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Don't Wait Until The Gear Fails When Regular Maintenance Can Prevent It!

Plus: Taser Training Changes and What LEAF Thinks About It!



By Gene King, LEAF Coordinator

In a recent meeting of the LEAF Committee, a couple of members sought feedback from the group on whether it thought the criminal defense bar was ramping up the strategy of trying to discredit the police by defendants changing their stories and then claiming they were coerced into giving a confession by officers. The claims range from threats of violence, failure to take care of basic human needs, and keeping suspects awake to interrogate them well beyond what is reasonable. In these cases, the defense attorney tries to paint officers as untruthful, calloused to the ethical treatment of a human and unconcerned with the protection of civil rights. Of course, no legitimate departments would ever allow such behavior and are outraged with the allegations. The problem is that the prosecutor will have to answer these allegations and they may not be as motivated as the department in defending itself.

Unfortunately, sometimes law enforcement executives do not hold their department to their own accountability standards and reporting practices. This failure can give these allegations

some traction. If the outcome in the criminal case is a dismissal or not guilty finding because of the suspect's allegations, the officer's and the department's reputation is going to be damaged. Even more aggravating, the allegations remain alive, no matter the trial's outcome, if the department does not investigate the allegations to determine wrongdoing or the need to change practice or policy. This edition of the LEAF Newsletter will discuss the issues that police executives can address to help reduce the potential for criticism because of the department's action or inaction.

In the discussion of the criminal defense bar attacks, LEAF members said that defense lawyers usually start with the validity of the confession or statement, and, if it appears that approach will be successful, they go on to attack other aspects of reporting and handling evidence. Audrey Forbush, LEAF's Legal Advisor, asked whether members recorded suspect interviews. Most answered "yes." Forbush's next question was whether there were any gaps in the recordings of interviews

where the reason was not explained on the tape. Some answered “yes”; others were quiet. She went on to comment that documenting bathroom or smoke breaks for the suspect on the recording is important and noted that it is even more desirable to hear the interrogator ask the subject if they need a break, food, drink, or any medication and then document providing them on tape.

Forbush went on to ask whether departments kept a log of who was present in and outside of the interrogation room as a means of demonstrating that others monitored the session. She also asked if a command officer had documented their review of the tape to ensure the interrogator used proper techniques and department policy had been followed. The room was quiet as Forbush continued to talk about the need for management to make supervisors accountable for monitoring the work of their subordinates!

The group was reminded of the October 2006 LEAF Newsletter, *Why Michigan Police Agencies Should Embrace A Policy To Record Certain Custodial Interrogations* that contains a number of recommendations from the LEAF Legal Council. Chapter 21, *Sample Policy for the Audio/Visual Recording of Custodial Interrogations* in the LEAF Manual for Law Enforcement Risk Control was designed to eliminate a number of these issues. The LEAF Committee decided to review both In-Car and Custodial Recording policies at its next meeting.

LEAF Legal Advisor says Department is Its Own Worst Enemy

This discussion was a good opportunity for Forbush to talk about how departments get themselves into trouble by not doing what they say they are supposed to do. She said she does not have experience with the criminal defense side of the justice system, but she surely has experience in trying to put together a defense to civil charges brought on by the success of the criminal defense lawyer.

The problem that drives criminal defense attacks against law enforcement are rooted in the failure to complete the mundane tasks of law enforcement when enforcing the law and serving the public. Police departments perform the tasks everyday and at all levels of the operation. These tasks might result in direct service or in providing support services. Some are boring, some are exciting, and others are terrifying. However, no matter what the nature of the activity is, the constant is the need for daily documentation of the department’s enforcement and service activities even if doing so seems commonplace, redundant and rather mechanical.

To use a machine analogy: machines run smoothly as long as the gears are oiled and maintained. All it takes for a machine to malfunction is for someone to decide it is not important to put oil in the right spot. Likewise, if there is no or inadequate documentation the prosecutorial machine can come to a dead stop. The failure to “oil” the case with appropriate documentation is what the criminal defense and plaintiff’s bar are looking for. This failure provides the opportunity to cast doubt on the validity of the prosecutor’s case or in a civil trial suggests the appearance of proof of evidence to the plaintiff claims. (LEAF Newsletter, October 2003, *If You’re Going To Be a Leader, The Devil’s In the Details*)

The badly maintained gear in the prosecutorial machine often appears because someone does not thoroughly document an original or follow-up investigation report or complete other tasks that departmental policy requires. There are many excuses and a lot of finger pointing when the damage is discovered. One thing is for sure, if nothing is done about the bad behavior, it will happen again. Because of system failures, departments often do not even know the gear was not oiled unless there is enough damage to draw attention. In most cases all management sees is the disposition report of an acquittal or dismissal and business goes on as usual.

