



LEAF — The Wisdom of Jim DeGrazia The Manual and New Material on the Web

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Law Enforcement Action Forum NEWSLETTER

A LITTLE HISTORY

In 1992, the Loss Control professionals for the Michigan Municipal League's Liability and Property had concerns about the growing number of police liability claims among the Pool's member municipalities. They suggested that an effective way to address the problem was for police executives to meet regularly. The goal was to develop their own loss control standards that would contribute to reducing the frequency and severity of the claims. This process, many felt, would have more credibility with members than having an insurer impose loss control recommendations without police input. As a result, the Law Enforcement Action Forum (LEAF) came into being.

LEAF comprises two groups of police professionals: the Northern and Southern Committees. Each Committee meets regularly in its respective region. The basic philosophy underlying the endeavor is that by establishing law enforcement supported safe working practices, departments might reduce or, at least mitigate, their exposure and, in turn, this would reduce the potential for litigation. LEAF'S mission is to develop law enforcement policies and related support materials designed to provide guidance to law enforcement executives in addressing their risk exposures.

However, LEAF's policy development is only part of the story. Once a policy is developed, it does not stagnate. LEAF continuously reviews and, where necessary, revises its policies to recognize changes in the legal and professional environment in which Michigan's police officers operate. Member agencies receive revised policies promptly, with adequate explanation and instruction for effective implementation.

ALL THE PARTS ARE IMPORTANT

The key to LEAF's success is not always obvious. LEAF has three key components: The police executives who bring practical knowledge about doing the job to the table; the risk management facilitator whose role is keep the group focused on the issues at hand. The facilitator identifies the risk exposures that are creating liability for the police organizations and recommends solutions to eliminating or reducing their impact. The legal advisor must have experience with all aspects of municipal and police liability, including acting as defense counsel during trial. This experience helps the legal advisor to guide the committee, thereby ensuring that potential litigants, judges and juries will perceive the final products positively. The involvement of a proficient legal advisor at the policy development stage adds authenticity to the process. Finally, the legal advisor's role is also to keep LEAF informed about the many changes that occur in the law and to offer his or her opinion about the direction that courts may take on certain issues.



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A BIG LOSS TO THE LAW ENFORCEMENT PROFESSION

Since LEAF'S inception until April 2005 when he suddenly passed away, James I. DeGrazia of O'Connor, DeGrazia, Tamm and O'Connor, P.C. served as LEAF's legal advisor. Jim had a couple of legal specialty areas, one of his favorites being police liability and legal defense. He had a profound respect for law enforcement officers, and he worked diligently to ensure they receive appropriate representation in litigation. He was also dedicated to helping guide the profession through his participation in law enforcement education and legislative arenas.

Jim DeGrazia's death has ended a very enjoyable and, for the LEAF members, an extremely valuable period in the growth and development of the Law Enforcement Action Forum. Those individuals who had an opportunity to work with Jim received the gifts of his expertise and his friendship. He touched everyone who worked with him.

With his help, LEAF has significantly contributed to the steady and sustained reduction in both the frequency and severity of law enforcement claims. These proven results have helped to garner credibility for LEAF and the respect of Michigan law enforcement professionals. Many consider the policies and the information in the MML, LEAF Manual for Law Enforcement Risk Control to be the standard for law enforcement in the State of Michigan.

IN HIS OWN WORDS

In his memory, this edition of the LEAF Newsletter offers significant statements from LEAF Newsletters and the LEAF Manual for Law Enforcement Risk Control in which Jim focused on the law enforcement issues that he felt were most important. He would want every officer to remember these bits of wisdom while they are out doing their job. Unfortunately, the editors decided that the many limericks, jokes or ribald stories that often accompanied his lessons might be less than appropriate in print. In retrospect, I wish I had kept them, for he would have gotten a kick out of knowing they continue to make us smile.

