



Law Enforcement Action Forum NEWSLETTER



If You're Going To Be a Leader, The Devil's In the Details

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For police executives, a major concern is how to keep their officers and departments safe from the risk of litigation. This edition of the LEAF Newsletter explores the areas within a police executive's control that can reduce the potential for litigation. To identify these areas, I turned to the MML Team that assists Pool members by either helping them to prevent litigation or by defending them once it occurs. The MML's Risk Management, Claims, and Loss Control Services all participated by providing comments and expressing concerns based on their experience. I also asked James DeGrazia of O'Connor, DeGrazia, Tamm & O'Connor, P.C., LEAF's Legal Advisor, for his perspective. The discussion raised a variety of issues, most of which fit into a few specific categories. It also revealed that there are still a number of departments with deficiencies in critical areas. If your department is not one of them, then congratulations! Read on and apply an honest self-assessment to validate your belief.

The MML Pool and Fund believe that risk management is good management. They want all their members to be concerned about the risk exposures in their operating environments. The Pool and Fund feel this is so important that cooperation with MML Loss Control Services is a condition of membership. Despite all the effort and cooperation, it is impossible to avoid all risks because some are inherent to any operation. What we must do is recognize and manage these exposures to reduce their impact.

SOMETIMES IT'S TOUGH TO LOOK IN THE MIRROR

If police executives continue to tell us that litigation is a major concern, then how often do they look at their operations as a risk manager or a court of law would? This edition of the LEAF Newsletter discusses a variety of risks – risks that often result in litigation – that police executives can control. A recurring theme will be the significant amount of discretion afforded officers at every level. This use of discretion is necessary because of the fluid nature of law enforcement activities. At every level of the police operation, officers must be able to make decisions based on the dynamics of a specific situation. At the same time, the use of discretion often triggers complaints and litigation. Departments must implement policies, procedures, rules and directives to help guide officers' use of discretion.

The Law Enforcement Action Forum believes officer safety is the primary concern. LEAF knows that officers who work safely are less likely to get injured or cause liability. LEAF also knows that the best protection against injury or liability is a foundation comprising an up to date system of rules, policies, and procedures that guides officers and regulates their behavior as well as training in the philosophy and proper use of the tools that the department provides. Effective supervision with quality control systems that evaluate the department's activity is also necessary.

If departments lack even one of these components, they are at risk, and it is only a matter of time before they have problems with public scrutiny or litigation. If it hasn't happened yet, it is because luck has been riding on their side, for now!

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HIGH FIVES AND LOOSE LIPS

Police officers in our society are given authority and discretion to take action that is sometimes quite aggressive. Because of this daunting responsibility, departments know they need to train to those activities that are high in severity. Based on past history, our officers usually make appropriate decisions in these situations because most member departments have policies and training that prepare officers for most high-risk activities. If it's not these activities that are causing problems, then what is? It's what officers say and how they handle themselves after incidents and while doing the routine parts of the job that gets departments in trouble.

It is LEAF's premise that today's law enforcement agencies must direct their employees by providing guidance and tools, mandating training, and then supervising employees to make sure it is all working right. From this point of view, let's explore those things that a law enforcement executive can control to avoid problems.

REVIEW AND UPDATE PROCEDURES

All the participants in the discussion agreed that at the core of the things that cause litigation is the lack of clear or current policy to guide officers. Departments have some policies, but they are often outdated and no longer reflect their actual practices. Either the practices have changed or the officers just ignore the policies. This is a serious problem and also reflects badly on the boss.

The LEAF Newsletter has often stressed that a department's policy manual and rules are living documents that need regular review and updating. LEAF recommends a documented yearly review of the manual with changes made as necessary. Everyone recognizes this is a large task, so it should involve several officers in the department. The law enforcement executive of each department should require their officers to review the manual to ensure its applicability to daily operations and to report back any recommended changes.

It is up to the Chief, Director, or Sheriff to decide whether changing the policy or the practice of the department is necessary. They are also responsible for ensuring that each policy reflects the department's philosophy and that officers are putting it into practice. It is the policies and rules that establish the parameters within which officers get to use their discretion. Invite input from the line officers that work with the document.

COVER THE EVERYDAY TASKS

When reviewing their manuals in relation to practices, administrators should ensure that they have policies for those activities that officers regularly perform as part of their job

duties. Manuals often contain guidance in the use of firearms and the operation of vehicles in high-risk situations but ignore the job functions officers perform most frequently. Officers drive every day, and they regularly detain, arrest, search and take subjects into custody. Yet, some departments do not have policies that guide officers in how to perform these tasks or inform them as to how the law affects their ability to exercise their authority. These are also the areas that most commonly cause litigation. Administrators need to reflect upon their department's job descriptions and expected job functions and ensure that the policies and rules provide guidance in those areas.