Most departments have a policy, or at least a practice, that officers shall report and document

incidents or services in some form. This documentation provides proof that the officer performed some activity. It also can reveal that the officer failed to oil the gear, which is indicated by leaving out key details or shrouding them in innuendo or police-eez. Supervisors reviewing the report may recognize the innuendo and police-eez and let it slide because they recognize the reporting technique often indicates there were issues that the officers would like to leave vague. By failing to challenge the report's inadequacy, supervisors do nothing to make sure the machine is protected. Unless the original and subsequent reports of the incident are reviewed with omissions fixed or corrections made, management may find out that the gear was not oiled until it is too late to fix it.

Supervisors At Every Level Have To Supervise And Top Management Has To Make Sure They Do!

The root of the problem rests with the person who is responsible to ensure the machine is oiled. That is the first line supervisors' duty. They are responsible to make sure reports or documentation is thorough and complete. They are responsible to identify when officers have inconsistent or obviously vague statements or use police-eez in their reporting. Supervisors have to make sure the reports contain the correct elements of crimes: how evidence was handled; if force was used, including what the outcome was, and if there were any injuries to the officer or the subject. Supervisors must document their review by either signing or initialing the reporting form or, if the form is computerized, by using an electronic stamp.

They cannot rush through the initial report review. They have to watch for missing information. They have to hold the officers' feet to the fire and reject inappropriate responses to requests for further clarification of their activities. Management has a right to ask employees to provide an accounting of how they have fulfilled their duties and should have rules that address that right. Supervisors must enforce the rules and if the situation looks

suspicious or criminal, they should report the matter to their supervisor as soon as it is reasonable. The report of any incident is the baseline for all court activity going forward. Evidence must be preserved and all departmental activity on the incident, no matter how trivial it may seem at the time, must be documented. In doing so the gears stay lubed!

Forbush Wonders Why Cops Don't Get This: If You Didn't Document It, You Didn't Do It.

The common thread in *Terry v. Ohio*, *Tennessee v. Garner*, *Graham v. Connor*, *Scott v. Harris*, and *Arizona v. Gant* is the Supreme Court's telling law enforcement officers that they have to be able to articulate to the trial court the objective facts as they knew them at the time of incident. The court will defer to the experience of law enforcement officers and their assessments of criminal modes and patterns of behavior and will give the officer the benefit of the doubt in the decisions they made as long as they describe, in plain English, the actual behavior or activity that led to their conclusions. (*People v Oliver*, 464 Mich 184, 627 NW2d 297 (2001).

A significant number of the challenges in court come because officers fail to document what they did or why they did it. Months sometimes years later when they have to account for their actions, officers cannot explain it. **Audrey said that LEAF has pointed out repeatedly how important it is for officers to articulate what they do to satisfy the courts that they were at least trying to do the right things.** For whatever reason, law enforcement does not get the message that it is important to tell the story in clear, plain language. (See LEAF Newsletter December 2008, *Knowing When to Say "Hold It"* and July 2007, *U.S. Supreme Court Rules that Officers Can Use Force To Stop a Fleeing Vehicle. What Does It Mean for Michigan Law Enforcement?*)

Withholding Exculpatory Evidence is Costly

Examples of real expensive cases where information was not included or just withheld are

the ones involving exculpatory evidence. In most cases the evidence was not properly documented and subsequently, either purposefully or inadvertently not provided to the defense as required by *Brady v. Maryland*, 373 U.S. 83 S.Ct. (1963). Exculpatory evidence is any evidence in a case that is held by the prosecutor that could be favorable to the defendant. It includes evidence relevant to the issue of guilt, evidence relevant to the issue of the appropriate punishment, and evidence reflecting on whether witnesses against the defendant are trustworthy. (This is where an officer's reputation for honesty and truthfulness can be relevant). A defendant could use this evidence at trial to impeach a witness. *Brady* clearly established that prosecutors have an affirmative duty, as a matter of constitutional law, to disclose all known exculpatory evidence to the defendant in criminal cases. If the prosecution holds back evidence favorable to the defendant, it violates the defendant's right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

In the Michigan cases, the evidence was known and purposely excluded or destroyed, or the prosecutor did not think the evidence was relevant and it was not provided to the defense. In the latest U.S. Sixth Circuit case, *Moldowan v. City of Warren*, 573 F.3d 309, 333 (6th Cir. 2009), the court said it is not necessary for a defendant to demonstrate a government official's bad faith in destroying or suppressing evidence if the evidence is clearly materially exculpatory, because the loss of such evidence "directly threatens the fundamental fairness of a criminal trial, and thus undoubtedly implicates the Due Process Clause."

