



Know What Your Officers Know!

By Gene King, Law Enforcement Action Forum Coordinator



A Brief Overview of Management 101

It is an entity's management responsibility to make sure their employees know what is expected of them. This is accomplished by establishing job descriptions and outlining job tasks that employees are regularly expected to perform. In law enforcement, a lot of time is spent defining job tasks, expectations for performance of those tasks, establishing policy and rules for doing the tasks, training employees to the policy and rules along with the skill sets needed to safely perform the assigned job tasks, with attention to mitigating the risk of injury where it is practical. Management is then responsible to audit the activity of the department, supervisors and employees to ensure compliance with established expectations.

It Started With A Question

During a meeting of the Michigan Municipal League's (MML) Executive Committee of the Law Enforcement Action Forum (LEAF) one of the members asked "From a historical prospective, topically, what are the areas where officers most often make mistakes which result in injury, complaints or civil litigation." After some contemplation, Tom Wolff, Claim Manager, MML Risk Management Services listed operation of motor vehicles, use of force, custody and search and seizure as activities that have been the frequent source of litigation against members of the MML Liability and Property Pool. He went on to say that the most serious claims of injury from the MML Workers Compensation Fund revolved around motor vehicle crashes, human violence and officers being injured because of a slip, trip, fall or striking against an object because they lacked environmental or situational awareness.

He then asked Audrey Forbush, LEAF Legal Advisor from Plunkett Cooney PC, what her thoughts were. Forbush was quick to say Wolff's list was topically correct but felt the discussion should be taken to a subset list of specific issues that arise because officers either do not know or understand the standards of law or court decisions that specifically establish the correct action to be taken.

What followed was a discussion of the specific things officers must know and do while performing their job tasks involving the emergency operation of a motor vehicle, using force and taking people into custody, stopping people on the street and what parameters they must meet when entering property. The list was not

all inclusive but represented the Fourth and Fourteenth Amendment violations often alleged by plaintiff's bar in litigation that is filed in response to an officer's action. Both Forbush and Wolff said that the issues often involve whether the officers' actions were reasonable based on the information they had at the time they took action and if that action was within the boundaries of either the law or limitations set by the courts.

Forbush commented that one of the most important issues facing law enforcement today is having the ability to prove that officers are complying with the department's expectations and/or policies and rules. Evaluating the activity of the department, she said, is part of the audit process to identify the proofs contained in the documents, information, video and data generated by the department. A department must know that they are functioning within the parameters of the law; meeting the goals and expectations established by their enabling governmental entity and, the people they represent. Proofs are a major component in meeting and maintaining the MACP Accreditation Standards.

After the discussion, several LEAF Executive Committee Members said they would like a list of what their officers needed to know so they could test to "*know what their officers know*". It was the predominant theory that auditing the officers' knowledge would identify any need for training, supervision or modification of policy to ensure the department's performance complies with the law and the municipal entity's and public expectations.

Based on that request, Forbush and Wolff helped develop the following questions:

Questions and answers alone can be found at:

www.mml.org/insurance/shared/risk_resources/know_what_your_officers_know.html

Know What Your Officers Know!

1. What determines an emergency and who authorizes a police officer to respond in an emergency fashion as outlined by law?

Your employer defines what an emergency is and authorizes emergency employees to respond in emergency fashion. The State of Michigan, by statute, prescribes how the vehicle may be operated and the officer's behavior and discretion.

2. According to the Michigan Vehicle Code, when is an emergency vehicle exempt from speed limitations?

(MCL 257.632) The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, ... This exemption shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary or when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicles, unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators. This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.

MCL 257.603 (3) The driver of an authorized emergency vehicle may do any of the following: (c) Exceed the prima facie speed limits so long as he or she does not endanger life or property.

MCL 257.603 (4) This exemption shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary or when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicles, unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators. This exemption shall not, however, protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.

3. When is a police officer exempt from activating a siren in an emergency and what standard of care must they meet if a siren is not used?

MCL 257.603 (5) A police vehicle shall retain the exemptions granted in this section to an authorized emergency vehicle without sounding an audible signal if the police vehicle is engaged in an emergency run in which silence is required.

4. When can an emergency vehicle disregard a red light or stop sign?

MCL 257.603 (2) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, or when pursuing or apprehending a person who has violated or is violating the law or is charged with or suspected of violating the law may exercise the privileges set forth in this section, subject to the conditions of this section.

MCL 257.603 (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.