As you read the following, visualize the quick grin, sly smile or the stern scowl and wrinkled brow that sometimes helped to make his point:

TRAINING:

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 the 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! (If You're Going To Be a Leader, The Devil's In the Details, 10/03)

Canton v Harris

Citing 1206 of *Canton*, *supra*, which contains "famous footnote 10," DeGrazia stresses the far-reaching impact of the Court's decision. At page 1206, in what has now become the famous footnote 10 of *Canton*, *supra*, the court noted examples as to when liability would be imposed under a policy of deliberate indifference. One such example would be if the city armed its officers with firearms in order to permit them to arrest fleeing felons, and then failed to train them on the use of deadly force. This could be said to be "so obvious" that the failure to train could be characterized as "deliberate indifference" to the constitutional rights of a municipality's inhabitants.

In light of *Canton* and its progeny, a municipal entity has police officers they must be trained for any task that they are asked to perform. It does not have to be the best training available but they must be trained. (IT'S YOUR DUTY! The Need to Protect People Taken Into Custody, 6/99)

Types of Training

There should be training to meet the specific requirements of the sample policy included in this chapter and the recurring situations that officers might confront. The training should include classroom discussions, wherein the discretionary portions of the policy are fully analyzed using input from those who must implement the policy. It will be beneficial to both the city and the officer under any context if the appropriate weapon is used to meet the force necessary. There should not be escalation to deadly force when non-lethal force is mandated by the policy and the law.

Physical Training and Discretionary Aspects

There should be physical training that is appropriate to the activity described in the policy. While reading and discussing the policies is necessary, one must also receive training in the actual physical requirements of using the weapon. The type of training should be appropriate to the actual physical task at hand. The more closely one can approximate real life conditions in the training, the better prepared the officer will be to meet real life challenges. After all, criminals seldom come in cardboard.

Aspects of Performance

In this writer's experience, the discretionary aspects of an officer's duties more often result in liability than the failure to perform properly the physical requirements of the job. For example, the officers usually hit their target. The liability is incurred in the decision to shoot. Thus, the decision making process is as important in the training of officers as the physical training. Both the range and the classroom are important.

Documentation

It is important for both the department and the officer to document the training that is received. When an officer receives training, it should be described and dated. Many departments are tracking training via computer records relative to their personnel. Without documentation, the training does not exist for purposes of legal defense.

OFF-DUTY WEAPON

While it is the decision of individual departments as to whether to allow officers, or require officers, to carry weapons off duty, if the off-duty weapon that is carried is different from the on-duty weapon, then training should be required in the off-duty weapon. The weapon may vary in size and in handling capabilities. An officer in a stressful situation must be trained in the weapon that is to be utilized. This is for the protection of the officer and for the citizen at large.

SUMMARY

The Supreme Court stated in *Canton* that, "we know to a moral certainty" that we must train officers if they are to carry a weapon. This is a mandate from the highest court in the land and cannot be ignored. Thus, we must train for the protection of the officer and the protection of the citizens.

Since *Canton* came down in 1989, the courts have expanded the areas where training is required. However, in no area is the training more clearly required than in the use of weapons (**LAW ENFORCEMENT RISK CONTROL MANUAL, Chapter 4, Use of Weapons -- Review of Law**).

VEHICLE OPERATIONS

DeGrazia said that although *Fiser* has been overruled, the basis of safe and reasonable operation still exists. Because a police pursuit presents varying degrees of risk exposure to the officers involved and the traveling public, the emphasis on decision-making is still very important. Officers must be able to articulate the reasons for the pursuit and their choice of tactics. The relief given by the Michigan Supreme Court in *Robinson* allows a police officer to do his duty without having to take responsibility for the actions of the fleeing offender. Unless officers hit a fleeing car, physically cause another vehicle or object to hit the fleeing car, or physically force the fleeing car off the road or into another vehicle or object, they will maintain their governmental immunity (**Michigan's New Law Regarding Police Operation of Vehicles, 9/00**).

