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Don't Let Shoddy Work Lead to a Wrongful Conviction

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While it is a terrible thing to be the victim of a wrongful conviction, it is also disturbing to be accused of being the cause of such an activity. The Innocence Project (www.innocenceproject.org) reports that there have been in excess of 300 people released from custody as a result of its work. DNA evidence exonerated most of these individuals. Based on its experience, the Innocence Project has identified four factors that contribute to wrongful convictions:

- Eyewitness Misidentification Testimony
- Improper Forensic Science or forensic science that is not validated
- False Confessions
- Informant's Testimony

In addition, official misconduct by government employees, which may exist in the above situations, may also lead to a wrongful conviction.

LEAF sought to determine how police agencies can avoid making unnecessary mistakes that may contribute to a wrongful conviction. LEAF turned to Audrey Forbush, Legal Advisor and leader of the Plunkett Cooney Governmental Law Practice Group, because of her experience with wrongful conviction cases. She matter-of-factly stated that departments can only influence those areas over which they have control. Therefore, errors in forensic science or advancements in techniques, prosecutorial or judicial misconduct, or incompetent representation are outside the control or reach of a police department. However, eyewitness misidentification, false confessions, improper investigations and bad conduct are areas that law enforcement departments can control and for which they are accountable. For this reason, police executives should focus their attention on them.

It Starts At the Top

According to Forbush, most police executives focus on providing their departments with policy, training, tools, supervision and an audit process that aids officers in doing the right thing. She also noted that most of their focus is on patrol officers because they comprise the largest and most frequently exposed portion of the operation. However, while this is probably true, the severity of an incident caused by untrained and/or poorly supervised investigators has a historically higher cost.

Individuals assigned to be investigators need the same supervisory structure and oversight as patrol. Additionally, they need more specialized training in the law, crime scene observation and processing, evidence handling and preservation, effective communication, techniques of interrogation and case presentation. They must know how to verify clues or gut feelings and be able to articulate, through proofs, why their conclusions are valid.

Forbush remarked that it is important for investigators to avoid tunnel vision, conformity bias or political pressure to bring charges. Even when investigators believe that they have identified a suspect, they should continue an objective investigation that either supports or eliminates all suspects. Supervisors not involved in the investigation should review reports and recorded interrogations to validate and verify the conclusions that investigators make. Peer review, she opined, is also a good option for this analysis.

Furthermore, departments should require investigators to submit status reports or investigative logs on active investigations daily and require supplemental reports in a timely manner because this allows supervisors to challenge the conclusions of the investigator as they are reported. Regular communications with investigators can also help to identify outside influences and pressure being exerted from both inside and outside the department for a timely conclusion or a particular outcome.

Forbush emphasized that a department's top command must take the lead in addressing pressure from the political body, the public, or the media. It is critical that top command not let the department's ego or pride override the good judgment of asking for help from a department with more experience and resources if necessary.

She reiterated her long standing opinion that a department's top management has the ability to reduce the potential for error by keeping the department in compliance with industry standards, by training officers and by holding supervisors responsible for their subordinates' behavior. Regular audit activities at several stages of an investigation, Forbush continued, can identify potential mistakes and misdirection that can then be corrected before damage is done. These steps also help increase the potential to identify department misconduct or illegal activity before it affects a case.

Identifying the Bad Guy

The Innocence Project identified Eyewitness Misidentification Testimony as "a factor in 72% of the post-conviction DNA exoneration cases in the US." This is a significant factor and one that the State Bar of Michigan has been working with their criminal justice partners to reduce or eliminate. Among members of this task force were the Director of the Michigan Chiefs of Police Association and the Director of the Michigan Commission on Law Enforcement Standards. The work of the Task Force was significant and the resulting policy guide is meant to assist departments in developing the knowledge and skills necessary to significantly improve the probability that no unintended influence is applied during a police held lineup or showup. In 2012, the Bar published this document titled *Law Enforcement and Eyewitness Identifications: A Policy Writing Guide*.

