

**TRY TO ACT CIVIL**  
Civil Rights for the Criminal Practitioner

Andrew B. Stoll  
Stoll, Glickman & Bellina, LLP  
71 Nevins Street  
Brooklyn, NY 11217  
(718) 852-3710  
astoll@stollglickman.com

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When a criminal defendant feels they have been significantly wronged in the course of an arrest, there is the potential for a civil action to remedy the wrong. Even relatively minor matters involving false arrests, malicious prosecutions, and excessive force are grounds for potentially viable lawsuits. When advising a client who feels they have been wronged by police misconduct, it is important to consider the effect any disposition in the matter might have on any potential civil action.

While consideration of the civil aspects of your client's case may be an additional burden in your practice, some of the aspects of the civil system can be beneficial to your case, providing you with valuable information concerning the police involved in your case, and even potentially with sworn interviews from witnesses to the very incidents in which your client is accused, including the police.

**I. THE EFFECTS OF DISPOSITIONS ON POTENTIAL CIVIL ACTIONS**

An analysis of what causes of action might be available to the client is necessary to determine how any disposition might affect the case. There are three broad categories of causes of action covering the great majority of suits arising from police contact: false arrest, malicious prosecution, and excessive force. These can be brought pursuant to state law and under 42 U.S.C. § 1983, but since a § 1983 action "borrows" the elements of analogous state common law causes of action, there is little practical difference in how to advise your client. See Cook v. Sheldon, 41 F.3d 73, 79 (2d Cir. 1994).

From the standpoint of the civil rights practitioner, we always advise our clients that they must closely weigh the possibility of a loss if they proceed to trial against any considerations of their civil matter. Sometimes, the loss of one of the potential causes of action, through taking a plea, is not fatal to the civil case, and a balancing of what is to be gained by each cause of action against the risk of trial can further help you advise on a course of action.

## A. FALSE ARREST

The elements of false arrest in New York are:

- defendant intended to confine plaintiff
- plaintiff was conscious of the confinement
- plaintiff did not consent to the confinement and
- the confinement was not otherwise privileged or justified

Savino v. City of New York, 331 F.3d 63, 75 (2d Cir. 2003).

1. ANY GUILTY PLEA that suggests that police had probable cause to arrest the client will thus preclude a false arrest cause of action. With rare exceptions, this means virtually any plea at all.
  
2. AN ACD MAY PRECLUDE a false arrest action. Typically, an ACD does not kill a false arrest action, but civil defendants have (inexplicably) been slow to take up the Courts' leaning against the civil plaintiff in these matters. The issue is currently the source of conflicting case law: The Second Circuit appears to be attempting to walk back its broad, plaintiff-hostile holding in Roesch v. Otarola, 980 F.2d 850, 853 (2d Cir.1992) that "a person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim." Meanwhile, the First Department is running with Roesch. The case law holding that an ACD does preclude a false arrest claim has arisen out of two theories. The first is an erroneous importation of the "favorable disposition" element of malicious prosecution into a false arrest cause of action. The second is an explicit (in Roesch) "policy consideration" that "should we consider such a program to be a favorable disposition and allow the state court defendant to maintain a civil rights action, the program would be less desirable for the prosecutor because the issue of guilt or innocence would still have to be litigated in the civil context". Id at 852.
  - a. Second Department: the Second Department has not ruled directly on the point.
  - b. First Department: a plaintiff's acceptance of an adjournment in contemplation of dismissal operates as a waiver of his right to challenge whether there was probable cause for his arrest and renders untenable his claims for false arrest and imprisonment. Hock v. Kline, 304 A.D.2d 477, 477-478 (1<sup>st</sup> Dept. 2003). This case, however, relies on Second Circuit case law that the Second Circuit itself has called in to doubt, and only ruled on in the § 1983, and not common law, context.

- c. 2d Circuit: the Second Circuit laid out a surprisingly broad principle in Roesch v. Otarola, 980 F.2d 850, 853 (2d Cir.1992) that “a person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim”, and seems to have been trying to walk the principle back ever since. See, Weyant v. Okst, 101 F3d 845, 853-54 (2d Cir. 1996); Russo v. City of Bridgeport, 479 F.3d 196 (fn9) (2d Cir. 2007): “Based on our conclusion that Russo did not make the requisite showing that his arrest lacked probable cause, we need not decide whether a *nolle prosequi* in Connecticut is a *per se* bar to a § 1983 claim of false arrest. On the one hand, we have stated that “[a] person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim.” Roesch v. Otarola, 980 F.2d 850, 853 (2d Cir. 1992). However, several years later, when we discussed Roesch v. Otarola and its Connecticut precedent, we indicated that a judgment of *conviction* was a *defense* to a claim of either malicious prosecution or false arrest, and then went on to say that we were “not aware of any opinion by Connecticut’s highest court addressing the issue of favorable termination in the context of a claim for false arrest where there has been *no determination as to guilt*.” Weyant, 101 F.3d at 853 (emphasis added). The apparent tension between these decisions, and their applicability in the context of Connecticut’s procedures for entering a *nolle prosequi* specifically, has been the source of disagreement among district judges in this circuit. Compare, e.g., Holman v. Cascio, 390 F.Supp.2d 120, 125-26 (D.Conn.2005) (holding that the context of the prosecutor’s decision to enter a *nolle* matters, and that such a decision does not, *per se*, preclude initiation of a false arrest suit in federal court) with Birdsall v. City of Hartford, 249 F.Supp.2d 163, 171 (D.Conn.2003) (holding that a prosecution resulting in a *nolle* is not a favorable termination for the purpose of a false arrest claim).