No matter how it happens, or why, it is tough to provide a defense when the U.S. Supreme Court in *Brady* is emphatic that failure to provide all evidence is a violation of the defendant's Fourteenth Amendment Rights. How often does this happen? According to the Innocence Project, there have been 245 post conviction DNA exonerations since 1989. November 3, 2009 was the latest release in Michigan and it was a non-DNA case. In January of 2009, Humanity for

Prisoners, based on New York Times research, estimated that of the 50,000 prisoners held in Michigan, 3% or 1500 were wrongfully convicted.

Failure to disclose exculpatory evidence was the foundation for liability in *Gregory v City of Louisville*, 444 F.3d 725 (6th Circuit, 2006). In this case, a former inmate brought a civil rights claim under §1983. The inmate alleged that members of an investigatory team involved in his criminal conviction did not disclose and, in fact, withheld evidence causing him to serve seven years in custody. The evidence involved holding picture lineups. In this case, the court not only found Fourteenth Amendment violations but the court also looked even closer at the cause of liability. They ruled that the failure to supervise and train officers was a significant issue. Using *Canton's* "deliberate indifference" standard, the Sixth Circuit ruled in *Gregory* that the failure to train officers in their duty to reveal all of the evidence they possess, even that which is favorable to the criminal defendant, has the *highly predictable consequence* of being a moving force in a constitutional violation. The obligation to turn over exculpatory materials is a significant constitutional component of police duties with obvious implications for individuals facing criminal charges. This Court held that evidence pointing to a City's failure to provide *any* training on key duties with direct impact on the constitutional rights of citizens is sufficient to survive summary judgment with a *Monell* failure to train claim.

Thus, the potential for cost due to additional civil rights violations continue to rise. As Forbush points out, this is not rocket science; it is a basic tenet of the law and industry standard for law enforcement. Failure to properly train and supervise employees in these situations has a *highly predictable consequence* of liability. Management must investigate to ensure their employees follow the law and standard industry practices. If employees do not, no matter the level, there must be consequences.

Management Has to Go Back to Basics

This is not new, but sometimes a reminder does not hurt, especially if it can save some blood later on! First, remember the role of top management is to ensure things are done. In order to do that, management has to know what is being done. An audit of the department should be made to ensure up to date policies and rules are in place. The proper tools, weapons, and devices must be provided so employees can perform their regular and recurring job tasks. Employees must be trained in the department's policies and rules, tools, weapons and devices. The training needs to include the expectations of management for their behavior and the amount of discretion they have in performing the tasks. The next step is basic "Management 101:" supervisors have to be held accountable for holding their subordinates accountable for following the policies and rules, properly using the materials provided and meeting management's expectations.

Supervisors and officers generally do not receive in-service training in what is an acceptable report. If they have, how many computer systems and bosses ago did that take place? What happens is that officers default to what they can get away with depending on their supervisor or they default to a twenty-five word or less version of their activities. To correct this situation, departments can provide officers with a checklist that tells them what is expected in a report based on the classification of the incident. The County Prosecutor has a book that outlines what elements have to be present to support a given charge. The Michigan State Police has a good in-service report-writing guide. Some MCOLES pre-service academies have a pocket manual they give to recruits. Others resources are probably available.

Supervisors should review all activity reports from logs to incident reports. They need to be aware of notations that may reveal a high-risk activity that is not appropriately documented. A command officer should be required to sign off on all high-risk activity reports, especially supplemental and follow-up reports. Watch for report inconsistency

and questionable activity. Investigate reports of incidents that do not meet the department standards. Discipline all levels of employees, if it is found that they failed to properly report incidents or did not audit the reports to the expectations of the department.

Require all use of force to be reported and investigated by a supervisor. A use of force form should be completed and audited by the supervisor and a command officer to ensure the reporting is accurate and is consistent with the written report. Encourage supervisors to also flag incidents that may strike them as unusual or extraordinary. In doing so, it is important for command to follow-up on the incidents to determine if there are problems.

It is extremely important to require investigators to document all follow-up work and evidence with designated reports. Having an audit system that requires officers to report on case activity in frequent durations keeps files fresh and lessens the probability of lost information and stale cases that can cause suspicion and exculpatory evidence problems in criminal court. In civil court, if evidence is not preserved the Michigan Civil Jury Instructions, 6.01, Failure to Produce Evidence or a Witness, allows the jury to infer that the evidence would have been adverse to the defendant.