MCOLES and the MACP continue to encourage departments to adopt the practices discussed in the Guide because doing so will add protections and reduce the risk of error in the identification process of investigations. The goal is to adopt the recommendations as an industry standard practice before the legislature mandates it, thus eliminating the ability for practical modifications. The MML and LEAF also encourage departments to adopt eyewitness identification practices that are consistent with those outlined by the Task Force. Resources can be found on both the MCOLES and MACP websites.

Forbush agrees that adopting the Task Force recommendations is a good step toward eliminating some risk exposure for errors when attempting to identify perpetrators. She encourages top management to educate themselves on the particulars of the recommendations and then adopt the practices outlined as a normal part of the investigatory process. She stressed that when lineups/showups take place, the process, materials used and outcomes are evidence and should be kept as such, no matter the outcome. Preserving these materials as evidence demonstrates the department's commitment to fair play and compliance with industry standards.

Forbush cites the U.S. Supreme Court's opinion in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, (1972) as the case that pretty much sets the standard for eyewitness identification in the courts. This case established five considerations for the court when evaluating whether or not pretrial eyewitness identification has violated the defendants' due process rights. They are: [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty that the witness shows during the confrontation, and [5] the length of time between the crime and the confrontation.

The Court emphasized, first, that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Even when the police use such a procedure, the Court said, "suppression of the resulting identification is not the inevitable consequence." Forbush said in *Stovall v. Denno*, 388 U.S. 293 (1967), the Court ruled that the defendant could claim that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." She said *Stovall* was where the court established that the suggestiveness of procedures used by the police leading to the eyewitness identification was anything other than a matter to be argued to the jury.

Forbush said the *Biggers* court used a "totality of the circumstances" approach and held that law enforcement's use of an unnecessarily suggestive identification procedure did not require suppression of the victim's identification. The decision in *Biggers* was reaffirmed in *Manson v. Brathwaite* 432 U.S. 98 (1977) when it held "The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability."

According to Forbush, as recently as 2012 the U.S. Supreme Court ruled in *Perry v. New Hampshire* 132 S. Ct. 716 (2012), that due process rights of defendants identified in the courtroom under "suggestive circumstances" are protected by normal trial defenses. She said those defenses include the right to confront witnesses and challenge their testimony; the right to be represented by an attorney, whose job it is to argue witness irregularities and inconsistencies during trial and before the jury; the right to jury instructions recommending care when considering eyewitness testimony; and the requirement of proof beyond a reasonable doubt.

The courts have taken the position that officers may use a variety of methods to have victims and witness identify wrong-doers. She stresses that these cases do not alleviate investigators from doing the right thing and following accepted practices to insure they get to the right answer. The courts are allowing defense attorneys to raise the issue of inappropriate or illegal activity to the jury at the time of trial to discredit the eyewitness testimony. Forbush is adamant that using legitimate lineup/showup practices, documenting those practices and preserving them as evidence for use at trial will help to disprove claims of unethical or illegal behavior.

Grilling Them Under The Light, The Suspect Isn't The Only One Who Can Get Burned.

Sounds like a title from a B movie! The importance of recording in-custody interrogations has its roots in the work of the Innocence Project. Its work in discovering false confessions had a significant impact on the State of Michigan Bar Association which, in May 2006, convened a Task Force to establish protocol for recording custodial interrogations. The MACP, MSA and PAAM actively participated in the project. Upon reviewing the data at the time, MML Risk Management felt it was important to encourage the Liability and Property Pool members with police agencies to adopt the LEAF *Sample Policy on Audio/Visual Recordings of Custodial Interrogations*. In the October 2006 issue of the LEAF Newsletter, *Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations*, the case was made that video recordings will corroborate the prosecutor's assertion that officers acted appropriately in obtaining evidence or a confession helping to support a successful prosecution. In addition, the Newsletter pointed out that a recording that documented inappropriate conduct by officers would provide a means for management and/or the prosecutor to identify the behavior and take action to address it. All factors that can impact a department's risk exposure.

