



LEGAL DEFENSE TRUST TRAINING BULLETIN

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LETHAL FORCE AND LAW ENFORCEMENT ACTIVITY-RELATED DEATHS--A SUGGESTED PROTOCOL FOR INVESTIGATION

by

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reviewed and edited

by

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The conduct of the lethal or major force investigation, known variously as the Officer-Involved Shooting Investigation (OIS), the Law Enforcement Activity-Related Death Investigation (LEARD), and Law Enforcement Activity-Related Injury Investigations (LEARI), properly culminates in the accommodation of the separate interests of the criminal justice system, department administration, organizational management and discipline, civil liability protection and defense, and respect for the involved officers' civil rights. These are plainly competing interests, which require a "balancing" approach to achieve success in the quest for fact and truth. Optimal achievement is best assured by conformance with a protocol to guide department investigators, supervisors, managers, executives, trainers and involved officers through the complicated legal maze confronted when law enforcement activities result in death or major injury.

This paper focuses on first, identifying the competing interests at stake, second, understanding how these interests interrelate and sometimes collide; third, assembling an orderly catalogue of the objectives and needs in the major incident investigation; fourth, transforming the catalogue into a useful model protocol; and fifth, applying the protocol in the field.

Most agencies have something of a protocol in use already. For those, this paper provides an opportunity for comparison, and identification of weaknesses or gaps, or perhaps confirmation that the existing procedures are satisfactory. For those who have none, or who have an unworkable procedure, the model may be a blueprint for construction of an individualized protocol appropriate to your agency. In either event, we begin with an undisputed truth: *a detailed and specific protocol is necessary*. From there, we get on with the task of developing the best one for you and the agency.

My thanks to Captain Greg Meyer, LAPD, for his generous contribution in reviewing and editing various drafts of this paper as each was developed. His expertise and perspectives had significant impact and influence upon the final product.

*-Michael P. Stone, August 1999
Pasadena, California*

expert witness for the defense in the Rodney King federal civil trial. Captain Meyer reviewed and edited this paper and the author acknowledges with gratitude, the important contributions made to the text of the paper as a result of Captain Meyer's study and review.

PART ONE

IDENTIFYING THE INTERESTS AT STAKE IN THE MAJOR USE OF FORCE INVESTIGATION

A major use of force incident, an officer-involved shooting, or the death of someone related to a police activity, instantly triggers the interest of a variety of agencies, systems and groups, each with its own focus, perspective, and point of view. Before we can balance and accommodate these interests, we need to identify them and understand how they are implicated, and where and how they are likely to conflict and collide. The following discussion is illustrative, not exhaustive. It is a listing of the interests at stake, not a prioritization. The discussion of one interest ahead of another does not mean that either interest is more or less important than any other. All are entitled to respect; each must be considered.

1. THE DEPARTMENT INTERESTS: Management, Accountability, Control, Discipline, Training And Organizational Health.

Anytime a law enforcement officer uses major force, shoots someone, or engages in some police-related activity that causes death or serious injury, or which triggers intense scrutiny or public outrage, the officer's agency is profoundly affected. Policies that govern police conduct in such matters must be reviewed; the circumstances and critical facts of the incident need to be identified, analyzed and compared to the policies to see whether compliance and conformance are present, or, if any failure of compliance is related to the outcome of the event, and if so, whether excusal in conformance is warranted and justified. Administrative disapproval will follow "out of policy" determinations. Often, the department is expected to give an accounting of the event to a higher authority--perhaps a city council, a board of police commissioners, a county board of supervisors, or a citizen review board. Internal department concerns in preserving good order, morale, efficiency, discipline, *esprit d'corps*, supervision and public confidence are directly and substantially implicated in how the agency responds to these major events. Department trainers must be thoroughly exposed to each major event to

determine if the training has been adequate to prepare the involved personnel to respond appropriately in the circumstances of each case. The trainers will help determine whether the involved personnel followed their training or departed from it, and if so, why. The trainers' review will also identify training needs for the future, so that a better, more appropriate response is made possible. The men and women in the organization will watch closely to see if the agency moves forward with confidence and resolve to first "get to the truth of the matter", or whether for example, it permits itself to be whip-sawed and bullied by politicians, the media, and special interest groups, often condemning officers' actions based on "appearances", opinions and public reaction and sentiment. Finally, the discipline system and the officers' administrative interests are naturally implicated in the department's response to the event.

2. THE CIVIL LIABILITY DEFENSE INTERESTS: Ensuring That The Agency Response Adequately Considers Liability Of The Agency, And Officer.

Governmental tort and civil rights litigation spotlight police use of force more than any other public entity conduct. Departmental policies which go too far in controlling and restricting an officer's responses can be just as problematic as those that say nothing or too little on the subject. Theories of liability commonly range from antecedent negligence in hiring, training, supervising and entrusting, to plain police brutality and intentional harm. Tension may quickly develop between those interested in *protection* of the officer and the agency, and those who are *accountable* to powers outside of the agency, with regard to disclosure of investigative facts and the prospect of waiver of any confidentiality which might otherwise apply.

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3. THE CRIMINAL JUSTICE INTEREST:
Prosecution Of Officers And Others.

Police use of force in the last decade has increasingly become the focus of federal and local prosecutorial agencies. These agencies (for example, the United States Department of Justice, state departments of justice, and county prosecutors) have demonstrated that their efforts in this area are driven, at times and in part, by political or public opinion considerations. More than one case in this writer's personal experience has resulted in an indictment or trial, following public outrage and interest group influence at the highest levels of prosecutorial policymaking and discretionary decisionmaking. Unfortunately, there are many persons and groups who believe that the police *will not* "police themselves", and that any police use of force must be investigated by an independent prosecutor's office, regardless. While prosecutorial agencies generally have not tried to assume *primary responsibility* for major police use of force incidents, they have almost universally responded to the call for *independent review*. Various prosecutorial policies call for everything between "roll-outs" upon notification of an incident, to grand jury subpoenas for investigative reports after the fact. Departmental determinations of "in policy" conduct of the officers are likely to be scrutinized, especially if the community, politicians, or interest groups are unsatisfied. Regardless of how, or in what manner, the prosecutorial agency approaches a given force case, one thing is a sure bet: the prosecutorial interest will be high, and the protocol needs to make provision for this fact, because obviously, the prosecutor's interests and those of the involved officers are often in marked conflict.

4. THE LAW ENFORCEMENT OVERSIGHT AND PUBLIC POLICY INTERESTS: The Functions Of Commissions, Inspectors General, Citizen Review Boards, And Other Oversight Entities, And The Public Interest Groups Likely To Be Demanding Their Attention.

Police oversight and public policy entities are concerned with individual major force incidents for a variety of reasons, but their involvement would rarely be in evidence early in a force incident or investigation.

