



Volume 12, Issue 3

September 2005

# Law Enforcement Action Forum NEWSLETTER



## LEAF's New Legal Advisor Shares Her Vision for Avoiding Entrapment with Enforcement Executives!

By Gene King, MML LEAF Coordinator

As many of you know, the Michigan Municipal League's Law Enforcement Action Forum is comprised of law enforcement executives from various sized departments around the state as well as a risk management and legal advisor. One of the key factors in LEAF's success is that all the elements of the Law Enforcement Risk Management Team are at the table when the committee develops policies and professional/technical positions and solves problems. Its diversity provides an opportunity for team members to hear and debate an issue from several points of view and allows members to ask questions, make arguments or dispute a position based on their knowledge or opinion. LEAF's mission is to serve as a resource for the MML in areas of law enforcement, and, specifically, to provide risk management tools and resources for the Liability and Property Pool and Workers' Compensation Fund members.

Each component of LEAF is important, but it helps greatly to have a legal advisor who has experience in all aspects of municipal and police liability, including as defense counsel during trial. LEAF feels that stating a policy is less important than how workable it is and how potential litigants, judges and juries will view it. The involvement of competent legal counsel during policy development adds legitimacy to the process. LEAF sought to find an individual to fill that role as the committee searched for its next legal advisor from the law firms that represent the Pool in its various court actions.

### Leaf's Legal Advisor

The Law Enforcement Action Forum is pleased to announce the appointment of Audrey Forbush of O'Connor, DeGrazia, Tamm & O'Connor PC of Bloomfield Hills as their new Legal Advisor. LEAF selected Audrey after rigorous interviews of the top-flight candidates from law firms that represent the Michigan Municipal League's Liability and Property Pool in police and civil rights types of litigation.

Audrey is a graduate of Central Michigan University with distinction and received her Jurist Doctorate, magna cum laude from Thomas M. Cooley Law School. She has been with O'Connor, DeGrazia, Tamm and O'Connor, PC, since 1992, attaining partner status in 1998. She has handled many municipal law, police liability and civil rights cases for the MML Pool and other insurers. MML Risk Management Services and the LEAF Committee look forward to Audrey helping to continue the success of the Law Enforcement Action Forum and its influence on law enforcement in the state of Michigan.

### Shared Concern from the Legal Advisor

One of the tasks asked of Audrey during her interview was what she thought were pressing issues affecting law enforcement today. Interestingly, her response was one that caught the attention of the Interview Committee. She felt that a significant and ignored issue in law enforcement today was that top executives often do not hold their middle management consistently accountable for enforcing the rules and policies of the department. In her experience, Audrey found that police activity did not necessarily create problems. She felt most departments perform well doing enforcement and investigative types of activities. The problem areas are generally those involving the behavior of internal employee. She described this situation as a misalignment between the expectations of the top executive and the actions of their mid-level managers and supervisors, frequently lieutenants and sergeants. For example, she pointed to problems that are easily identifiable such as harassment and discrimination in the workplace. Today everyone should know that harassment and discrimination in the workplace are illegal. Since Supreme Court Justice Clarence Thomas went through the unseemly confirmation hearings in the U.S. Senate Judiciary Committee, sexual harassment and discrimination have been hot button news issues in today's society. Those hearings were years ago yet harassment and discrimination in the workplace is still a significant problem. In law enforcement, it remains pervasive and is an example of top-level management either ignoring inappropriate behavior or not recognizing that the lower levels of management and supervision are not regulating the behavior of their charges.

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### Management Must Lead

It is Audrey's opinion that the relationship between middle management and their employees sometimes overrides the priorities set by top management. For example, when questioned after an officer files a complaint, mid-level managers generally acknowledge that they are aware their department has a policy against harassment and discrimination. They often respond that, even though they were aware of the behavior, the victim did not complain to them, so they figured the behavior was acceptable and inoffensive. These same people do not believe or understand it is their responsibility to enforce harassment or discrimination rules. The problem becomes much greater when top-level management participates in the harassing behavior.