Audrey Forbush remarked that wrongful convictions have become a very costly issue for municipalities with little that can be done for actions taken in the past. She said she stands by her remarks made in 2006 that electronic recording of custodial interrogations is a practical and potentially powerful law enforcement tool. These recordings can both eliminate disputes over what took place when police questioned the suspect and can also have a great evidentiary value as well. The recording also provides the department's management with a powerful tool to audit the competency and effectiveness of their department performance in this area.

In 2012 the Michigan Legislature eliminated law enforcement's discretion when it comes to recording interrogations when it enacted Public Act 479 of 2012 (MCL 793.8 et seq.). This act requires all law enforcement agencies to "make a time-stamped, audiovisual recording" of custodial interrogations for certain felonies. It mandates MCOLES to set the Standard that departments have to follow to comply with the law. Unfortunately the Legislature did not fund the new regulations so mandatory compliance remains in question. However, as Forbush states, whether the Legislature funds the MCOLES Standards or not, it is obvious that custodial interrogation recording is now a de facto industry standard. The expectation to record exists in the mind of the public. Forbush points to the body camera controversy as evidence. She believes police executives need to make efforts to either use the existing capability to record custodial interrogations or find an agency that will assist as the need arises. The MML strongly recommends that the MCOLES equipment standard should be met if the department is considering buying new equipment.

Current Innocence Project data asserts that false confessions and incriminating statements lead to the wrongful convictions of about 27% of the cases they were able to get exonerations for because of DNA evidence. In homicide cases, false confessions accounted for 62% of the wrongful convictions. A number of these subjects pled guilty to crimes they did not commit. In several of the Innocence Project cases, the subjects who confessed or made admissions were either mentally ill, a juvenile, or both. These people are susceptible to coercion and suggestion so special care must be given to following proper interrogation techniques.

Forbush notes that an issue that is not often discussed but that can be a legitimate barrier to a successful interrogation is the interrogated person's inability to understand English or to hear and/or see well enough to understand and read documents and materials that investigators may present. It is the interrogators' responsibility to know if any of these issues are present. Title VI of the Civil Rights Act 1964 and the Michigan Elliott-Larson Civil Rights Act require establishing language access procedures for Limited English Proficient or visually impaired subjects to participate in the services of government. This means when identified as a legitimate barrier to communication, an interpreter must be provided and documents/aids must be provided to

allow the person to participate and understand the proceedings. Additionally MCL 393.505, a little known statute, requires that “If a deaf or deaf-blind person is arrested and taken into custody for any alleged violation of a criminal law of this state, the arresting officer and the officer's supervisor shall procure a qualified interpreter in order to properly interrogate the deaf or deaf-blind person and to interpret the deaf or deaf-blind person's statements. A statement taken from a deaf or deaf-blind person before a qualified interpreter is present is not admissible in court.”

Interrogators are responsible for ascertaining the medical and mental condition of the persons to be interrogated and when they last slept. In Chapter 21 of the LEAF Law Enforcement Risk Control Manual, Policy 21B, *Audio/Visual Recordings of Custodial Interrogations*, establishes specific questions interrogators must ask to establish the condition of the subject at the time of interrogation and to show that interrogators are considering and taking care of the subject's basic human needs. This can be as simple as providing water to drink, snacks or food, bathroom breaks and providing for the ability to take prescribed medication when needed. All questions and the responses need to be recorded. Forbush very pointedly remarked that there is a good reason to make sure these bases are covered and documented on the recording.

Forbush pointed to the U.S. Supreme Court in *Miranda v. Arizona* 384 U.S. 436 (1966) and the progeny of cases that have established the law when interrogating a person in custody. In *Miranda* the court ruled that law enforcement must confirm that the person being interrogated understands the right to remain silent and the right to have an attorney present. The person must knowingly, intelligently, and voluntarily waive those rights and that waiver must be a free and deliberate choice not made as the result of intimidation, coercion or deception. *People v Shipley*, 256 Mich App 367, 372-373 (2003).