However, oversight entities will certainly have access to the investigative product, and so the protocol must be constructed with this fact in mind. Oversight entities, compared with police department officials, are understandably more responsive, or seemingly so, to special interest or so-called "public interest" groups and "watchdog committees" such as the National Lawyers' Guild (NLG), American Civil Liberties Union (ACLU), Police Watch, National Association For The Advancement of Colored People (NAACP), Mexican-American Legal Defense Fund (MALDEF), Amnesty International, and more localized interests, such as the Greater Watts Justice Committee and Coalition Against Police Abuse (CAPA) in Los Angeles. These interest groups will be demanding that the oversight entities take an evermore active role in investigating major force cases and in establishing or changing policies that on the whole, will likely restrict officers' discretion and range of options.⁴ An effective protocol will help identify

⁴ Sometimes, oversight entities get far off the track and too deeply involved in department use of force policies, continuum and training as, for example, happened in 1980-82 when the Los Angeles City Council and Los Angeles Police Commission declared a moratorium on the use of carotid neckholds in response to community complaints that the use of the "LAPD chokehold" was responsible for an alarming number of in-custody deaths (this was long before the alarm went out on "positional asphyxia" in relation to the "hogtie" or hobble restraint). Wanting the "chokehold" off the front page of the *Los Angeles Times* and the 6:00 news, the politicians told Chief Daryl F. Gates and his defensive tactics trainers at the LAPD Academy to ban the carotid restraints from the use of force continuum at the intermediate level, and replace that most frequently used and effective technique with increased use of the side-handle baton, *but only as an impact weapon*. Gates and his trainers predicted a stunning increase in suspect and officer injuries. The politicians were unmoved. A 1982-84 review of every intermediate use of force report written in those years showed the truth of Gates' grim forecast: officer injuries were up more than 500%; suspect injuries were up more than 600%. Even this compelling study failed to move the politicians to withdraw the moratorium. Indeed, one councilperson

problems *before* they are seized by these interests, and held up as examples of the need for radical change to rein in the police who are “out of control” or “above the law”.

5. THE TRAINERS’ INTERESTS:
Identifying Training Failures And Training Needs.

Often overlooked, the department trainers have an immediate and significant role in the protocol for the use of force investigation. They are in a superior position to determine first, whether the officers’ use of force followed their training. Obviously, that determination goes a long way toward establishing the *objective reasonableness*⁵ of the force used. “Objectively

noted that, “It would be more cost-effective for the City of Los Angeles to pay damages for broken bones (from the batons) than for chokehold deaths”. Today, the LAPD is one of the very few agencies that prohibits the use of neckholds in all but lethal force situations. Equally devastating to the LAPD in the 80’s and 90’s, was the shift away from physical engagement of combative suspects in the Academy training, to a “don’t tie up” policy wherein the baton was used to overcome resistance by simply beating the suspect into submission. Hence, there were spectacles like the infamous “Rodney King Incident” previously in Los Angeles, but few were recorded on videotape. Recently, LAPD trainers have returned to physical engagement training in a dynamic series of lectures and hands-on realistic training in grappling techniques in the LAPD “Arrest and Control School”, an in-service, week-long program required of every sworn officer. Unfortunately, the neckhold remains out of reach, except at the deadly force level, although it is a “natural” extension of the grappling technique.

For an excellent discussion and first-hand view of the impact of improvident force policy changes motivated by political considerations rather than officer and suspect injury concerns, see “*After Rodney King: What Have We Learned?*” by Greg Meyer, attached hereto.

⁵ “Objective reasonableness” of the force used is the ultimate standard against which every use of force should be measured; in connection with an arrest

reasonable” force will not likely be the subject of any criminal or civil liability, and most likely will result in administrative approval of the force used, as well. So, obviously, the trainers’ initial views are extremely important, and if there are further proceedings in review or in litigation, or both, the trainers’ participation is essential and critical to a positive outcome. The trainers’ review may also identify or indicate a failure, either in comprehension or in application, or it could even expose a breakdown in the training that had previously gone unnoticed. A single force incident review by trainers can be the catalyst for a substantial change in, or overhaul of, policy and training in use of force. The trainers’ input, standing alone, can sometimes accurately forecast the results of civil and criminal litigation over a particular use of force incident.⁶ The protocol then, must call for timely review of the incident by the trainers--but their review must be comprehensive; they should not be asked to answer a few specific, out-of-context, or hypothetical questions.

or detention (hence, a “seizure”), and in the courts, it is the standard that *will* be applied to determine whether a use of force amounts to an unconstitutional deprivation under the Fourth Amendment. *See: Graham v. Connor* 490 U.S. 386 (1989).

⁶In the practice of law defending law enforcement officers and agencies in all manner of use of force cases, I have found it helpful and mostly necessary to “teach” jurors about police use of force, how the rules of engagement work, how continuums function, and how the principles of escalation and de-escalation operate. They must understand “lag time”, and appreciate the physical and psychological phenomena that operate on the officer in the dynamic use of force incident. For all of this, I depend on the trainers as expert witnesses. The jury, now thoroughly conversant in use of force principles, will next hear from the officer about his training, and how he applied it in this incident. Quite simply, I would rarely attempt defense of a use of force case in civil or criminal litigation without plenty of expert testimony from the trainers.

That is a disservice to everyone involved, and it will invariably lead to a disaster.⁷

6. THE INVOLVED OFFICERS' INTERESTS: "Taking The Fifth" And Other Civil And Administrative Concerns.

The involved officers' decision to invoke his right against self-incrimination will likely constitute the single, most profound development in the global view of the use of force incident. For example, that single decision removes the statements of the involved personnel who are targeted for prosecution instantly from the reach of the criminal justice system. While compelled accounts based upon pain and penalty of insubordination are usable in an administrative context, and perhaps in a subsequent civil action⁸, "use immunity"

⁷ There are no less than 15 variables that must be considered in the use of force equation. A trainer or expert who is queried by investigators or managers on a specific point, may answer in a particular way because he or she is unaware of the other variables, which, when later developed, perhaps by cross-examination, will cause this witness to either reverse the opinion, or at least, withdraw it. Trainers and use of force experts operate in a "totality of circumstances" environment. They don't do well with selected, limited facts taken out of context.

⁸ But see, *California Government Code* §3303(f) reads:

No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding. This subdivision is subject to the following qualifications:

(1) This subdivision shall not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.