3. A § 30.30 DISMISSAL will not bar a false arrest cause of action.

## **B. MALICIOUS PROSECUTION**

The elements of malicious prosecution in New York are:

- the defendant initiated a criminal proceeding
- proceeding terminated favorably to the plaintiff
- there was no probable cause for the criminal charge
- the defendant acted maliciously.

Rothstein v. Carriere, 373 F.3d 275 (2d Cir. 2004).

Malicious prosecution compensates your client for post-arraignment deprivations of liberty, even if that deprivation was just the need for the client to keep coming back to court. See Singer v. Fulton County Sheriff, 63 F.3d 110, 116-17 (2d Cir. 1995); Bryant v. City of New York, 404 F.3d 128, 138 (2d Cir. 2005). Thus, the most important times to preserve a malicious prosecution claim are when he was incarcerated for a significant period past his arraignment, or when the case continued over a particularly long period of time. Otherwise, the damages from these deprivations of liberty may not be compensable in a civil action.

Ironically, a malicious prosecution is almost never against a prosecutor-prosecutors have absolute immunity for anything they do in their role as a prosecutor, however outrageous. However, if their actions arise out of an office wide policy, practice, procedure, or failure to train, supervise or discipline, a § 1983 action may lie against the municipality. See Ramos v. City of New York, 285 A.D.2d 284 (1<sup>st</sup> Dept. 2001); Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278 (2d Dept. 2003).

1. A GUILTY PLEA will preclude a malicious prosecution action.
2. AN ACD will preclude a malicious prosecution action.
3. A §30.30 DISMISSAL will NOT preclude a malicious prosecution action, since a § 30.30 dismissal is a “favorable termination” of the charges. Smith-Hunter v. Harvey, 95 N.Y.2d 191 (2000).
4. A PARTIAL DISMISSAL OR AQUITTAL may PRESERVE a malicious prosecution action, though not if it is pursuant to a plea bargain. See Green v. Montgomery, 219 F.3d 52 (2d Cir. 2000), citing Posr v. Doherty, 944 F.2d 91, 100 (2d Cir. 1991). But where the higher charges are terminated pursuant to a compromise, the termination is not “favorable to the accused”. Smith-Hunter v. Harvey, 95 N.Y.2d 191 (2000).
5. DISMISSAL IN THE INTEREST OF JUSTICE  
The Courts have been hostile to the idea that a dismissal in the interest of justice is a favorable disposition. “As a matter of law, [a dismissal in the interests of justice] cannot provide the favorable termination required as

the basis for a claim of malicious prosecution.” Hygh v. Jacobs, 961 F.2d 359, 368 (2d Cir.1992), n. 7. Although it is always hard to argue with a dismissal, if the potential for a civil action is real, the prosecution should be forced to more accurately or specifically articulate their basis for the dismissal. “The defendant has a terminal illness” is obviously different than “our police officer witness lies whenever his lips move”; the latter should be an admission that the People cannot prove their case beyond a reasonable doubt, rather than an “interest of justice” dismissal. Some courts have held that in some circumstances, to determine whether an interest of justice dismissal is a favorable disposition, one should look to the facts surrounding the termination of the matter. Janetka v. Dabe, 892 F.2d 187 (2d Cir. 1989), but it is unlikely that Janetka can survive Hygh, Id. The practitioner should always place on the record what is meant by such a dismissal, and clarify that the prosecution may be citing “the interest of justice”, but that you are requesting dismissal because the People are conceding an inability to prove their case beyond a reasonable doubt.

### **C. EXCESSIVE FORCE**

Potential excessive force claims are the least complicating of the potential civil claims for the criminal practitioner. An excessive force claim is typically brought under state common law assault and battery causes of action, and under § 1983 for violating the plaintiff’s Fourth Amendment right to be free from an *unreasonable* search and seizure.

