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The Normalization of Deviance and Officer Created Jeopardy; Two Terms to Remember When Auditing Department Activity

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> *"The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing." Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996)

This issue of the LEAF Newsletter provides information on two behavioral issues that emergency service organizations often face but generally fail to address until they result in a disastrous outcome. It also discusses solutions that top management can apply to identify the behavior and prevent a reoccurrence.

The Behaviors

Normalization of Deviance is generally described as: The gradual process through which unacceptable practice or standards become acceptable. As the deviant behavior is repeated without catastrophic results, it becomes the social norm for the organization.

Diane Vaughan, Columbia University sociologist, explained this phenomenon in her book, *The Challenger Launch Decision* (1996), which analyzed the Shuttle disaster:

> Social normalization of deviance means that people within the organization become so much accustomed to a deviant behavior that they don't consider it as deviant, despite the fact that they far exceed their own rules for the elementary safety. But it is a complex process with some kind of organizational acceptance. The people outside see the situation as deviant whereas the people inside get accustomed to it and do not. The more they do it, the more they get accustomed.

The Normalization of Deviance is a naturally occurring human tendency that exists in almost all human systems driven by industry standards and regulations. Each time a deviation from an established standard

occurs and nothing bad happens, the more likely it is that the deviation will reoccur. The longer the deviation is successful, the more likely it is that the conduct becomes ingrained and is converted to the new standard.

In law enforcement, behaviors that deviate from departmental policy, procedures and rules frequently are not perceived to be extreme if the outcome is successful. Examples of normalization of deviance cover a wide range of activities and responsibilities that include:

- Failing to check the vehicle's fluids, the patrol shotgun or rifle, first aid kit, AED, flares or fire extinguisher at the beginning of the shift.
- Failing to wear a seatbelt while driving or a safety vest at an accident or when directing traffic.
- Distracted driving.
- Using excessive speed and unsafe practices in emergency response.
- Going for backup and not calling out or not waiting for backup in critical calls.
- Use of aggressive or inappropriate language in citizen contacts.
- Overstepping Terry Stop and search and seizure rules or using intimidating tactics when confronting or questioning subjects.
- Displaying weapons at inappropriate times.
- Failing to write reports that are complete and accurate.

As time passes and officers continue to do what they want without a negative outcome or management intervention, the more quickly actual standards become irrelevant and the less impact an occasional negative outcome has. Officers start to recognize that things go wrong occasionally but as long as they remain below the radar, the job got done and nobody cares!

Officer Created Jeopardy occurs when officers do not follow established tactics, policies or training, needlessly placing themselves or others at significant risk of harm. In the Fall 2011 issue of *IOTA News,* the Illinois Tactical Officer Association suggests that Officer Created Jeopardy results when officers make poor decisions and rush into a problem situation instead of stabilizing or containing it first.

Officer Created Jeopardy usually involves some aspects of Normalization of Deviation because the officer's behavior generally is contrary to training, policy and, frequently, good judgment. If officers choose to act in this way, they may act in a tactically unsafe manner or make a reckless decision simply because doing so has worked in the past without repercussions. The behavior is often enhanced by the afterglow of a successful outcome -- high fives and back slapping - that overshadows the rash actions the officers took and the risk exposure to all involved. That is until someone says "That's nuts! We're lucky it worked!" Officer Created Jeopardy also breeds contempt and mistrust among officers who are exposed to the danger and the potential ramifications of the behavior. Some examples of Officer Created Jeopardy include:

- Stepping in front of a moving vehicle.
- Violating the personal space of a subject and acting aggressively to evoke a reaction or body contact.
- Entering a person's property without legal authority or permission to do so.
- Rushing or acting hastily at an incident.
- Forcing a confrontation or the need for use of force.
- Leaving cover to confront an armed subject.
- Ramming a vehicle in a pursuit without regard for consequences or location of the event.

Officers finding themselves in these situations often respond with force in an attempt to get out of the danger they initiated.

Consequences

Unfortunately, in today's media obsessed culture, the public has access to videos on YouTube, news reports, or commentaries that purport to show officers ignoring departmental policy and/or training or acting in a manner that appears to be contrary to departmental expectations. Some of those incidents have resulted in tragedy and social unrest; others have caused injury to employees or the public as well as damage to property. Analyses of these examples demonstrate how allowing deviant behaviors to exist in an organization will eventually be costly and frequently lead to a loss of the community's faith and trust. This can pose an enormous threat to the effectiveness of the police agency.