Audrey feels that Employment Practices Liability is going to continue to be a troublesome area for law enforcement executives. As an example of how these problems manifest themselves, she cites the existence of blatant harassment and discrimination in some organizations. Participants often refer to what they do as horsing around, kidding, BS'ing, playing pranks or just having a little fun. They think that is fine, as long as everyone involved, especially the butt of the joke or cartoon, thinks it is funny. Unfortunately, relationships can change and what people may have thought was funny may become something they consider offensive. The bottom-line is that as long as management allows an environment that accepts or tolerates this type of activity in the workplace, then it is only a matter of time before a problem arises. By then it is too late.

### It Is a Matter of Law

In a brief explanation, Audrey said this is how it works: on the federal level *Title VII of the Federal Civil Rights Act* and, in Michigan, the *Elliott-Larsen Civil Rights Act, MCL 37.2102*, prohibit harassment and discrimination. People have the right to be in the workplace and not be subject to inappropriate or offensive behavior.

Since people have that right, it is top management's responsibility to make sure harassment or discrimination does not happen. She points out two 1998 United States Supreme Court decisions, *Faragher v. City of Boca Raton*, 524 U. S. 775 — (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742— (1998) that underscore the need for having and enforcing clear and understandable policies and procedures for supervisors, managers and employees. Additionally, in Michigan, *Chambers v Tretco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000) establishes that a supervisor's knowledge assigns knowledge to the employer.

These cases dealt with sexual harassment and established that management is liable if a person of authority in an organization knows of or is the perpetrator of harassment or discrimination. This translates to top-level management's being responsible for the actions of their employees. To avoid being vicariously responsible, they must ensure that employees receive training on what types of behavior are appropriate in the workplace. Management must document the training. If employees submit complaints of harassment, management must investigate and take prompt remedial action if the investigation substantiates the complaint. Documentation is essential.

It also means that management must consistently follow-up with their mid-level managers and supervisors to ensure that they are meeting departmental expectations about not participating in or tolerating inappropriate behavior by any employee. All employees, but particularly offending employees, must know that top-level management will provide swift and severe punishment to anyone who allows, participates, or ignores inappropriate behavior.

That places the responsibility for monitoring the behavior of the employees squarely on the shoulders of mid-level managers and supervisors. They have the most contact with employees. They also are the people who feel the pulse of the department and know when someone is having trouble. Waiting until someone complains is no longer good enough. Moreover, even if they do not want to do something about it, if employees make a complaint, the person receiving it, regardless of rank, must forward the complaint to a superior.

### The Best Protection

Audrey indicated that top management has to invest in the training and development of their staff. She went on to say that having rules and policies are important, but the additional components of training and supervision to ensure compliance with department rules and policy are essential. Top management can no longer assume that the operation is functioning properly. They must perform and document some form of quality assurance to confirm mid-management and supervisory staff are meeting their expectations. They and their mid-level managers and supervisors must enforce departmental rules and policies.

Further, Audrey said that she would like to see LEAF take the message to law enforcement executives that they must no longer tolerate their mid-level people idly sitting by while employees participate in inappropriate behavior or engage in such conduct themselves. This is as a priority because, according to Audrey, it is one of the more costly and destructive problems that modern law enforcement faces -- damage from within due to inattentiveness and failure to enforce the rules or the law.

### Training Standards Might Not Be All Bad

During the interviews, all of the candidates for the position of Legal Advisor shared a number of interesting thoughts. The Interview Committee asked all the candidates for their thoughts about MCOLES' push to develop mandatory in-service training standards. The interview panel first wanted to know what the candidates thought about in-service training standards and, then, how they thought the standards might affect police litigation. Every candidate stated that instituting mandatory standardized in-service training for all law enforcement would be a smart thing to do. The candidates felt this way because of the disparity they have found in training among the departments that they have represented.

All acknowledged that some of the disparity resulted from budgetary constraints, but most felt that the real reason for the disparity is the failure of some top-level managers and the municipality to provide it. Most believe that those departments that do not participate in training opportunities are examples of

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management that is particularly uninformed or ignorant of its responsibility to train their public safety personnel as a matter of the law.

