increase successful prosecutions, but not always in ways that are evidence-based or which properly address these challenges.

***II. Community Trust and Communication***

Attendees discussed ways to effectively engage with the community prior to and during a “major media event” in which social media may drive public opinion and debate as much as traditional mainstream media. This work begins with building community relationships *before* a crisis occurs. Ways to achieve that include:

* Knowing your community and making sure your community knows (and trusts) you, perhaps through a social media presence or through involvement in community-based work (charities, etc.)
* Considering a community outreach program that educates the public on what prosecutors do and how they do it
* Ensuring you and your staff are aware of ethical limitations on sharing information (such as TDRPC 3.07 and 3.09)
* Establishing good relationships with local news media through open communication and honest interactions, including candid explanations when something cannot legally or ethically be shared
* Establishing good relationships with local, state, and federal elected officials who may want access to information during an investigation
* In larger offices, pre-designating staff members to handle PIA requests, media inquiries (including from national news outlets), social media, IT security, office security, and personal security

***III. The Investigation***

Summit participants recognized that an elected prosecutor is not necessarily able to control the direction of an initial law enforcement investigation into a use-of-force incident. To complicate matters, there are often multiple focuses of those investigations, including: the conduct of various actors leading up to the incident; the officer’s conduct in relation to departmental policy; and the officer’s conduct in relation to the criminal laws. This can result in multiple agencies being involved to varying degrees. To facilitate good rapport with those agencies ahead of time, prosecutors may consider:

* Creating regular opportunities—individually or as a group—for communication with the law enforcement agencies in your jurisdiction
* Creating standing multi-disciplinary work groups for these types of cases
* In larger offices, assigning office liaisons to various law enforcement agencies or specific departments within those agencies
* Agreeing with your local agencies when and how you will be notified about an officer-involved incident
* Determining which agency will criminally investigate an incident involving a specific agency and utilizing MOUs when appropriate
* Creating a special unit or division of prosecutors who have or will develop the expertise needed to best handle these cases
* Establishing guidelines for whether or when a prosecutor will go to the scene of an incident and what role that prosecutor will play, if any
* Establishing guidelines for deciding when the prosecutor should recuse his office from an investigation or prosecution
* Establishing guidelines for the release of information (including videos) by the investigating agencies and the prosecutor’s office
* Establishing media guidelines for handling the conclusion of a case regardless of outcome

Participants also discussed key aspects of a thorough, objective investigation into excessive force allegations, including:

* Ensuring that no grand jurors have a conflict of interest
* Understanding the potential types of witness statements from officers (walk-throughs, formal statements, *Garrity*/administrative statements, public safety statements) and how they differ
* Understanding how to find and obtain the video footage (body-worn, dash, surveillance/security, citizen-generated) that may exist
* Accounting for the challenges created by officers’ unique privileges in some jurisdictions (such as “cool down” periods or their ability to review scene videos before giving a statement)
* Familiarity with officer training and departmental policies on use of force

***IV. Use of the Grand Jury***

Discussions of when and how to use the investigative powers of a grand jury were the most varied of the entire summit. After discussing the policies of various prosecutors—urban, suburban, and rural—around the state, participants recognized this topic as perhaps the most difficult area in which to identify commonly successful practices. Among the topics discussed were:

* The appropriateness of presenting every officer-involved use-of-force incident and in-custody death to a grand jury versus the general practice of using prosecutorial discretion to more quickly decide what to present for consideration by a grand jury; and if choosing the latter, where an office should draw the line on which cases should and should not be presented to a grand jury
* The pros and cons of putting grand jurors through the shoot/don’t shoot virtual training that some law enforcement agencies use to educate their officers about self-defense and defense of third persons laws
* Whether the prosecutor should make a recommendation to the grand jury
* How prosecutors should handle cases when they disagree with the grand jury’s decision
* The process after a no-bill, including what information can be released to the public, how any release should be done, and how to explain the results to the complainant or the family members of a person killed by the use of force

***V. The Trial***

There are several unusual aspects to peace officer use-of-force cases that manifest themselves at trial.

Due to the defendant being a peace officer, excessive force trials may require prosecutors to employ more criminal-defense-oriented approaches to jury selection, witness examination, establishing a theme of the State’s case, and jury arguments.

Use-of-force training and standards are often a key aspect of a trial and can become the subject of dueling expert witnesses put forth by both sides, which can be confusing for a jury. To limit the chances of a jury being misled, prosecutors should consider:

* Familiarizing themselves with different use-of-force models and standards
* Employing incident reconstruction techniques for the jury’s benefit
* Researching defense experts’ past testimony in other hearings
* Using *Daubert* hearings to exclude testimony from unqualified experts

Due to the high regard with which peace officers are traditionally held in their communities and the ease with which defense counsel can elicit mitigation evidence for their officer clients, prosecutors should prepare victims and their families for a realistic punishment outcome.

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