A further threat, pointed out by Audrey Forbush of Plunkett Cooney PC, LEAF's Legal Advisor, is that law enforcement could lose the courts' current use of the reasonable officer standard when evaluating officer conduct. The court measurement is that ". . . a reasonable officer is one who acts as other similarly trained and experienced officers could be expected to act, under similar circumstances." The Supreme Court's mandate on officer reasonableness is a common thread in *Terry v. Ohio, Tennessee v. Garner, Graham v. Connor, Scott v. Harris, Arizona v. Gant, and Plumhoff v. Rickard.*

Officers must be able to explain clearly their actions and why they chose them. If they cannot and have acted on their own outside the protocol of the department or industry standard, they may jeopardize the reasonableness evaluation and be targeted by civil and criminal charges. 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]). At the same time, Forbush advises that officers need to know that the U. S. Sixth Circuit Court of Appeals' ruling in *Griffith v. Coburn*, 473 F.3d 650 (Sixth Cir. 2007) creates additional responsibilities when it said that officers must consider a subject's mental state as part of the totality of circumstances when determining the reasonableness of an officer's actions.

Your Organization Has A Culture: Are You Supporting It?

Organizational culture is a system of shared expectations, standards, and beliefs that direct how people behave in it. The expectations and standards determine how employees dress, how they behave when they interact with people and how they perform their jobs. Every organization has its own unique culture that provides the guiding principles, rules and boundaries for its employees' conduct. This means that every employee, regardless of position, is responsible to maintain the culture of the organization in their everyday job assignments.

Fulfilling this responsibility is critical in law enforcement where employees work independently and have a significant amount of discretion afforded to them 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 and know how to make decisions based on need and the dynamics of a specific situation. At the same time, the use of discretion is a critical component that often causes criticism and sometimes litigation. Departments must provide guidance to officers in using the discretion allowed by implementing and training them to department policies, procedures, rules and directives. Supervisors must then be accountable for monitoring the work of their subordinates to ensure compliance.

If a department either does not or is not perceived as living by its standards, or if questions arise as to whether the organization or its officers are untruthful, calloused to the ethical treatment of a human and unconcerned with the protection of civil rights, it is fair for its stakeholders to ask questions and be angry. Of

course, legitimate departments would never allow such behavior, are outraged with the allegations, and work hard to openly counter them. In order to defend itself or to eliminate the wrongdoers, a department must have a process in place that is proactive and provides an early intervention process to identify problems before impropriety is alleged or discovered.

Departments must be always alert to incidents that are in question, and be willing to do a 360 degree evaluation of itself, and if deviations or incidents of officer jeopardy are discovered, be willing to review or rebuild the standards and re-train or remediate the officers to eliminate the potential risk.

Know Before The Media Does!

LEAF asked Forbush what a department should do to identify situations where departmental behavior increases risk. She was candid in her response, saying that in the recent past, a theme in the media and in a number of television and movie police dramas is that police think it is alright to bend the rules, knock people around, invade their property, or take advantage of the weak as long as they "get" the bad guys. To add to the negativity, the constant media assertion of the existence of the blue wall of corruption further damages the integrity of each officer on the job.

She said she is not naïve and knows bad cops do exist. However, no matter the portrait of law enforcement in the media, it is her experience that most real world police officers believe in the process of law and go to great lengths to try and uphold their responsibility to follow it. That is not to say officers don't occasionally make mistakes, but their intent is to do the right thing.

She was very direct when she said it is top management's responsibility to lead and lay the foundation of trust so officers can maintain their and the department's integrity in the effort to follow the rules and do the right thing.

Management must provide industry standard policies and training that will guide officers in doing their job. Providing the appropriate tools and weapons and teaching the mechanical skills to use them is also important. She points to the US Supreme Court decision in *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197 (1989), as the gold standard for establishing that officers must be trained in those job tasks that are "usual and recurring situations that municipal employees face."

Once the officers know what is expected of them, they also must understand the discretion they have to make decisions as they regularly encounter evolving incidents and challenges. Management must teach its officers to think outside the box for solutions when they face rapidly changing dynamic situations that may not fall within their frame of reference or do not fall within the specific guidance of the department. They must know how to apply what they know of the law and policy and adapt it the best they can to the situation. It is important for the officers to know when escalation and de-escalation may be appropriate and that clearly describing the specific acts they confronted and the action they took in response to control each act in the situation will help define the outcome of the incident and defend their decision making.

According to Forbush, accomplishing this requires management to develop and institute an audit process that functions as an early warning of any deviant activity or abhorrent behavior. Today, there are a variety of department resources that regularly capture the Department's activities in real time and in accurate and descriptive formats. She points to radio, audio and video recordings, computer data, GPS, phone and department reporting requirements. Some of these sources have been around a long time and the material has been available for varying periods, but some for years. The current body worn camera initiative is described as an additional tool for this purpose. Data is constantly captured and stored for archival history. A regular

review of the data will provide insight and graphic evidence of the activity of the department and the behavior of its employees.

Forbush said that supervisors and command officers who review reports should know the key phrases officers use in reports that are ambiguous or may be descriptive but not definitive. Examples are:

- Guided to the ground.
- That force necessary.
- Overcome resistance encountered.
- Observed under the front seat or between the seats.
- Suspect made a furtive movement.
- Observed suspicious behavior.