Most candidates forecast that if MCOLES mandated training, the municipalities would have to ensure that their licensed police officers remained eligible to work. They felt that the ultimate outcome would be that Michigan would have more professional, competent and discerning police officers. Further, the candidates individually articulated their belief that the standards that MCOLES promulgates should be general in nature, outlining the topic areas where training should be mandatory but staying away from specific performance outcomes.

When it came to discussing the complications that training standards would pose in litigation, each candidate stated that the issue of compliance with a rule, policy, standard or ordinance was not relevant in the burden of overcoming gross negligence and/or deliberate indifference protections that federal or state law offer. They felt that under today's law, in most circumstances, it would be a matter of a protective motion before the court to remove or mitigate the issue.

### Why Is This Important?

The reason for the question and this discussion is very important. Gene King, MML LEAF Coordinator, represents the LEAF Committee at the MCOLES' In-Service Firearms Standard Project. This group originally came together to discuss MCOLES' response to HR 218, the Law Enforcement Officers' Safety Act of 2004. After that discussion, the Commission decided to pursue the in-service firearms training standard. There have been subsequent meetings held by MCOLES and some progress has taken place. MCOLES is making a great effort to hear from their stakeholders as they attempt to develop a meaningful training standard that does not have unintended consequences. Since this is the first standard, progress is purposely slow and painstaking.

From a risk management point of view, the establishment of standards may be a problem in civil litigation. Until now, we have had the luxury of not having to address the quantity or quality of training as much of an issue in lawsuits. Except in the high standards of deliberate indifference found in *Canton v Harris*, 489 U.S. 378; 109 S.Ct. 1197 (1989) some training is better than no training. This has allowed the defense to focus on whether the decisions an officer made, which led to the action taken, were reasonable. Risk management for law enforcement has worked long and hard to preserve the Reasonable Officer Standard as found in *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989) and *Delude v. Raasakka*, 391 Mich. 296, 303; 215 NW2d 685 (1974). The Reasonable Officer Standard states that the police have the right to use that level of force that is objectively reasonable under the circumstances to effect a lawful arrest.

All MML members should understand that LEAF's aim is to evaluate the various perspectives on firearms training so we can help the MCOLES committee to agree upon an In-Service Firearms Standard with which all agencies can live. The top police litigation minds of the MML Pool have reassured that we can live with training standards, but we need to talk about what type of firearms training standard LEAF would like to see.

### Firearms Training Recommendations

Historically, MML Law Enforcement Risk Control Consultants have recommended that departments need to have firearms training programs and recommend that officers attend firearms training four times annually. The expectation is that departments will hold firearms training twice annually at a minimum. Training needs to include a classroom component that deals with weapon safety while at home and work. The training should cover the department's use of force policy, including the expectations of the Chief, Director or Sheriff and an explanation of the discretion that the department allows its officers.

The training should include exercises that are practical to the environment that the officers are in and include the following:

- A demonstration of proficiency at least twice annually with each authorized firearm. This includes all primary duty firearms, all off-duty and backup firearms and any shotguns, rifles or any other authorized firearm.
- Participation in reduced light firearms training annually
- Annual participation in an outdoor cold weather firearms training while wearing the proper seasonal gear
- Decision-making and target identification drills at least once annually although twice annually is preferable
- The inclusion of simulated stress scenarios as part of a tactical exercise
- A requirement that officers use any holsters and other equipment while training that they would normally use or wear while on and off duty; these include concealed carry holsters and reloading equipment, body armor and uniforms.

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 with the loss prevention techniques suggested herein might 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.***

**UPDATED CHAPTERS IN THE *LAW ENFORCEMENT RISK REDUCTION MANUAL***

Many Chapters in the Law Enforcement Risk Reduction Manual have undergone revision and updating. Please go to [www.mml.org](http://www.mml.org), click on Insurance and then on Risk Management Resources. On the next screen, click on LEAF. Once you at the LEAF website, click on "What's New." It will link you to the updated policies. If you have a problem getting on the site, contact Gene King, MML LEAF Coordinator at [gking@meadowbrook.com](mailto:gking@meadowbrook.com).

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