Forbush also pointed to the Michigan Court of Appeals in *People v Tierney*, 266 Mich App 687, 708 (2005) that states, “The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” Further, she commented that *People v Gipson*, 287 Mich App (2010) explains the factors that contribute to the totality of circumstances and provides a compilation of the above cited cases. The factors include: age; education; intelligence; criminal experience; lack of advice of rights; unnecessary delay in arraignment; injuries; intoxication/drugs; ill health; deprivation of food/sleep/medical attention; physical abuse; threats of abuse and any promises of leniency.

To ensure the integrity of the recording and eliminate the subject's ability to claim they were threatened, abused or coerced, Forbush was adamant that investigators must not turn off a recording device unless the reason and time stopped is noted. The time the recording has been restarted also needs to be documented on the recording. She said juries take exception to officers shutting off recordings with no explanation and then not giving reference to how long it was off. An unexplained gap in time may create doubt in the minds of jurors. Since most incidents occur many years before they are ever presented to a jury, having to explain why certain actions were taken and to account for that missing time may be difficult for an officer.

Don't Forget, You Need To Give Notice!

When audio/visual surveillance is used, departments need to post a sign announcing the practice at the entry points to the facility. In *People v DeGeer*, 140 Mich App 46; 363 N.W.2d 37 (1985) the court ruled that where a sign indicates that conversations are recorded, an individual only has a limited expectation of privacy, and the recording does not violate his constitutional rights. In the Michigan Court of Appeals decisions in *People v Crider*, 2004 WL 1366045 and again in *People v Good*, 2013 WL 5630072, the court reaffirmed *DeGeer*. The Court ruled that the defendant had no justifiable or legitimate expectation of privacy in calls, mail or in an interview room because there was a sign in the lobby announcing that the premises were under audio surveillance, there was notice given at the beginning of calls or notice was given in the rules of a jail.

You Have To Pay Attention!

Top management must establish an audit process for monitoring the activity of investigations and particularly the identification of suspects and any ensuing interrogation. Forbush said that investigators must receive training in the proper techniques of evidence gathering and communicating with suspects. Supervisors must be able to look at the investigative process as a third party evaluator to ensure the investigation is on track and is considering all leads. Case evaluations must be made to determine that all exculpatory evidence is provided to prosecutors. She went on to say, by adopting the recommendations of the MACP and MCOLES concerning Eyewitness Identification and, when reasonable, the standards established by MCOLES for In-Custody Interrogation and the MML LEAF policy, a number of concerns about the investigative integrity can be avoided.

There are also a variety of investigative techniques that can inadvertently or purposefully either convince a person to identify a suspect or, during an interrogation, convince suspects they are the perpetrator of a crime. There are several cases where these types of miss-identification or false confessions were reported as contributing to the wrongful conviction. As examples, national cases that had extensive media coverage were the 1989 New York Central Park jogger case and the 1993 Memphis Three case. Some cases in Michigan that are notable examples are: 1985 Eddie Joe Lloyd, Murder and Rape; 1996, Jamie Lee Peterson, Murder; 1998, Nathaniel Hatchett, Sexual Assault, Robbery; 1999, Robert Farnsworth, Theft, Missing Bank Bag; 2000, Chamar Avery, Murder. There are also people who confessed because they want notoriety and attention caused by their actions. The key to ensuring the investigative process works as intended, Forbush reiterated, is top management auditing the department's lineup/showup and interrogation practices when evaluating the strength of the case before sending it on for prosecution. Officers and investigators must be required to document every step they take in an investigation.

This is where the investigative logs are essential. Many years later they provide step by step documentation of the actions taken to get the right guy. Forbush stressed that preservation of the notes and evidence of the investigation is essential in avoiding wrongful conviction claims. By the time a claim is alleged, the victim, witness, prosecutor or even the officer could be retired, dead or long gone. All that stands is the record of the court and the materials the department can produce that prove their case.

The key, says Forbush, is to have a policy, and then to train, supervise and continuously audit the activity of all involved to maintain the integrity and reputation of the officers and the department. This is an issue of commitment by top management which will pay dividends in a variety of places and ways besides hopefully avoiding a claim of wrongful conviction.

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.

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