Keep in mind these policies are just one segment of the risk management process that helps to avoid litigation.

REAL LEADERSHIP MAKES A DIFFERENCE

This is a big one! It ranks right up there with the lack of up to date policies and practices. When supervision is lacking, the department has a tendency to break up into separate little departments that are operating on their own. They follow the policies just enough to keep below the radar screen so as not to bring attention to themselves, but they pretty much operate the way they want to. Nothing comes to light until an incident occurs and people start asking questions. This is when the stonewalling begins, and suddenly a variety of problems come to light. By this time it is often too late to avoid serious scrutiny or litigation. And the incident looks worse when depositions are taken and the process becomes public.

It won't be a shock to anyone that a lot of activity that generates litigation occurs in the late evening or early morning. That's when most of the bad guys are out doing their thing under cover of darkness. It is the time when officers encounter people who are under the influence and not inclined to cooperate or speak to officers with the greatest of respect. It is also the time when a lot of not so bad guys are wandering home having had a hot toddy or ten. Officers frequently face intoxicated, uncooperative, resistive people during late night and early morning. It is a time when officers have to know the boundaries of discretion. They have to know that their department does not tolerate the little extra subject control technique.

They have to know that particular types of language will bring scrutiny if they use them in the wrong environment. They have to know that contempt of police is not an offense for which they can arrest

someone. They have to know that sometimes you have to step back and take a breath before going forward. They have to know that they can't talk about department business wherever they want. They have to know that management is going to evaluate their decisions and actions.

To avoid these scenarios, management has to exercise its responsibility to supervise its employees. Departments can partially achieve this through policies, rules and training. But that alone is not sufficient. It is management's responsibility to oversee the activity of the department to make sure its employees are following the rules. This is an important area because employees only know what the limits of their use of discretion are when they are taught. They learn boundaries through training, through contact with management and supervisors, and through peer review and evaluation of incidents.

Management needs to have regular contact with its employees. Through regular contact, employees have an opportunity to learn the philosophy that backs the words in the policies and rules. Having regular contact in an operation such as a police department means that management regularly visits those shifts with which it does not have routine contact. Providing back up for an officer unexpectedly at an incident or checking on an officer during a traffic stop on a weekend or late at night are good strategies. Being available affords the employees an opportunity to talk about issues, and it also gives management the ability to provide feedback. By having more contact with management, employees will gain a better understanding of the discretion they are granted and their accountability when using it. If employees think that management might show up at any time, they often ensure that their behavior is in line with the department's philosophy.

Management is responsible for holding its employees accountable for their decisions. A good way to accomplish this is to perform a quality review on all operations. This can be as easy as viewing a random 30 minutes of video on every officer and then giving the officer documented feedback based on the observation. It is fine to delegate this to a supervisor. Departments should require the supervisor to forward the audit to management for review. Random audits by management help to ensure that supervisors are complying with the requirement. Another means of maintaining control is to review incident reports and investigative notes. A random poll of those people with whom the department comes in contact, using a satisfaction questionnaire, can provide a good snapshot of the public's perception. Conducting a poll can be as simple as stopping by the homes of randomly chosen complainants and asking questions on how the department handled their requests for service. Departments should keep the overall results of the

audits on file as well as the documentation of any action taken in response to the results.

TOOLS AND THEIR USE

Departments provide their officers with a variety of equipment to facilitate job performance. The issue that arises is whether departments are giving officers the right tools and providing policy and training to guide their appropriate use. When charges of excessive use of force arise, the argument will focus on whether officers went too far in the level of force used considering the circumstances that existed. Frequently an officer's choice of weapon comes under scrutiny. When choosing tools for officers, administrators must examine the types of usual and recurring situations that their police officers face. This examination will lead to sound decisions about what types of tools to provide.

Avoiding physical engagement until the subject has submitted to officers' authority and control is always the safest alternative for officers. To accomplish this, officers should have tools that allow them to control subjects from a distance. Providing officers with training in verbal judo as well as with a variety of tools such as aerosol sprays, impact weapons, electronic emitting, or other less lethal weapons, and firearms allows officers to exercise their discretion in selecting the tool that best fits the situation. Trouble occurs when officers use a tool in which they have not received training or when they improvise by using a tool as an impact weapon despite their departments' prohibition against the practice.