The following is taken from the new Sample Policy and Procedures for Police Vehicle Operations Chapter 2, of the LEAF Manual for Law Enforcement Risk Control, Policy 2B, Section VII, Traffic Crashes Involving Department Vehicles. Jim strongly encouraged that the language be part of the policy as a direct result of *Robinson*. After a pursuit, the only way a department can prove they did not have contact with the pursued vehicle is to have 360 degree photographs or video of the police vehicles involved. He was adamant that LEAF needed to promote how important it was that this be done and the evidence preserved.

- D. The (Insert Person or Position) is to investigate the cause of the accident and submit a report, with photographs and/or videotape of the findings to the (Chief, Sheriff, Director) or his designee. (Chapter 2B, Section VII)

USE OF FORCE

To minimize liability while maximizing an officer's safety, the professional officer will use force only in the appropriate situation. The officer will use that force necessary for the situation. He will use deadly force only in situations as mandated by *Garner*. He will use only the amount of force necessary to effectuate an arrest or stop.

An officer must be able to avail himself of an objective "good faith" belief that the force that he used did not violate the Fourth Amendment. If an officer knows the criteria of *Graham* and *Garner* and the laws of arrest, he will be in the best position to defend himself against an excessive force claim in the federal context and a gross negligence claim or an assault and battery claim in the state context. (Manual for Law Enforcement Risk Control, Chapter 3, Use of Force -- Review of Law).

REASONABLE OFFICER:

LEAF's Legal Advisor and Coordinator have presented at conferences and written in past LEAF Newsletters about the significance of the "Reasonable Officer Standard". They have cautioned departments against diminishing the standard by promoting the weapon in such a way that the public's expectation of taser use by officers is only when faced with extreme levels of resistance.

It is LEAF's view that if officers have an objective and reasonable belief, based on the circumstances and resistance they face, that a subject's actions may result in great bodily harm or loss of life, then a firearm or projectile firing less lethal weapon would be appropriate. Officers should understand that they must follow their training, experience, and judgment in these very critical situations and take the action they believe is correct as they evaluate the facts and circumstances confronting them. Departments must review their training to ensure it does not leave the impression that an officer must default to a less lethal weapon in these critical situations. This will confuse officers when the use of the firearm may be tactically prudent better than the use of the less lethal weapon. We have added so many tools to the belt and/or available weapon choices that if the message is confusing or creates hesitation it could cost an officer or a citizen their life (TASERS -- The Michigan Municipal League's Liability and Property Pool and Workers' Compensation Fund Stand On Electrical Current Weapons, 3/05).

A Note about Officers Hurt when Using Force

Over the past year James I. DeGrazia, LEAF Legal Advisor has referred to the "Reasonable Officer Standard" in *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), (LEAF Newsletter, Volume

10, Issue 1, March 2003) in discussions about use of force. Mr. DeGrazia suggests that when conducting an evaluation, management should remember the applicable legal standard: "was the officer's response to the subject's actions objectively reasonable in light of the facts and circumstances confronting the officer at the time the force was used?" Officers have to know that they need to be able to articulate why they chose to do what they did. There is no penalty if it was reasonable. Officers know what is reasonable but they don't always know what management thinks is reasonable. To avoid controversy or risk of review an officer often will choose not to put himself in the position of being questioned. Either they will avoid the use of a control technique, tool or weapon, or they will use it inappropriately. Most often, the officers will default to striking with their fist or try to strong-arm the suspect. That is when they get hurt! (THERE IS MONEY ON THE TABLE! Things You Can Control to Reduce Your Losses Due to Accident, Liability or Injury, 1/04)

GARRITY:

Mr. DeGrazia told the LEAF Committee that *Garrity* applies to all municipal employees. He went on to say that management has to respect their employees' right not to incriminate themselves when their statements must be taken under the threat of dismissal. He also said that the right to refuse to incriminate oneself does not extend to every occasion when management asks an employee to provide an accounting of how they have fulfilled their duties.