The bottom-line is that the reporting and documentation function is a recurring job task. If this task is done poorly, there is a predictable consequence that the outcome may be support for an accusation of civil rights violations. Top management has to place an emphasis on making sure their department gets it right or they will suffer the consequences of public embarrassment and humiliation at trial. The ball is in your court to get this aspect of the operation right.

LEAF'S REVIEW OF TASER'S TRAINING BULLETIN 15.0

By now, almost everyone has seen or heard about Taser's Training Bulletin 15.0, Version 2.0, dated

October 10, 2009 in which the company tells users of the Taser that they have issued a new targeting guide for the XREP, X26, M26 and X3 models. Taser is lowering the front point of aim target area from center mass to lower center mass -- basically below the sternum. Taser said back shots remain the preferred area when practical. They are also warning users to minimize the duration of the physical struggle when they are dealing with exhausted persons or those exhibiting symptoms of distress or agitated/excited delirium. Taser said that an ECD discharge of up to 15 seconds produced less physiological effects than fleeing or punching a heavy bag to simulate fighting.

According to Taser, the best risk management practices when using the weapon is to avoid striking the chest area and to lower the front target area to below the sternum which will reduce a .25% (Yes, that is ¼ of 1%) risk of serious injury.

This Is What Departments Need To Do

Taser has a point. Departments commonly deal with a significant number of people who are mentally ill or under the influence of a substance, or both. There is often a probability these subjects are long-term users of medication and/or substance abusers, which can put them at physiological risk. Officers need training on how to recognize these subjects including those exhibiting symptoms of distress from exhaustion caused by exertion or by having agitated/excited delirium. (Review the LEAF Manual for Law Enforcement Risk Control, Chapter 22, Persons In Custody, paying particular attention to Topical Resources Section for two LEAF Newsletters and a white paper on Sudden Death.)

Additionally, officers need to be aware of Taser's new target area as being optimal because ECD discharges are most effective on large muscle masses in the back and lower front of the body. The bulletin does not say that deployment of the Taser in the chest area is wrong. The recommended change increases the safety margin and avoids the close proximity of the dart to the heart which, Taser is concerned, may create a

higher risk to the subject. Although it is not addressed, Forbush concludes that drive stun should be included in these recommendations.

There are also references throughout the Taser documents to the 15-second threshold for the ECD not causing an effect on subjects. Departments should note that in this latest bulletin, including the warnings and advisory sections, Taser states several times that after 15 seconds of ECD, non-risk persons are not at any greater risk than if they had been fleeing, fighting, or being subject to another control technique. The company also remarks that most research uses the 15-second exposure time and gives notice in the warning and advisory section to minimize the number of ECD exposures.

Other than to minimize the number of exposures, Taser gives no number of cycles that are considered dangerous. Their warning is to use the lowest number of exposures that are objectively reasonable to accomplish the lawful objectives. They say to reassess the resistance before continuing the exposure. LEAF is concerned that the rhetoric in Bulletin 15.0 lends credibility to a concern that if the subject is not under control within three 5-second cycles, officers should consider using another method of control. To ensure the integrity of the department's use of force, every incident should be reported using a Use of Force Report for administrative review. Based on our review of Taser's Bulletin, LEAF recommends **any use of a Taser over three cycles should require administrative review as to the appropriateness of the necessity for that level of force.**

Forbush opines that the bulletin is Taser giving notice of the company's position for product liability. If a department has litigation and Taser is joined, it can be expected that Taser will testify to the best practices of the bulletin using the supporting research and more. That means officers had better be prepared to articulate (Hmm, see the Newsletter above!) why they used the Taser and to explain the justification for the number of cycles.

Forbush suggests that the following language should be considered for the department's policy:

When practical, preferred Taser targeting is to the subject's back or below the sternum in front to the large muscle masses. This is especially important if the subject is exhibiting symptoms of distress because of exhaustion from exertion or from what the officer believes is agitated/excited delirium behavior.

Medical attention should be provided, as soon as it is practical, to subjects taken under control who suffer from exhaustion or exhibit agitated/excited delirium behavior.

LEAF believes, when used appropriately, Taser is a legitimate and useful law enforcement tool for controlling an actively resisting subject. It is important to read the entire Taser Training Bulletin 15.o, Medical Research Updates and Revised

Warnings, especially the warnings and advisory sections.

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 reader's 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.

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