(2) This subdivision shall not prevent the admissibility of statements made by the public safety officer under interrogation in any civil action, including administrative actions, brought by that public

attaches to the statement, precluding its use *for any purpose* in a subsequent criminal case, absent waiver. Here the officer's interests are bound to collide with all others, because it may well be in his or her interest to remain silent and *not speak*, when every other interest demands disclosure and revelation. Agencies should not encourage officers to waive their rights, and should not *discourage* them from exercising their rights to counsel and silence, in order to benefit the fact-finding mission. Long after the department's interest in "getting to the truth of the matter" is satisfied, the officer may be left "twisting in the wind" as the result of incriminating admissions made at a time before he had counsel or could, in any way, appreciate the fact that his voluntary account of the use of force would later furnish a "link in the chain of evidence" called up by the prosecutor to argue for the officer's conviction. The involved personnel are required to make the "public safety statement" in certain cases, but beyond that, they should never be encouraged or influenced to waive their Fifth Amendment rights. The protocol *must* permit and allow for protection of these important individual officer civil rights.

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7. THE PUBLIC AND MEDIA INTEREST: Managing The Public

safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) This subdivision shall not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) This subdivision shall not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

And, of course, although there is no case yet specifically so holding, this state statute would quite likely be ignored in a federal court entertaining a federal claim.

Information Function In The Use Of Force Incident.

In our experience, public safety administrators most often err in saying too much, rather than saying too little, in use of force cases that attract immediate media attention and public interest. Often, the public interest is only aroused because of the media treatment (spin) of the event. But, as the flames of mounting community criticism are fanned by an unscrupulous media, bent on whipping up controversy over an "out-of-control" police force, the stage is set for the police chief or sheriff to step up and make an improvident statement to appease an angry citizenry, that he or she will later regret; but once said, may irreparably harm the involved officers' interests. I cannot imagine why it is necessary to say anything more than, "the incident is under investigation and I will have no comment until the investigation is complete". The late Los Angeles County Sheriff Sherman Block was masterful in his "no comment" sound bites--somehow he instilled confidence in the listener that he was in control, and conveyed a definite "the buck stops here" image, without saying much, if anything of consequence to an unfolding controversy, whether it be allegations of jail brutality or a deputy-involved shooting. But, even the media-savvy Chief Daryl F. Gates was occasionally spurred into making regrettable statements about particular use of force cases. His much-televised statements about the officers in the Rodney King incident, after reviewing only the infamous video, did more to prejudice their chances of vindication than anything the Department's detractors could stir up. After all, "if Gates won't defend his cops, they must be guilty". Gates was under unbelievably intense political fire, and, I suppose, had to say something--but his comments were based only upon a subjective review of the video, without any understanding of the officers' position in the case. It wasn't until more than three years later, during the civil damages trial (*King v. City of Los Angeles*) after Koon and Powell were convicted in the politically-charged and unprecedented federal prosecution following the state acquittals, that Gates testified that the Department had let the officers down: "All we gave those officers to use out there was a Stone-Age metal club".⁹ By then, it was too

⁹ This testimony referred to, among other things, the fact that the City had, ten years before the

late for the police chief to acknowledge that the wrong persons were on trial, and that policies were at fault. If anybody should be on trial, it is the policymakers.

Captain Greg Meyer, LAPD, suggests that police and city or county leadership should speak to "calm the waters", providing a sense of accountability, while protecting the integrity of the investigation and the rights of those involved. Captain Meyer suggests that leadership might say, in the event of a major incident which has triggered public concern or outrage, something like this: *"This is obviously a difficult situation for all concerned. Out of millions of street encounters each year, there are bound to be a handful of controversial incidents. We are committed, as we always are, to conducting a thorough, fair investigation by experts to determine the truth of what happened. If there are lessons to be learned from the incident, they will be learned through a series of objective review processes, not by emotion generated by the event or the media attention surrounding it. Police operate in circumstances that are tense, uncertain, and rapidly evolving. The courts recognize this, and give the police wide latitude and discretion in the application of force as we seek to protect society. In reality, your police typically do a pretty good job in meeting the near impossible demands we place upon them. I realize that this is a controversial incident, and we are committed to resolving it. It is understandable that the friends and families involved are highly concerned about what has happened. The concerned families include those of the involved civilians and the officers themselves. No good can come from the additional emotions and tensions, stirred up by well-meaning and no-so-well meaning activists and special-interest groups, who seek to influence the course of what is supposed to be a proper, objective investigation, or those who have prejudged the outcome to suit their own purposes."*

King incident, eliminated the carotid restraint from the use of force continuum, replacing it with the baton, which, with the Taser, kicks and mace (later, OC) constituted the tools of intermediate, non-lethal force. But, as Sergeant Koon and other experts and trainers testified, the carotid could and would have been used, but for the moratorium.

Regardless, even if the public information contribution by the department's media relations officer is a tight-lipped "no comment", the protocol must embody allowance for the media interest and the public's "right to know".

PART TWO

A CATALOGUE OF NEEDS AND OBJECTIVES IN THE MAJOR FORCE EVENT

It is common today in personal injury litigation on both sides of a case, to retain experts in engineering, biomechanics, ballistics, photography, projection photogrammetry and other forensic sciences, to *reconstruct* the scene, and as nearly as possible, the mechanics and dynamics of the injury event.

In the defense of police litigation over the last decade, some of us have borrowed techniques from the best plaintiffs' lawyers in high-stakes personal injury litigation, and adapted these techniques and programs to defense of police use of force, with good results. Elaborate scene reconstruction, supported by a number of forensic science experts is an extremely expensive undertaking for the personal injury lawyer. So, the use of these techniques has usually been reserved to the really "big money" cases, and not for customary auto accident and "slip and fall" lawsuits. Nearly 20 years ago, I was retained by a small, southern California coastal city to defend it, and its officer, in a jail death case. The cause of death was blunt force trauma, likely head-in-motion, which produced a fairly serious skull fracture, and cardiac arrest hours later, according to the autopsy report. It developed that in removing the thoroughly-drunken prisoner from the car to the jail, two officers attempted a "baton carry" which slipped, and dropped the poor fellow on his head. Since that misstep appeared not to have caused any external injury, the officers did not report it nor take any other precautions. In his jail cell, the fellow appeared to be sleeping upon each jail check, until hours later when it was noticed he was no longer breathing. I had become acquainted with Dr. Carley Ward of Pacific Palisades, California, who was a leader in the relatively new field of biomechanics, or the application of the principles of mechanical engineering to the human body,

as a deformable mass. In particular, I defended her and the City of Orange Police Department in a civil rights case arising out of an infant homicide conviction wherein she testified for the People, that the cause of death couldn't have been an accidental stairway fall, as claimed, but rather severe blunt force applied to the child's head. Recalling her expertise in head trauma and injury, I called upon Dr. Ward to help me "reconstruct" the baton-carry fall. Her conclusion: the fall, as reconstructed, did not cause the fatal skull fracture. That helped a little, but obviously we still had a problem, because after all, the fellow died in the city jail. However, the parents of two youths read about the case in the newspaper, and before long, two burly young high school football players came forward to admit they had been involved in a street confrontation with a drunk, and he had been knocked to the sidewalk. He got up and stumbled away. *Yep, this was our guy.* He was probably hemorrhaging then, but subsequently passed out on the sidewalk a couple of blocks away. The paramedics checked his vitals, and pronounced him "just drunk--ok to book", whereupon the officers took him to the jail. A reconstruction of the confrontation on the sidewalk showed that the skull fracture occurred then, not in the jail sallyport. These were two of Dr. Ward's first cases, testifying as an expert in injury event reconstruction. Since that time, she and her colleagues at Biodynamics Engineering, Inc., of Pacific Palisades have reconstructed injury cases ranging from police shootings and baton force cases to defective product cases against helmet manufacturers and automakers, by the hundreds.