Thus, no particular disposition will necessarily preclude a civil action for excessive force, though certain pleas will of course make an excessive force claim harder. Try to avoid convictions that suggest the client fought with police or was violent: Resisting arrest of course is the main one to avoid, as are assault, obstructing governmental administration, disorderly conduct (subsection 1).

If pleading to a count that may be construed as warranting police force, try to clarify in an allocution that the plea is in regard to a count not related to police force. For example, in a domestic violence case involving resisting arrest, be clear on the record that your client is pleading to assaulting his partner, and not the police when they arrived and beat him up an hour later. Or, for example, in a drug case where your client swallowed drugs as he was about to be apprehended, be clear that the obstruction of governmental administration was the swallowing of the drugs, and not the alleged resistance he offered to the subsequent, retaliatory beating he received.

## **II. PRESERVING YOUR CLIENT’S RIGHT TO SUE- NOTICES OF CLAIM, 50-H HEARINGS, STATUTES OF LIMITATION, AND ACCRUAL OF ACTIONS**

While it is obviously best for a client to file notices of claim to preserve all of his causes of action, a common misconception is that a claimant who has not filed a notice of claim is barred from suit. This is false for several reasons.

A. STATE NOTICE OF CLAIM STATUTES CANNOT BAR § 1983 RELIEF Felder v. Casey, 487 U.S. 131, 152-53 (1988). Thus, although the state causes of action make a case stronger (they provide for *respondeat superior* liability and suit against individuals not acting “under color of law”), the majority of civil rights claimants will still have a potential action even without a notice of claim.

B. MOTIONS TO FILE A LATE NOTICE OF CLAIM:

New York State General Municipal Law §50-e(5) allows a Court to grant leave to file a late notice of claim. “In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances including... and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.”

C. CONTENTS OF A NOTICE OF CLAIM

The criminal practitioner is obviously concerned about memorializing any client statements. General Municipal Law requires only:

- 1 the name and post-office address of each claimant, and of his attorney, if any;
- 2 the nature of the claim
- 3 the time when, the place where and the manner in which the claim arose;
- 4 the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled

As a practical matter, in New York City, a notice of claim is unlikely to have any effect on your client’s criminal case. The notices of claim are received by the Comptroller’s office, and there is no formal mechanism by which the Comptroller notifies a prosecutor of a potential action.

D. THE 50-H HEARING

Of course, the last thing the criminal practitioner wants is a full blown transcript of her client’s version of his arrest. But a notice of claim triggers a 50-h hearing,

and the state law causes of action may not proceed until a 50-h hearing has been held, once demanded. A few things of note, however:

1. IF THE CLIENT IS UNREPRESENTED, NEW YORK CITY DOES NOT DEMAND A 50-H HEARING. This is not, to my knowledge, a matter of statute, but of practice. If you do not represent your client on the civil matter, it seems unlikely you are the attorney referenced in Gen. Mun. Law § 50-e(1), and thus, your name should not go on the notice of claim.
2. THE COMPTROLLER'S OFFICE WILL GENERALLY AGREE TO ADJOURN A 50-H HEARING WHILE THE CRIMINAL MATTER IS PENDING. Again, this is not a matter of statute, but of practice. It is important to keep in mind, however, that *the statute of limitations is 1 year and 90 days on most of the state law claims against the municipality and the individual officers*. However:
  - a. the § 1983 action is not subject to the notice of claim requirements, and has a 3 year statute of limitations.
  - b. The statute of limitations runs from *accrual* of the claim; but a malicious prosecution claim does not accrue until after a favorable disposition. For this reason, the practitioner who is zealously assisting his client in preserving his potential causes of action will advise to file additional notices of claim after a favorable disposition, to preserve the state malicious prosecution cause of action. In fact, due to the holdings in Green v. Montgomery, 219 F.3d 52 (2d Cir. 2000), and Posr v. Doherty, 944 F.2d 91, 100 (2d Cir. 1991), that dismissal of some charges, but not all, may support a malicious prosecution cause of action, it is arguably most prudent to file a new notice of claim every time a charge is dismissed, as in when felonies are "reduced" to misdemeanors.

#### E. WHERE TO FILE NOTICE OF CLAIM

Although in New York City the city comptroller is most often the proper party to serve with a notice of claim, there are other agencies for which a notice of claim is required; be sure to analyze who the potential claim is against. Some other agencies the New York City practitioner may encounter are:

- a. Port Authority
- b. New York State (including SUNY, CUNY (suits related to CUNY may require a City or State notice of claim, depending on whether it is a community college where the incident arose!), OCA, for Court Officer misconduct, and New York State Department of

- Correctional Services, for holdover cases that may be related to parole issues)
- c. Health and Hospitals Corporation

### **III. INTERACTING WITH POLICE OVERSIGHT AGENCIES**

Clients who earnestly feel they have been wronged will often want to take their complaints to an agency they feel is tasked with addressing the issue. Obviously, the criminal practitioner's hair stands on end at the thought of his client discussing his matter, on the record, with such agencies. Sometimes, however, the agencies are involved before you've even met your client, sometimes they become involved through non-party witnesses, and sometimes your client may insist on going to them against your advice.