USE PLAIN ENGLISH NOT POLICE JARGON

Problems arise when officers cannot articulate why they chose to take a particular action with a particular tool. They often use "police-eze" when defining the use of force. An example is "only that force that was necessary to overcome the resistance by the subject." Law enforcement knows what that means, but no one else does. They can understand "the subject was trying to get away by hitting, kicking, biting, gouging, and calling me bad names." Officers have to be told to write reports and speak in plain English. What is wrong with saying, "I couldn't get him under control, so I sprayed him in the face or struck him with my baton?"

ELIMINATE THE "I FORGOT DEFENSE"

If you said it or did it, fess up to it. If officers make a mistake or use poor judgment, they have to be up front about it. Sometimes, in the fray, bad things happen. Officers have to be able to explain how these bad things happened and what

caused the officers' reaction. It is better to deal with the issue up front than be surprised later in a complaint or pleading.

VIDEO CAMERA

An in-car camera is a valuable tool that can help support officers' explanations as to how and why they took the actions they did. Proper use of the camera can protect officers from "he said, she said" claims and complaints. An incident is either on the tape or not. Recording devices have proven themselves to be an asset to law enforcement and not the liability everyone envisioned when they first were introduced. Officers are doing a better job knowing that their actions can be scrutinized. The public is rapidly learning they cannot make false claims against officers to get charges reduced or in retaliation for officers doing their job.

Chapter 21, In-Car Video Camera, of the LEAF, Law Enforcement Risk Control Manual is a valuable source for information and contains a sample policy concerning this valuable tool.

APPROPRIATE INVESTIGATION & EDUCATION

It is also very important to do a 360-degree investigation when the department receives a complaint about its officers. No matter how trivial the complaint, the department should document it in a management file and should include the outcome of the investigation. The department should maintain open communication with the complainant, including a discussion of the findings. If the department could have acted better, admit it. Let the complainant know that the department is doing something to remedy the situation. Maintain the officer's privacy. If the complaint results in disciplinary action against an officer, limit the information provided to the complainant to the fact that the department has taken action. If the investigation reveals the department took the correct action, explain why and suggest that, perhaps, the incident could have been handled better.

The department should share the results of a complaint with those who have been complained about. If they did nothing wrong but could have handled the situation differently, then explain how. If an officer violates a policy or rule, then formally correct that and document the outcome.

WHAT IS TRAINING?

Neither administrators nor their officers seem to recognize that they are constantly training. They are bombarded with training materials and information about various topics relevant to their jobs. The following paragraph is the definition of training that should be burned into the memory of every police employee in this state. The LEAF committee developed this definition that also reflects the thoughts of

Jim DeGrazia, LEAF's Legal Advisor, who has defended many law enforcement departments across the state. You can find it in Chapter 19, Training Policy, in the Manual for Law Enforcement Risk Control.

Training is the opportunity to learn, develop and become further educated. This is accomplished, in part, by reviewing and discussing the rules, policies, procedures, philosophy, and practices of the department and current case law applicable to their performance as employees. The purpose is to assist employees in performing their essential job functions. As an example, employees may be provided briefings, videos, periodicals, magazines, bulletins, newsletters, books or lectures. Training may also include discussion of current events, incident debriefing and public policy issues and performing mechanical and motor skills important to the job.

Law enforcement administrators must work to change the mindset of an officer who believes, "I am not being trained unless I am sitting in a class room environment". If officers fully understood the above definition of training, they would quit answering "NO" when asked if they had received training or not. As Jim DeGrazia has said many times, it is very difficult to rehabilitate an officer when he states under oath that he has not been trained. It is amazing how one little word can be so damaging!

CONSORTIUM TRAINING DOESN'T COVER ALL OF IT

Participation in consortiums by Michigan law enforcement agencies has grown. By banding together, Michigan law enforcement has made great strides in improving the content and availability of its training. The consortiums emphasize that the law requires training and that the high-risk situations that officers may face make it essential. Law enforcement executives and their municipal administration must continue to embrace the need for training and persist in seeking means to provide it in a cost effective and convenient way. But this is only part of the picture.

Police administrators must recognize that participation in a consortium does not guarantee that officers receive training in every essential area, particularly in those that are the "usual and recurring situations that municipal employees face". If that sounds familiar, it is part of the U.S. Supreme Courts decision in *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197 (1989). After *Canton*, if a department knows that its officers frequently face a particular situation and are continually not handling it properly, and the department

still does not provide training to fix the problem, then liability can be attached. For a complete discussion on how *Canton* and its progeny impact training read Jim DeGrazia's Review of the Law for In-Service Training Programs found in Chapter 19 of the Manual for Law Enforcement Risk Control.