The point of this illustrative example is that an investigative protocol must provide for sufficient fact

and data gathering to permit reconstruction of the event at a later time. Naturally, it would be best to mobilize all of the necessary experts and scientists as part of the initial roll-out, but that is hardly justifiable as the customary response in a major use of force event. So, the next best thing to do is to recognize what data will be required later, and make sure that your protocol provides the procedure for obtaining that information as close in time to the event as possible.¹⁰

In this second part of this paper, we need to catalogue our needs and objectives in the investigation of the major force event. This catalogue can be transformed into an orderly protocol to be applied in the field, as the particular situation dictates.

1. IDENTIFICATION AND PRESERVATION OF THE SCENE:
The Field Laboratory For The Reconstructionist.

“Taping off the crime scene” is as familiar an expression to the police officer as are handcuffs, diagram templates, and fingerprint powder. Every police academy graduate knows that every crime scene needs to be identified and isolated as quickly as possible. Evidence within must be identified, photographed *in situ*, collected, replaced by an observable number or letter identifier, preserved, marked, catalogued, and listed on an index. Broad or panoramic scene photography, with the number or letter identifiers in place, will show the relative positions of the various items of evidence. Spatial relationships between various items of evidence, measured and photographed are very important to accurate reconstruction.

¹⁰ Keep in mind that in court, the most effective way to attack any expert with regard to his opinions, is by showing that his assumptions, upon which his opinions are based, are flawed or mistaken. Hence, if your reconstruction expert has been forced to rely upon insufficient or incorrect data for his assumptions, he will be impeached if your adversaries either know the data he relied upon is wrong, or worse yet, have the correct data. Clearly, the time to get all of the information and data that will be needed in the case is *as soon as possible*, during the initial investigation.

Some evidence considerations that figure into initial investigation of a homicide scene should be employed in an OIS, whether death results or not, and to any other major force incident or law enforcement activity related death investigation. The number and kinds of evidence available in a major force investigation may not be as great or varied compared with the typical homicide scene, but the importance of gathering the evidence that *is* there, cannot be overstated. Most importantly, we don’t want to miss or overlook evidence that will then be lost forever.¹¹

2. RECOGNIZING AND IDENTIFYING THE TYPE OF EXPERTS THAT WILL BE NEEDED: Knowing Your Experts.

How can we begin to do an adequate job of preserving evidence at the scene, if we do not know what kind of forensic experts will reconstruct the scene? The answer to this is partly experience-based and partly common sense. For example, minimally, in a shooting case with a hit, you should consider collecting and creating evidence for: (1) a ballistics (trajectory analysis) expert; (2) a medical expert for gunshot wound ballistics, (including precision measurement for eventual projection photogrammetry, and placement of objects,

¹¹ In seminars I have done in the past, some audience members looked at me as though I was from another planet when I suggested that a use of force event reconstruction and “walk-through” (*see*: Part Three, *ante*) should be performed at the end of a videotaped pursuit where a major baton-swinging use of force occurred in connection with the arrests. Evidence of the “reasonableness” of the force used may well be found at the scene, and not apparent in a videotape taken from a news helicopter some 2000 feet above, because of the inherent limitations in the two-dimensional images of video film. There are many things that can be observed at the scene that figure into the case that one could never discern from a video or panoramic photography. As we point out in Part Three, a contemporaneous visit to the scene and a “walk-through” with the involved officers is absolutely critical to proper scene reconstruction. Do not overlook this aspect. The consequences of failure can be disastrous.

persons and evidence in correct spatial relationships for reconstruction; the weapons involved, including photography, shell casings collection, counting of expended and unexpended rounds, the location of all shots and trajectories); (3) the biodynamics expert, who will help you reconstruct the event by reference to the evidence and data you collected in (1) and (2) above; (4) an expert forensic photographer, who will visually recreate the scene, as it appeared, for the reconstructionist; (5) a training and policy expert, who will, based on all the evidence, determine whether the tactics and shoot were within training or otherwise;¹² and (6) a use of force expert, who will give an opinion on the ultimate question: was the use of force “objectively reasonable”, regardless of everything else?

Other cases may, upon consideration, call for different or additional expert evaluation. The point is, start thinking about these issues early on, so that the proper arrangements for preservation of the evidence that will be required, are made in a timely fashion.

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3. THE “PUBLIC SAFETY STATEMENT”: Gathering Initial Information From The Involved Personnel.

The first supervisor on the scene of a major force event or OIS has a lot of responsibilities. Among the most important and immediate needs is to obtain information from the involved personnel that affects the public safety. These are considered exigent circumstances, and the supervisor cannot await the arrival of representatives or attorneys for the officers, nor the OIS team, internal affairs, or the commanding officer. It is therefore accepted among knowledgeable officer

¹² Remember that a certain use of force can be outside the Department policy, but yet entirely “objectively reasonable” under the Fourth Amendment. In these cases, you may need more than one expert: “training and policy”, and “use of force”.

defense counsel that the officers shall cooperate freely in helping that first arriving supervisor in handling his responsibility. Typically, these “public safety” statements will concern suspect(s) outstanding, physical descriptions, direction of flight, known arms, vehicle(s) description, number of shots fired in all, and direction and estimated trajectories, location of wounded and weapons, need for medical aid or ambulances, scene parameters, and other facts that are needed to assess any continuing risk to public safety.¹³

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4. THE PHYSIOLOGICAL AND PSYCHOLOGICAL CONSIDERATIONS: Involuntary Responses And How These Affect Perception And Reaction.