Vague or ambiguous wording may also point to behavior an officer feels is inappropriate but is reluctant to specifically report. Field supervisors and officers may also use cryptic phrases in incident reports because they want to report suspicious or inappropriate behavior but fear reprisal if challenged. Management must require report reviewers to follow-up with officers and require them to defend the words they used. Police jargon and ambiguity leads to misconceptions and conflict when the phraseology is evaluated or has to be defended. Officers should use plain English that is descriptive and specific to the observations and information that the officer had at the time of action.

If an incident occurs or a complaint is filed, all the stored and archived data, audio, video and reports will be mined to paint a picture of the officer and the department. Recent history has shown that the mining has been productive in providing evidence of a history of inappropriate behavior on the part of officers, supervisors and command officers who either didn't audit the history or did nothing when the behavior was discovered or reported. Forbush said this need not occur if an appropriate audit and early intervention process is in place to not only identify bad tactics or inappropriate behavior but to defend the department because of its own due diligence.

So What Do We Audit?

This is an issue that has been a dilemma for many years. Today, most departments produce so much data and recordings they feel there is no time to review all of it. Forbush feels that is an excuse! Forbush continued, in most departments, if supervisors are responsible to regularly view a random 15 minutes of video activity for each officer on their shift and reconcile it against the documentation of that activity and the audit is spread across each quarter, the time needed is manageable. Each audit should include a report containing documentation of the activity audited, what observations the supervisor made, recommendations for praise, remedial training or action and the substance of any discussion initiated with the employee by the supervisor as a result of the audit. A sample audit form can be found in the Law Enforcement Action Forum's *Law Enforcement Risk Control Manual*, Chapter 21, Topical Resource section. The Manual is a resource for the MML Insurance Programs at mml.org, under Insurance, then LEAF.

The audit report should be sent to a designated command officer who is required to review the information and either approve, return or further investigate the findings. This command officer should also be responsible for early intervention if trends are identified across the department or inappropriate behavior is reported. Forbush also said that the command officer doing the final review should audit the supervisors' audit of a small percentage of those received to ensure proper reporting. Annually a report of the audit process should be provided to top management.

A number of criticisms aimed at law enforcement, Forbush said, are rooted in the failure of departments to complete the mundane tasks when enforcing the law and serving the public. Police Departments perform the tasks every day and at all levels of the operation. These tasks 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, supervision and auditing of the department's enforcement and service activities even if doing so seems commonplace, redundant and rather mechanical. These tasks are often a victim of the normalization of deviance.

She went on to say the only way to ensure the culture of an organization is intact as top management has defined it, is to regularly look at what the organization is doing, root out incidents of normalized deviance and officer created jeopardy and take appropriate action.

Forbush offers the following action points:

Review LEAF Newsletters. Each contains information that is relevant to this discussion and speak to the issues of the law and to strategies that help mitigate the risks inherent in a law enforcement operation. Some are listed below:

http://www.mml.org/insurance/shared/risk_resources/leaf_newsletters.html

If You're Going to Be a Leader, The Devil's In the Details (October 2003)

Knowing When to Say, "Hold It! (December 2008)

Don't Wait Until the Gear Fails When Regular Maintenance Can Prevent It! (December 2009)

Warning – The Courts Scrutinize an Officer's Response to Encounters with at Risk Subjects! (January 2011)

Evaluate your operation to see how well your organization is meeting these recommendations:

- Establish up to date policies and rules to guide employees.
- Provide officers training in policies, rules and required skills.
- Train employees in the philosophy of policies, management expectations of behavior including the rationale for the appropriate use of discretion in decision making.
- Use real life scenarios to train employees on how to make appropriate decisions in fluid, dynamic incidents.
- 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 exposures that have been identified as risk and liability concerns.
- Hold supervisors accountable for supervising and maintaining management's expectations.
- Use quality assurance type audits to ensure that the officers' actions and behavior meet the department's expectations both in the intent and the philosophy of its policies.
- Ensure officers are able to explain the decisions they make during incidents and document them in plain English. Officers must be confident that their explanation reflects their intent to do the right thing under the circumstances.
- Establish and communicate management expectation that officers are responsible for their actions, decisions, and their use of discretion.
- Provide tools that allow officers to do their jobs safely.
- Create a management file for each complaint. The file should contain the complaint as well as complete documentation of the investigation and its outcome.

- Find the root cause of a complaint and work to educate those involved to avoid future complaints.
- Require complaint investigations to be 360 degrees and not focus solely on the topic of the complaint.
- Maintain communication with complainants to provide them an understanding of the findings and their resolution.
- Take remedial action when problems are identified during investigations or audits.
- Document, Document, Document! It is your proof!

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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