MCL 257.603 (4) The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary, except as provided in subsection (5), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc unless it is not advisable to equip a police vehicle operating as an authorized emergency vehicle with a flashing, oscillating or rotating light visible in a 360 degree arc. In those cases, a police vehicle shall display a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle. Only police vehicles that are publicly owned shall be equipped with a flashing, oscillating, or rotating blue light that when activated is visible under normal atmospheric conditions from a distance of 500 feet in a 360-degree arc.

MCL 257.603 (5) A police vehicle shall retain the exemptions granted in this section to an authorized emergency vehicle without sounding an audible signal if the police vehicle is engaged in an emergency run in which silence is required.

5. What are the lawful reasons to enter a residence?

Consent, Search Warrant, Exigent Circumstances

Consent: Officers should know that they bear the burden of showing, by a preponderance of the evidence, that the totality of the circumstances supports a conclusion that consent was given voluntarily. U.S. v Mendenhall, 446 U.S. 544 (1980)

United States v. Worley, 193 F.3d 380, 386 (6th Cir.1999), the Sixth Circuit Court of Appeals ruled “Moreover, we note that not any type of consent will suffice, but instead, only consent that is “unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion.”

Exigent Circumstance: those that demand immediate action and generally justify entry into a dwelling or building without a warrant.

Get it on video!

6. What are exigent circumstances in a 4th Amendment context and give examples?

Exigent Circumstances are those that demand immediate action and generally justify entry into a dwelling or building without a warrant. They include the following:

- A. The probability that entry would prevent the destruction of evidence.
- B. A threat of injury to the officer or others exists.
- C. Without entry, a felon would escape.
- D. There is a crime in progress.
- E. Emergency aid circumstances exist.
- F. Officers are in hot pursuit of a felon.
 - 1) This refers to situations wherein an officer pursues a fleeing felon into a home or building, etc...
 - 2) It is important to note that court cases dealing with this exception are based on felonies, not misdemeanors.
 - 3) Officers generally should not pursue a person wanted for a misdemeanor into his home, and then expect to base an exception to the warrant requirement on hot pursuit.

Officers may only take steps to end the emergency that created the exigent circumstances and to stabilize the situation. If officers observe anything in plain view that officers have probable cause to believe is connected with criminal activity, they may seize it. The officers, however, may go no further without a search warrant.

7. What is curtilage and what privacy rights does a person have within it?

Oliver v. United States, 466 U.S. 170, 180 (1984) the U.S. Supreme Court defined curtilage as an area immediately surrounding a house or dwelling if it harbors the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’ In United States v. Dunn 480 U.S. 294 (1987), the U.S. Supreme Court said that four factors should be considered in determining the curtilage:

- A. The proximity of the thing to the dwelling;
- B. Whether the thing is within an enclosure surrounding the home;
- C. The purpose of the thing;
- D. What steps, if any, the resident took to protect the thing from observation/access by people passing by.

Areas away from the home and curtilage that are unoccupied and undeveloped are considered open fields. In open fields, there is no expectation to privacy even if the property is obviously private.

8. Under 4th Amendment, how much force can an officer use to accomplish an arrest?

The level of control that is objectively reasonable for the resistance encountered.

Whether an officer's use of force in effecting an arrest violates the Fourth Amendment turns on whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.

The courts pay careful attention to the facts and circumstances of the 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; the ultimate question, however, is whether the totality of the circumstances justifies a particular sort of seizure.

Courts must carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake; courts are to consider reasonableness at the moment of the use of force, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, and courts must take into account the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

9. Can a citizen resist an unlawful arrest or invasion of constitutionally protected areas by police?

Yes!

Michigan Supreme Court in *People v Moreno*, 491 Mich 38 (2012) ruled that under common-law a person has a right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas.

The right to resist unlawful arrests, and other unlawful invasions of private rights, is also well established in Michigan's common law. The current state of the law places the responsibility squarely upon the officer to specifically define the circumstances, as the officer knew them, the officer's knowledge at the time and the reasonableness of their decisions when they chose their course of action.

The courts, as evidenced in *Moreno*, have remained absolute on the core of the Fourth Amendment, which is, that barring exigent circumstances or consent, a search warrant is mandatory before entering or searching a person's home.

10. Define active resistance?

Active resistance as described by the 6th Circuit Court of Appeals could be a verbal showing of hostility by clinched fists or posturing in a fighting stance or threats with an apparent intention to carry them out. It can also be a deliberate act of defiance like resisting handcuffing or refusing to keep hands visible or using one's own body, such as pulling or pushing away, blocking, striking, kicking or grabbing, or use of some other mechanism, such as a weapon or vehicle.