The existence of predictable physiological and psychological reactions to sudden violent or life-threatening experiences in police work are well-known. The presence of threat and fear are known to be partly responsible for an officer’s ability to meet the threat and survive. Seen in this light, these automatic responses to sudden danger are helpful to the officer in mobilizing and focusing his body’s energy and senses on the threat, and dealing with it. However, these same automatic

¹³ This listing is again, illustrative not exhaustive. The public safety implications of a major force incident will vary from incident to incident; there may be no continuing public safety concerns, or there may be many. But the protocol must provide for this eventuality, so that its importance is appreciated by all involved, and the limits of the “public safety” interest are understood. Detailed statements about how the event unfolded are beyond the scope of the “public safety” inquiry. On the other hand, the supervisor should make it clear to the involved personnel that the information is required immediately, on pain of insubordination.

responses to danger affect perception, and cause what some commentators refer to as “altered states of consciousness”. The interplay of these forces upon audio and visual exclusion (referred to as “tunneling”), distortion of time and space, interruption in the mind’s ability to process and recall rapidly-evolving events in the proper order (“sequencing”), and other phenomena that affect the senses and perception, exist to some extent in every violent confrontation where an officer is suddenly placed in great fear, and must respond to neutralize or eliminate the threat.¹⁴

The protocol needs to make provision for consideration of these phenomena, which may legitimately explain differences in perceptions, recollections, observations and responses on the part of the involved officers, all of whom are looking at the incident unfold through their individual “tunnels”, not shared with anyone.

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5. ASSESSMENT OF POTENTIAL CRIMINAL IMPLICATIONS IN THE USE OF FORCE: “When It Begins To Look Bad”.

Any use of force or police-related death carries the potential that the officer’s conduct may be criminal, and lead to a prosecution. Fortunately, this is the exception, but the risk inherent in the mere possibility is so substantial that the protocol must call for early and continuing assessment of this potentiality. It may be that under your department policy, the responsibility for the investigation may shift, change or bifurcate as soon as it appears that the officers’ conduct may be criminal.

¹⁴ For an excellent discussion of the impact of fear, see “Coping With Vulnerability: The Dynamics of Fear in Critical Incidents and Training Implications” by Dr. Roger M. Solomon, PhD., Department Psychologist, Washington State Patrol, included herewith.

6. THE JURISDICTIONAL ISSUES: What Happens When The Force Event Occurs Outside Of The Employer’s Jurisdiction.

Especially in metropolitan areas, events often begin in one jurisdiction, and travel through or into several others before the event is brought to a proper close. Sometimes multiple force events occur over the route of travel or activity, or may happen only at the terminus of the event, but yet still in a different jurisdiction than the officers’. Other times, an off-duty officer may be involved in a force event in another jurisdiction.

It is generally accepted that the responsibility for any *criminal* investigation rests with the agency having jurisdiction over the site of the alleged criminal activity. Clearly, the protocol must take these variables into account, because the situation will unfold much differently from that where only one jurisdiction is involved. Your investigators need to clearly understand how the usual investigative steps may be altered when multiple jurisdictions are involved.

7. THE VISIT TO THE SCENE: The Walk-Through--The Most Important Investigative Step In Force Event Reconstruction.

No force event reconstruction would be possible without a carefully-executed visit to the scene or “walk-through”. A lot of agencies use this technique, but the timing is critical, and it should not be limited to OIS incidents, but applied to any major force incident investigation. And, it must be emphasized that the purpose of the technique is not so that the officer can help the investigators understand how the incident developed. The primary reason to do a revisit or walk-through is to permit the officer(s) optimal opportunity to recall all aspects of the event, and “reconstruct”, in their own recollection, initially, how the event unfolded. The seasoned use of force investigator will use the opportunity to assist the officer in recalling the event by carefully probing the officer’s memory at each step of the walk-through of the event, helping him recall what he did and why. The investigator must, as nearly as possible, stand in the shoes of the involved officers,

individually, in order to perform this technique correctly. As the investigator learns additional facts that make the reconstruction version unlikely, he must work through these with the officers until the investigator is satisfied that the recollections are consistent with other evidence, or that he has exhausted every reasonable way of resolving inconsistencies. Until this point is reached, the officer should not be committed to a formal or memorialized statement of the event. Most importantly, *he should never be directed to write a report about the force incident.* After all, one would read a report to gain insight into how something happened. In a violent, dynamic OIS or major force incident, one of the poorest ways of determining what happened is to ask the officer who has just emerged from this life-threatening combat, to make a statement without assistance, and include accurately every important detail. If this sounds problematic to you, why would you direct that same officer to write a report, and thereby commit to what will likely be an incomplete and inaccurate account?

The protocol must spell out how the walk-through is to occur, when it shall be done, who will be present, and what other investigative techniques will be included with the technique.

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8. PHOTOGRAPHY AND SEIZURE OF FIRED WEAPONS, BLOOD SAMPLES AND PSYCHOLOGICAL DEBRIEFING: Mandatory Provisions In Every Case.

The protocol must provide for the seizure of each weapon that is fired in the major incident. However, the weapon should be left in the officer's holster, until preparations are made to remove it, photograph and inventory live rounds and/spent cartridge casings (if a revolver), all in the presence of the officer. His duty weapon should be immediately replaced with a suitable substitute.

Blood tests of officers and suspects should be mandatory in cases where injury or death results, in order

to prove the absence or presence of intoxicants or drugs. Psychological debriefings should be mandatory in every case where serious injury or death results from a law enforcement activity, use of force, or shooting. Any stigma associated with these processes can be minimized or eliminated by simply making them mandatory in every case. Employees go along with these processes much more easily if they understand that they are mandatory in all such cases, and that the subject employee is not being "singled-out" arbitrarily for the distinction.

9. INVOLVED OFFICERS' RIGHTS AGAINST SELF-INCRIMINATION AND OTHER CONCERNS: "Taking the Fifth".

The conflict which can arise in any use of force investigation springs from an officer's absolute right to refuse to answer questions which may incriminate him. If, on the advice of counsel, or upon his own volition out of an abundance of caution, the officer asserts his right to silence, the inquiry "for all purposes" is at an end. Once this occurs, the department has a choice: it can either stop any questioning altogether, or it can "bifurcate" the inquiry into administrative and criminal prongs, give the officer the familiar "*Garrity-Lybarger Warning*", and proceed to compel answers for administrative purposes only.¹⁵ Once compelled statements of a potential accused officer come into the hands of the department, great care must be taken to shield these statements and their fruits from review by prosecutors or "criminal" investigators--otherwise, the prosecutorial authority has a difficult burden in demonstrating that the compelled statement has not, in any way, benefitted the prosecution of the officer-

¹⁵ See: *Garrity v. New Jersey*, 385 US 493 (1967); *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822; see also: "Taking the Fifth", Parts, I, II, and III, authored by Michael P. Stone, 1998, published in various publications, and available from the author upon request. This trilogy is an exhaustive treatment of the Fifth Amendment in the context of "course and scope" administrative and criminal investigations of police officers.

declarant under the rules established in *Kastigar v. United States*, 406 US 441 (1972), and *People v. Gwillum* (1993), 223 Cal.App.3d 1254.