Police officers are not entitled to invoke their *Garrity* Rights every time they are asked to fill out a report, activity log, appear on a video tape, or otherwise perform their daily duties. DeGrazia went on to explain that in determining whether *Garrity* is applicable, Michigan courts apply a totality of the circumstances test. Although each incident may differ, there are two common triggering factors in the *Garrity* progeny: (1) the individuals under investigation must receive explicit notice that they would be subject to discharge from public employment if they did not waive the constitutional right against self-incrimination, and (2) a state law or municipal ordinance must mandate the procedure.

Therefore, the fact that the department may have disciplinary rules and regulations, particularly for acts of insubordination, and that disciplinary actions may range from oral reprimand to termination does not necessarily mean that *Garrity* Rights apply. As long as termination is not an immediate consequence of failure to answer questions during investigations, *Garrity* Rights are not applicable. *Garrity* comes into play for the municipality only when the investigation becomes criminal in nature and the employee is the focus of the investigation.

When *Garrity* Does Not Apply

According to DeGrazia, it is an improper application of *Garrity* for officers to attach a statement of *Garrity* Rights to every report they submit, indicating that they have completed the report as a condition of continued employment and that the report cannot be used against the officer in a criminal proceeding. **If there is no presumption of wrongdoing or no investigation that focuses on the officer, the *Garrity* Rights do not apply.**

DeGrazia suggests that department heads issue an order to all officers as follows: (added to Chapter 11, Rules in the next edition of the LEAF Risk Reduction Manual)
 "Officers shall not modify official department documents, reports, forms or audio or video tapes or electronic files by attaching non-authorized statements whether written or verbal."

In conclusion, he remarked, "It is a perversion of the law and an insult to our officers to imply that every report submitted invokes an employee's Fifth Amendment rights. The right against self-incrimination is no more invoked in the context of a written report than a citizen's Miranda rights are invoked every time that an officer talks to them."

DO THE RIGHT THING:

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. (IF YOU'RE GOING TO BE A LEADER, The Devil's In the Details, 10/03)

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?" (IF YOU'RE GOING TO BE A LEADER, The Devil's In the Details, 10/03)

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. (IF YOU'RE GOING TO BE A LEADER, The Devil's In the Details, 10/03)

A TOAST TO YOU, JIM DEGRAZIA

The Law Enforcement Action Forum honors your memory, your work, your friendship and your life. You taught us that indeed "all life is perspective." It was a privilege to have known you and we miss you. Have one with Uncle Joe for us!

UPDATES TO THE MANUAL FOR LAW ENFORCEMENT RISK CONTROL

You can find The LEAF Manual a link on the MML web site or at mml-leaf.org. LEAF has updated many of the Chapters with the latest policy language changes, with new Review of the Law sections, and with the addition of some new policies. The language changes in the policies are in an orange color to make it convenient for the users to identify them. The following is a list of the Chapters containing changes:

- Chapter 2: Rewritten Policy 2A, Pursuit and Closing, eliminating regular operation issues. Policy 2B is the new Police Vehicle Operations policy. It handles the regular operation issues for most police vehicles. Policy 2C is the Fire/EMS Vehicle Policy. The intention was to address more fully standard vehicle operations outside the higher severity activity of pursuit or closing.
- Chapter 3: Use of Force has a new Review of the Law.
- Chapter 4: Use of Weapons has a new Review of the Law. It also has the addition of taser policy language as well as new language that deals with the issue of off duty carry of weapons by officers and is consistent with the language that has been

recommended since the passing of the Michigan Concealed Pistol Act and LEOSA.

Chapters; 6,7,8,15,16,18,19,22,24,26,27 all have updates and/or new Review of the Law updates

Chapter 29: The Incapacitated and Mentally III Subjects is a new chapter and includes two new policies. The Chapter contains model policies for handling Subjects Incapacitated by Intoxication and Incidents Involving Mentally III Subjects.

The website is available to members of the MML Pool and Fund. If you have not been on the website then take a look. If you do not have or cannot remember your password then e-mail gking@meadowbrook.com and we will see what we can do to get you going.

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 with 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.

Inside This Issue: **The Wisdom of Jim DeGrazia**



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