Michigan Commission on Law Enforcement Standards defines Active Resistance in the Subject Control Continuum Training Guide for Escalation and De-Escalation of Subject Control, 2008 as any action by a subject that attempts to prevent an officer from gaining control of the subject. MCOLES uses pulling/pushing away, blocking as examples. Examples of Active Aggression are physical actions or assaults, advancing, challenging, punching, kicking or grabbing.

Sixth Circuit Court of Appeals ruled that officers must know that they cannot use a Conducted Electrical Weapon (CEW) on a subject who is not actively resisting as the court described; is not a threat, is not armed or has not been told they are under arrest. A common thread in the Sixth Circuit case law on

evaluating the use of force: noncompliance alone does not indicate active resistance; there must be something more to indicate they pose an immediate threat. Kent v. Oakland County, 810 F.3d. 384 (6th Cir. 2016),

11. If an officer stopped, searched, handcuffed and detained a person in a patrol vehicle, is the next logical step to take them to jail?

Not always, if the officer has no probable cause to arrest, the subject must be released from custody.

U.S. Supreme Court case of held Terry v. Ohio, 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889, 899 (1968), when an officer makes a Terry Stop the officer must have a reasonable suspicion that the person has committed a crime, is about to commit a crime, or is committing a crime. The reasonable suspicion has to be more than a “hunch.” It has to be based upon specific, articulable facts that when put together with the officer’s experience or other knowledge justifies an investigatory stop. The court evaluated the officer’s conduct by an objective standard: “Would the facts that the officer had at the moment of the seizure warrant a man of reasonable caution to believe the action was appropriate.”

The criteria of a Terry Stop is that the subject is not necessarily free to walk away if the officer has reasonable suspicion to believe a crime has occurred, is occurring, or is about to occur. In a Terry Stop, the officer could handcuff the subject, pat him down, and place him in the patrol vehicle, or otherwise control him in order to allow the officer to investigate.

When an officer literally has no idea or lacks supporting probable cause whether a presumptively law-abiding citizen has violated the law, the Fourth Amendment clearly commands that government let the individual be. Indeed, if anything is clear about the Fourth Amendment, it is this: government may deprive its citizens of liberty when, and only when, it has a viable claim that an individual has committed a crime, and that claim is supported empirically by concrete and identifiable facts. Contempt of Cop is not a legal charge!

12. What factors must be present before an officer initiates a foot pursuit and apprehends a subject?

As with a *Terry Stop*, when officers pursue a subject, they need reasonable suspicion based upon specific, articulable facts that when put together with the officer’s experience, common sense judgments, inferences about human behavior or other knowledge that justifies an investigatory stop. The act of catching a fleeing subject constitutes a seizure under the Fourth Amendment. If an officer is able to capture the subject, the criteria of a Terry Stop apply. Upon capture, the subject is not free to walk away so the officer must have a reasonable suspicion to believe a crime has occurred, is occurring, or is about to occur. If probable cause exists then an arrest can be made, if not the subject must be released. The act of fleeing does not, on its face, support an arrest. Neither does it support a charge of “Contempt of Cop”!

13. List four issues officers should consider before initiating, joining or continuing a foot pursuit.

Below is a list of issues officers should consider before they engage in a foot pursuit: (Add additional issues you consider acceptable.)

- A. the severity of crime,
- B. whether the identity of the suspect is known,
- C. whether the suspect is armed,
- D. the risk of the subject hurting others,
- E. knowledge and nature of the geography, terrain and possible associates in the vicinity,
- F. vehicular and pedestrian traffic,

- G. time of day,
- H. weather conditions and ability to see,
- I. the ability to communicate with dispatch,
- J. availability of assist units, and
- K. the officer's physical capability to overcome any resistance offered by the subject if apprehended.
 - 1) Officers must understand they can use only that level of control that is objectively reasonable for the resistance encountered.
 - 2) Physical exhaustion may lead to officer created jeopardy, which may cause the use of unreasonable force by allowing emotion to guide their action or misreading the opportunity to de-escalate the incident.

14. Under the Michigan Mental Health Code, when does a person require treatment? (See MCL 300.1401)

A "person requiring treatment" is defined as follows:

- A. a person who is mentally ill, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation;
- B. a person who is mentally ill, and who as a result of that mental illness is unable to attend to those of his basic physical needs such as food, clothing or shelter that must be attended to in order for him to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs;
- C. a person who is mentally ill, whose judgment is so impaired that he is unable to understand his need for treatment and whose continued treatment as the result of this mental illness can reasonably be expected, on the basis of competent medical opinion, to result in significant physical harm to himself or others.