Moreover, some departments are reticent to compel statements from officers during the initial stages of a major force or OIS investigation. The danger here is that the department may, while seeking to avoid a compelled statement, encourage the officer to “waive” his rights against self-incrimination, so that a proper case for prosecution can be assembled against the criminal suspects whose conduct was the reason for the officer’s initial engagement. The problem with this approach is that while the investigators may, in good faith, believe that the officer is risking very little or nothing by cooperating, because the force *appears* justified, the ultimate decision to charge the officer rests with an independent prosecutor who may well view the case differently from the investigators. The protocol therefore must be designed to accomplish the objectives *without* a “for all purposes” statement from the officer(s). Investigators should *assume* that a reasonably intelligent and cautious officer will *not* waive his rights, and plan and execute the investigation accordingly. If the officer’s account is really necessary and critical to prosecution of a third party, inquiries should be carefully limited to evidence of the third party’s criminal conduct, and *avoid* discussion of the officer’s use of force, so as not to draw a refusal to answer on Fifth Amendment grounds. Further, as we demonstrate in Part Three of the Protocol, participant officers should be carefully segregated into two major groups identified as “involved” or “percipient” officers. Interviews should be organized so that the percipient officers are thoroughly interviewed first, to exhaust efforts to obtain information from those who have no real Fifth Amendment concerns. “Involved” officers should be queried for the third party criminal case only after interviews of the percipients are insufficient to assemble the case, and only then, to be focused only upon the criminal suspects’ conduct.

PART THREE

A PROTOCOL FOR OFFICER-INVOLVED SHOOTING, MAJOR FORCE, AND LAW ENFORCEMENT ACTIVITY-RELATED

DEATH INVESTIGATIONS

1. DEFINITIONS

* *“involved” personnel* - those members whose acts or omissions are directly connected to the shooting, use of force, or other law enforcement activity which has resulted in death.

* *“percipient” personnel* - those members who, although present or on scene and observing some or all of the events connected to a shooting, use of force, or other law enforcement activity which resulted in death, are not directly connected to the injury event by their acts or omissions.

* *“participant” personnel* - those members who are either “involved” or “percipient” personnel with respect to the particular shooting, use of force, or other law enforcement activity which has resulted in death.

* *“public safety statement”* - in the immediate aftermath of an officer-involved shooting, major use of force, or serious injury event, there are certain emergency considerations which must be effectively addressed without delay. These considerations affect public safety and consist of, among others, outstanding suspects and their physical descriptions, direction of flight, known arms, vehicle descriptions, number of shots fired and directions with estimated trajectories, location of wounded, need for medical aid and ambulance, and scene parameters.

2. IMMEDIATE RESPONSIBILITIES OF PARTICIPANT PERSONNEL

* Handcuff and secure *all* suspects without delay, even those who appear to be, or are, mortally wounded. Remove and secure any weapons from each suspect’s person or presence, carefully protecting for fingerprint, blood spatter, gunshot residue, and other types of forensic evidence.

* Make careful determinations of the nature and extent of need for medical care, and request appropriate medical personnel and equipment (i.e.,

paramedics and rescue ambulance) to provide necessary medical attention and transport at scene.

* Request a supervisor immediately, and if appropriate, provide information on direction and approach to scene.

* Request additional personnel and resources as necessary to establish a perimeter, provide crowd or traffic control, isolate witnesses, search for suspects, or to see to other exigencies present or soon to develop.

* Continue to coordinate arrival of responding law enforcement and emergency personnel with a view to the tactical situation, officer and citizen safety, scene and evidence preservation, and care of wounded persons.

* Be mindful of evidence. If it is tactically safe to do so, leave all evidence as is. If it is necessary to move an item of possible evidentiary value, mark the location as soon as possible. Do not replace any item once it has been moved--rather, secure it and mark its location. Be mindful of fingerprint evidence.

* As soon as it is prudent to do so, reholster your weapon and secure other firearms, rendering them safe, but not otherwise changing or altering the final condition or state of the weapon. Locking the weapon in the trunk of a supervisors’ car, after placing the weapon in a clean box or on a piece of paper, is an effective procedure to secure the weapon and preserve evidence if the weapon is carefully handled. Also if someone at the scene has a Polaroid or other camera, and the tactical situation is under control, it is a good idea to quickly snap some photographs to record the essentials of the scene before weapons or evidence items are moved. By the time the forensic photographers arrive, some necessary actions (such as securing a weapon in a trunk) may have altered the scene.

* As the situation and circumstances permit, identify and isolate witnesses. Obtain good identification from them, but do not interview them. Ask them to await arrival of the investigators, or

arrange for their transportation to the nearest police facility.

*Do not respond to questions from persons other than Department investigators, unless instructed by proper authority to do so, such as bystanders, news media representatives, residents, etc.

*Do not write any reports or statements which concern the shooting, or use of force, or the injury event.

*Prepare yourself to provide the required "public safety statement" upon the arrival of the first supervisor on scene, as that term is defined in this protocol.

3. RESPONSIBILITIES OF FIRST SUPERVISOR ON SCENE

The first supervisor to arrive at the scene of an officer-involved shooting, major use of force, or law enforcement activity related death, has significant responsibilities which require the cooperation of all personnel on scene in order to assure optimal effectiveness. Among the necessary duties are the following:

*Maintain tactical control of the scene and incident, and establish a perimeter when appropriate, request necessary additional personnel and deploy them, oversee or execute a search for outstanding suspects, and see that timely and proper communications broadcasts are instituted as necessary.

*Determine which personnel are "participant", "involved" and "percipient".

*Obtain the "public safety" information from the participant personnel but avoid discussion of the details of the event, or the officers' perceptions, assessments, states of mind, tactical judgments, justification for force and other "investigative" facts.

*Arrange for transportation of the participant personnel to the nearest police facility. Permit them to notify their legal representatives of the event.

*Direct these personnel to refrain from discussing the events except with department investigators assigned to investigate the shooting, use of force, or death, or with their legal representatives.

*Caution "involved" personnel not to unload, reload or otherwise alter the condition of their weapons.

*Ensure that appropriate notifications are made to proper organizational units and command personnel, according to the nature of the event, degree of media interest, continuing threat to public safety, and other variables that affect the necessity of notification.

*As soon as time permits, see that the scene is taped off, and that entry is strictly limited to necessary persons. Medical personnel should be cautioned to avoid disturbing evidence, except as necessary. Caution personnel to avoid moving or tampering with any item of potential evidentiary significance, and to report the existence of any such potential evidence and its location. Select one uniformed officer to serve as a crime scene monitor and to maintain a crime scene log of persons at or entering the scene, the time and the purpose.

*Arrange for witnesses to be transported to the nearest police facility to be interviewed by incident investigators.