#### **A. THE INTERNAL AFFAIRS BUREAU (IAB)**

The operative word in IAB is "internal". IAB is an arm of the NYPD. Its investigators are generally police and detectives who were previously in a precinct, and are likely to be rotated back to a precinct, or another non-oversight role. IAB will occasionally have already become involved in a case before you've even met your client, if there was a significant injury, or if there was an allegation of corruption made.

IAB interviews almost invariably involve questions locking witnesses and complainants into testimony favorable to the police, and leading police to answers justifying and explaining the police narrative. As a result, it is virtually never a good idea to allow your client to cooperate with IAB.

Additionally, IAB limits their mission to allegations of corruption or excessive force causing what they consider to be serious injury. The great majority of the time, if an allegation involving force is brought to their attention, they will interview only the complainant, lock in testimony favorable to the police, then refer the case to the Civilian Complaint Review Board, where your client must once again tell the entire story on the record before the case continues. Thus, if the client sincerely wants to proceed with their complaints, it is best to either walk them through the CCRB process, or, in particularly compelling cases, bring the matter to the DA's rackets division.

#### **B. THE CIVILIAN COMPLAINT REVIEW BOARD**

Despite many shortcomings and failings, the CCRB is at least an agency outside the NYPD, with some earnest investigators that may try to seriously investigate an allegation. A CCRB investigation can actually benefit your client's case in a number of ways.

First, where an officer has a genuine concern about his own actions in an arrest, an active CCRB investigation may make the officer think twice about compounding his misconduct by assisting in the client's prosecution. (Of course, the converse may be true, as well.)

Second, because officers are compelled to make statements to the CCRB when called upon to do so, there is an invaluable subpoenaable record of the officers' statements concerning the events underlying the arrest. This will usually occur before your client's case is actually moved to trial. Though judges will ordinarily pressure prosecutors to obtain this material, it is arguably not Rosario material. Thus, it is better to subpoena the material (which will include audiotaped interviews of the officers and your client).

#### C. DA'S RACKETS BUREAU

The district attorney's offices have rackets bureaus to handle allegations of criminal conduct against police officers acting in the course of their job. Though of course the great majority of valid police misconduct claims essentially allege crimes, you will not want to bring your case to a rackets ADA unless it is a particularly compelling matter.

If there is an earnest desire to address a particularly compelling matter, you should get the prosecutor's commitment to maintain a wall between his investigation and your client's prosecution. Typically, if the matter is compelling enough to bring you to the DA's office, your client's prosecution is unlikely to go far, in any case.

### IV. SOURCES OF POLICE MISCONDUCT INFORMATION

The bag of crack that your client is alleged to have swallowed was likely not his first. Similarly, Officer Doe's retaliatory beating was likely not his first. Look him up! Civil actions against police officers, though not formally tracked by the NYPD, are easy to look up. Civil actions against New York City police officers may be filed in the United States District Court, Southern District of New York, United States District Court, Eastern District of New York, or New York State Supreme Court. Links for searching are below. The federal courts require you to register, but it is a relatively painless process.

United States District Court, Southern District of New York:  
<https://ecf.nysd.uscourts.gov/cgi-bin/login.pl>

United States District Court, Eastern District of New York:  
<https://ecf.nyed.uscourts.gov/cgi-bin/login.pl>

New York State Supreme Court:  
<http://iapps.courts.state.ny.us/webcivil/FCASMain>

## V. POTENTIAL CLAIMS FOR CLIENTS

The criminal defendant unfortunately encounters myriad situations that may give rise to a civil claim. Here is a list of areas where it may be prudent to watch for potential claims, and provide a notice of claim:

- False arrest
- Malicious Prosecution
- Excessive Force
- Failure to release from custody (holdovers)
- Failure to seal records
- Inadequate medical attention in jail
- Corrections assaults
- Police failure to disclose exculpatory evidence
- Unlawful entries, searches and seizures (but note that “fruit of the poisonous tree” is an evidentiary doctrine inapplicable to §1983 actions. Townes v. City of New York, 176 F.3d 138 (2d Cir. 1999))
- Prosecutorial shortcomings that arise from a failure to discipline, train, or supervise, and that foreseeably would lead to constitutional deprivations. Whereas the individual prosecutor has absolute immunity for such incidents, the municipality may be liable for the policy and training failures.