15. When must a police officer take a "person requiring treatment" into custody and transport them to a hospital?

Officers should know that if they observe an individual conducting himself or herself in a manner which causes the peace officer to reasonably believe that the individual is a "person requiring treatment", (MCL 330.1401(1)(a)-(c)), as set forth above, the peace officer may take the individual into protective custody and transport the individual to a hospital for examination pursuant to statute or may notify the community mental health emergency service unit for the purpose of requesting mental health intervention services. If notified, the community mental health emergency service unit shall provide those mental health intervention services that it considers appropriate unless the individual declines the services. If the individual declines the services, the peace officer shall immediately transport the individual to a hospital. MCL 330.1427. Officers should document all observed mannerisms and behavior that causes them to believe that an individual requires treatment.

The mandatory provisions of § 1427 are not engaged until community mental health is notified that the individual is a "person requiring treatment." Therefore, the officers are able to exercise their reasonable judgment and discretion in making the decision whether to take an individual into custody on the basis of the manner in which the individual is conducting himself.

16. What are the restrictions on the use of force when taking a "person requiring treatment" into custody?

MCL 330.1427a(1) provides as follows: "If a police officer is taking an individual into protective custody,

the officer may use that kind and degree of force that would be lawful if the officer were effecting an arrest for misdemeanor without a warrant.”

It is important for officers to realize that these situations are often rapidly evolving and can easily escalate, should they meet with physical resistance when attempting to take an individual into protective custody for purposes of mental health evaluation and the situation escalates, the officer’s use of force can therefore escalate accordingly pursuant to the use of force continuum. The same standard of arrest applies: “The officer’s actions must be objectively reasonable in light of the circumstances. They are entitled to use that force that is reasonably necessary to effect this legal action.”

The Sixth Circuit, as far back as 2004, ruled in a case involving an autistic subject who could not communicate and in which the officers had been told was having a crisis and acting out, that “It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or retarded, even though the officers may not have known the full extent of (his) autism and his unresponsiveness. The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.” *Champion v Outlook Nashville Inc.*, 380 F.3d 893,904 (Sixth Cir, 2004).

Again, in *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007) the court reiterated *Champion* because the record established that the officers knew before they had contact with the subject that he was having some mental or emotional difficulty that had caused alarm in his mother. *Griffith* is the first time the Sixth Circuit Court of Appeals was very specific about officers being responsible for recognizing mentally ill or emotionally distressed individuals.

The *Griffith* Court held that officers are responsible for managing the situation based on the mental condition of the subject. Even though the court may have not specifically said so, its expectations appear to be that officers in these incidents need skills to recognize the situation. The court laid out their expectation that officers should be skilled enough to avoid unnecessarily escalating the incident by choosing action that serves to decompress the situation, avoiding the need for a high level of force response. *Griffith* also is the first time the Sixth Circuit has been this specific concerning how the court will evaluate use of force when dealing with a person who is mentally ill other than the reasonable officer standard found in *Graham*.

The court in *Griffith* also supported *Champion’s* ruling that officers’ action creating asphyxiating conditions by applying “substantial or significant pressure” to restrain a suspect who presents a minimal safety risk, amounts to excessive force. *Griffith* went further and put officers on notice that using severe force, including a neck restraint, against an unarmed and minimally threatening individual before he was subdued violates the Constitution. This was notice that remaining on top of, or using pressure to hold down, a prone subject who is restrained and no longer resisting is excessive force.

17. When was the last time you read a criminal justice related professional journal, newsletter, magazine or article?

Hope for some time in the past 30 days, at the least. Best answer is last week or less. Examples may be the Law Enforcement Action Forum (LEAF), MSP, Prosecutors, FBI, Force Science, AELE, FLETC Newsletters or a professional law enforcement magazine or website.

18. List the different ways you receive training.

Officers do not need to be in a class to receive training!

By reviewing and discussing our rules, policies, procedures, philosophy, and practices of the municipality, new/current laws that apply to their performance, employee briefings, videos, periodicals, magazines, bulletins, newsletters, books or class room lectures, discussion of current events, new regulations, or public policy issues, incident debriefing, practicing or reviewing mechanical and motor skills important to the job.

19. What is Below 100?

Below 100 Program, an initiative that aims to reduce the line of duty deaths to below 100.

20. What are the five tenets of Below 100?

- A. Wear Your Belt
- B. Wear Your Vest
- C. Watch Your Speed
- D. WIN—What’s Important Now?
- E. *Remember*. Complacency Kills!

Are you a MML Insurance Program Member?

Go to the League’s online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click “Don’t Have an Account”. To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League’s, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers’ participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers’ Compensation Fund
1675 Green Road, Ann Arbor, MI 48105 ph - 800-653-2483
Contact information: Gene King, gene.king@meadowbrook.com ph - 800-482-2726 ext. 8040*