*Arrange to have a sufficient number of officers remain with any suspects who are transported for medical care, and to take careful note of any spontaneous statements made, but not to interview the suspects otherwise. Photographs of clothing and wounds before treatment are very helpful, if possible. Any clothing removed from any suspect, even if cut off by medical personnel, should be seized as evidence and preserved in the customary way, with due regard for blood-borne pathogen safety protocols.

*Arrange to have another supervisor accompany and remain with the participant officers at all times. Caffeine intake should be limited. Participant officers will not be permitted to write any statements or reports. Contacts between participant officers and command officers will be monitored, and

participants are not to discuss the incident with anyone other than assigned investigators. The supervisor should try to foster a calming and reassuring atmosphere. Permit the personnel to call their families to advise that they are safe and will likely be detained beyond normal E.O.W.

4. INVESTIGATIVE RESPONSIBILITY¹⁶

*All Officer-Involved Shootings wherein either an officer or other person is wounded, all "major use of force" incidents, and all law enforcement activity-related death incidents shall be the investigative responsibility of the designated team of Staff Inspections Group (SIG), as determined by the Commanding Officer, SIG, upon notification of the incident¹⁷.

*All non-tactical accidental shootings without injury and all intentional shootings without personal injury, including animal shootings, shall be investigated by Internal Affairs Group.

¹⁶ Investigative responsibility for these incidents by organizational entity or unit will vary from agency to agency. The importance of having a specially-trained unit to assume immediate investigative responsibility with "roll-out" capability cannot be overstated. However, when performing the responsibilities under this protocol, the team performs directly for the Chief of Police or Sheriff, and the investigative product is considered a protected and confidential, *administrative* investigation.

¹⁷ The designation of "Staff Inspections Group" and "Internal Affairs Group" is illustrative only. Every agency of course, depending on its size and organizational structure, will determine which unit shall have responsibility for the investigation of the various categories of cases. "SIG" and "IAG" are simply fictitious. The importance is, that the protocol must clearly define these responsibilities, and the units responsible.

5. NOTIFICATIONS OF INCIDENTS TO STAFF INSPECTION GROUP AND INTERNAL AFFAIRS GROUP

*The on-duty Watch Commander shall have responsibility for timely notification to the Commanding Officer, Staff Inspection Group (SIG) for all incidents within the investigative responsibility of SIG, as shown in §4. above. Likewise, the watch commander shall make timely notification to the Commanding Officer, Internal Affairs Group (IAG), for all incidents within the investigative responsibility of IAG.

*The Watch Commander shall keep record of the dates, times and persons notified, and shall keep informed of estimated arrivals on scene of investigators, to permit the on-scene supervisor better coordination capability.

6. ARRIVAL OF RESPONSIBLE INVESTIGATORY TEAM AT SCENE

*Responsibility and command of the incident shall vest in the assigned investigatory team upon its arrival on scene, or at an earlier point where, under the circumstances, it is prudent to transfer such responsibility and command from the on-scene supervisor to the responding investigators, and the investigators have expressly assumed such responsibility. Until that time, the on-scene supervisor shall remain in charge of the incident and scene, and responsible for the proper conduct of activities under this protocol.

7. ASSESSMENT OF CRIMINAL LIABILITY OF INVOLVED PERSONNEL

*Among the several most important responsibilities of the officer-in-charge or senior investigative officer of the responding investigative team, is the *continuing duty* to analyze and assess the potential for criminal liability of any involved officer. If potential criminal liability is present, it is highly preferable to make this determination *prior* to any contact between involved officers and investigators, by resort to information and observations from other

sources. Even if not apparent at the outset, investigators must be constantly alert to this potentiality. In the event that it appears there may be potential criminal liability on the part of any involved personnel, the Chief of Police (Sheriff) shall be immediately notified by the officer-in-charge. A determination will then be made to have SIG continue with responsibility for the administrative investigation, or to suspend its work, as investigative responsibility is transferred to another unit or agency.¹⁸

8. PREPARATIONS FOR ADMINISTRATIVE INVESTIGATION AND INTERVIEW OF PARTICIPANT PERSONNEL

*Prior to any interviews of participant personnel, an admonishment shall be given to each consisting of the following:

(1) the investigation is administrative in nature and strictly confidential.

(2) each member is under an affirmative obligation to cooperate and provide truthful, accurate and complete responses during the interviews.

¹⁸ The critical point here is that should this occur, the investigation becomes solely a criminal inquiry. An outside agency cannot be brought in to conduct the administrative investigation, because of conflict with the officers' Fifth Amendment rights. Nor can an outside agency (district attorney, for example) be included to participate in the administrative investigation being conducted by the department, for the same reasons and also because of waiver of confidentiality. For a disastrous example of what can happen when these lines are crossed, see: *People v. Velez* (1983) 144 Cal. App.3d 558--city police officer had no Bill of Rights Act (Gov't Code §3303) protection nor Fifth Amendment use immunity for his "voluntary" statements to sheriff's investigators called in by police chief to investigate accidental shooting of records clerk by officer.

(3) failure to do so will result in charges of insubordination and neglect of duty which may result in removal.

(4) since cooperation is compelled by threat of discipline for failure, information and its fruits obtained in the interview cannot be used for any purpose in a subsequent criminal matter against the member.

(5) complete "Miranda" and "Lybarger" warnings shall be given. The administrative advisement form shall be completed and maintained as part of the administrative investigation.

9. ELEMENTS OF THE INVESTIGATION

*Upon their arrival at the incident, the investigative team may elect to conduct a preliminary interview of the participant personnel at the police facility where they are situated after being relieved at the scene.

*The order in which the interviews are conducted is important to the investigators' continuing duty to assess the potential for criminal liability on the part of any involved officer. Percipient personnel should be interviewed first, as well as civilian witnesses. Next in order would be the involved personnel; those with least involvement first. In this way, if potential criminal liability of an officer becomes evident, it may be revealed before the interview of that officer, and the notification made to the Chief or Sheriff, and the determination of whether to transfer, bifurcate or otherwise modify the investigative protocol can be made in a timely fashion.

*Experience has shown that it is rarely helpful to immediately commit participant personnel to a formal, tape recorded statement, before the visit to the scene and "walk-through" process.

*Once preliminary interviews are completed, and statements have been taken from civilian witnesses, the participant personnel should be returned to the scene for the walk-through process.

*Again, the primary purpose of the walk-through is to permit the participant personnel optimal opportunity to recall how the event unfolded, and to recall their observations, perceptions and assessments that precipitated the use of force. However, the walk-through also, of course, enables the investigators to “stand in the shoes” of each of the officers, so that the investigators can better understand how the event developed, and can resolve conflicts and inconsistencies in the various statements obtained earlier. We know that in a rapidly-evolving, dynamic force event involved personnel will be affected in their recall and sequencing by the intervention of psychological and physiological phenomena that usually accompany sudden, violent encounters. Patience on the part of the investigatory team, assisting the officer in sorting out his or her recollections and reconciling apparent conflicts and inconsistencies is crucial to the quest for accuracy and truth.