IDENTIFY PROBLEM AREAS

To fill the gaps in training, administrators should evaluate regularly performed activities and develop a plan to train in those areas. For example, a "Policy of the Month Club" training program can be beneficial. Administrators can require officers to read a policy every month and then answer a short open book test that demonstrates they grasp the important points of the policy. It's not hard to develop eight to ten questions that pinpoint the critical issues. Most chapters in the LEAF Manual have a test. The key is to be consistent in doing the monthly training and in requiring officers to answer all the questions correctly to pass the test.

DOCUMENT, DOCUMENT, DOCUMENT

In addition, departments must prove that they provide training and that their officers are participating in it. Departments must document any form of training they provide to employees and keep the documentation in a file that is separate from personnel files. Documentation should capture the date of the training, the name of the person facilitating training, attendance, subject matter, and whether a person passed or failed. When using a resource that does not belong to the department or distributing printed material, attach a simple slip that documents the source, title, volume, author and date and allows each officer who reads it to initial and date it after he or she has finished to reading it.

BOTTOMLINE – REMEMBER, YOU WANTED YOUR JOB

Although this issue of the LEAF newsletter probably does not provide much information that is new to many of its readers, the issues it raises remain relevant. The observations of the people who were consulted clearly indicate that operational deficiency issues are still prevalent in many departments. If, after assessing your department, you can say that your department has addressed every issue presented in this newsletter, and you are confident that documentation exists to support it, you deserve a star.



Here is a quick assessment list:

- ★ Supervise employees by having a presence, reviewing their actions and holding them accountable for the decisions they make.
- ★ Prioritize management presence on shifts during which officers historically encounter the risk exposures that have been identified as liability concerns.
- ★ Use quality assurance type audits to ensure that the officers' behavior meet the department's expectations both in the intent and the philosophy of its policies.
- ★ Officers must be able to explain the decisions they made during an incident and report it in plain English.
- ★ Officers have to take responsibility for their actions, decisions, and their use of discretion.
- ★ Establish up to date policies and rules to guide employees.
- ★ Provide tools that allow officers to do their jobs safely.
- ★ Document any complaint in a management file. The record should contain the complaint investigation and outcome.
- ★ Complaint investigations should be 360 degrees and not focused only on the topic of the complaint.
- ★ Maintain communication with complainants to provide them an understanding of the findings and a resolution.
- ★ Find the root cause of a complaint and work to educate those involved to avoid future complaints.
- ★ If problems are identified during investigations or audits, take remedial action.
- ★ Provide training to the policies, rules and required skills.
- ★ Train employees in the philosophy of policies, including the rational for the appropriate use of discretion.

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 800-482-0626, 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 reader's are encouraged to consult with their attorneys for specific legal advice.

BODY ARMOR RECALL

CENTRAL LAKE, Michigan – Second Chance Body Armor, Inc. announced today it will begin an immediate program to upgrade or replace its Zylon-based Ultima and Ultimax protective vests, saying that previously worn Zylon vests wear out faster than expected and that there is a potential officer safety issue.

The custom-made vests are worn by thousands of police officers and others who need protection from armed assaults.

Under the announced program, officers will be given a choice of a free upgrade to their current vest that will assure its performance throughout the warranty period, or purchase of a new Monarch Summit vest at a significantly discounted cost. The upgrade involves the insertion of additional pads in a current vest and can be accomplished within minutes by individual officers.

The voluntary upgrade program was announced following a series of in-service vest tests performed by Second Chance that indicated the Zylon-based vests wear out sooner than expected.

"We want to apologize for any inconvenience incurred by our customers, but we felt this is the right thing to do and we want to carry this program out as quickly as possible," said Paul Banducci, president of Second Chance. "We have always stood behind the quality of our products and we will continue to do just that," he added.

In the more than 30 years that Second Chance has been manufacturing soft, concealable body armor, no vest has ever failed to stop a round it was designed to stop. Over that same period, the company has documented over 900 officers lives saved, more than any other body armor manufacturer.

Contact our toll free hotline (1.800.828.VEST) with any questions about this upgrade or click on the link above to order your upgrade online.

Beth Currier
SACOP Manager

Inside This Issue: If You're Going to Be a Leader, the Devil's in the Details



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