*As with the preliminary interviews, personnel should be “walked-through” their individual involvement individually, in the *same order* as the preliminary interviews, for the same reasons.

*The only persons who should participate in the walk-through are the investigators, the officer, and perhaps, the officer’s representative. Since the participation of the officer is compelled, use immunity attaches to the statements of the officer just as in the preliminary interviews. The presence of criminal investigators or outside agency personnel creates the problem of either taint, or perhaps waiver of use immunity and should therefore, be avoided.

*During the walk-through, appropriate measurements and photography can be taken.

*Once this process is completed, the officers can be returned to the police facility, and formal statements are taken, and documented. Leading questions are to be avoided. Rather, each officer should be permitted to articulate his own recollections with appropriate questioning by the investigator. The final interview should be tape-recorded. Caution should be exercised to fully develop the officer’s observations, perceptions, assessments and state of mind as his description of the incident is developed.

Department policies which are implicated in the event should be reviewed, and the officer’s training and application of that training in the event should be thoroughly examined.

*Before officers are permitted to change clothes, they should be photographed from front, rear and both sides, full standing views. In a shooting case, the weapon should be fully photographed as it is unloaded and examined.

*A scaled diagram of the scene containing precision measurements is of significant help in subsequent reconstruction of the event. Sufficient measuring and surveying should be done to permit reconstruction of the placement of objects and the positions of persons at a later time.

10. RELATED THIRD PARTY CRIMINAL INVESTIGATIONS

*Usually in connection with a use of force incident, there will be a related criminal investigation into the acts and omissions of third parties (hereafter, “suspects”) which precipitated the use of force. These investigations must necessarily be conducted separately and independently from the administrative investigation.

*The investigative responsibility for these investigations will usually remain with the customary unit or division that would otherwise handle the case without the use of force element, unless an officer is injured, in which event the investigation may be handled by a special section.

*In any event, interviews of participant officers should be focused upon the conduct, acts and omissions of the suspect(s), and not upon the conduct of the officers, who may be “victims” in the investigation. The use of force by officers should only be referred to briefly and generally, if necessary.

11. OTHER AGENCIES INVOLVED

*When the force incident, shooting or law enforcement activity-related death occurs in another jurisdiction connected with the actions of on-duty *or*

off-duty personnel, the protocol applies to control the conduct of the administrative investigation, however, accommodation must of course, be made for the agency with jurisdiction over the incident to conduct its own investigation.

*Still, confidentiality and independence of the administrative investigation must be maintained, and while cooperation is necessary and helpful to all, the investigative product of the administrative investigation cannot be shared with the agency, which must be permitted to conduct its own independent investigation.

*The question which inevitably is presented is the extent to which participant officers will or should cooperate with the agency having jurisdiction. This involves a sometimes complicated legal analysis and suggests that the participant officers may want to avail themselves of legal advice before deciding whether, and to what extent, they should cooperate with outside agency interviews.

*The reason, again, is waiver of the right against self-incrimination. If the officers voluntarily speak with outside agency investigators, they will waive their rights, and if there is a criminal action commenced against these officers, their statements would be admissible for all purposes, against them. Hence, it is not advisable to encourage participant officers to cooperate, or to discourage them from asserting their Fifth Amendment rights.

*Arguably, if the employing police agency, through a supervisor, were to "order" a participant officer, on pain and penalty of insubordination, to speak to investigators from outside agencies, any statements made by the officers pursuant to the orders would be compelled, and thus immunized.

*And, the reality is that criminal justice agencies have little or no interest in receiving compelled or "tainted" statements from officers, so this situation just does not come up.

*It therefore can be seen that the officer, with or without a representative, will have to make the determination of whether and to what extent the officer

will cooperate with an outside agency investigating a potential criminal use of force. Realistically, the advice from knowledgeable counsel will be to invoke the right to silence if there is any risk of self-incrimination, at all.

*When officers from another agency are involved in a shooting, use of force, or law enforcement activity related death, their employing agency will be solely responsible for any administrative investigation of the event. If their presence in this jurisdiction is due to hot pursuit of a criminal suspect or investigative follow-up, the outside agency will continue to maintain responsibility for the investigation of related criminal conduct. However, where the shooting or use of force incident is unrelated to a crime in the outside agency's jurisdiction, this department will handle the criminal investigation. Further, if someone is wounded or killed as the result of an outside agency shooting unrelated to a crime in that agency's jurisdiction, Major Crimes Section shall be notified immediately, as it will have investigative responsibility.

12. NOTIFICATION TO DISTRICT ATTORNEY

*In the event of an officer-involved shooting with injury or death, or a custodial death, the District Attorney's Office shall be notified as soon as practicable by Staff Inspection Group. The District Attorney may activate its own roll-out team, consisting of a deputy district attorney and at least one investigator. The deputy district attorney and investigator(s) will be permitted access to the scene, and they should be briefed upon arrival by the officer-in-charge of the administrative investigation, however they should not be exposed to any information obtained from the participant officers by the administrative investigators, again, to avoid the difficult problems associated with the taint of compelled statements. The District Attorney shall be given the names and identifying information of all involved persons and witnesses, as well as access to any witnesses situated at a police facility. Interviews, if any, of participant personnel should be handled according to the guidelines in section 11 above.

13. PROFESSIONAL DEBRIEFING OF INVOLVED PERSONNEL

*In every officer-involved shooting where injury or death results, and in major use of force cases and custodial death cases at the direction of the Commanding Officer, Staff Inspection Group, involved personnel shall be “debriefed” by the Department Psychologist or contract provider of counseling and psychological services as soon as possible after the completion of investigative activities and before the member is released from duty, unless other arrangements are necessary, in which event it shall occur within 24 hours.

14. PUBLIC INFORMATION

*Media releases and public disclosure of information about incidents covered in this protocol shall be the sole responsibility of the Department’s Public Information Officer, in consultation with the Commanding Officer, Staff Inspection Group. Requests for disclosure of information shall be referred to the Public Information Officer without delay.

15. REVIEWING THE USE OF FORCE FACTS WITH THE TRAINERS

*As we have observed at several points herein, once the investigative details are collected, and the force event has been reconstructed, the case should be thoroughly reviewed by the department training staff¹⁹.

¹⁹ Usually there will be one or two senior trainers who are experts in use of force policies, techniques and dynamics, and who have experience in reviewing force cases for the purpose of determining whether training has been followed, and has been satisfactory, or whether a “gap” exists. For example, I have seen many cases where a particular department’s policies on force, and its training exist as separate systems. There is a failure to *integrate* policy and training, which leaves “gaps”--policy says one thing (usually in broad statements and principles) understood by administrators, and the training teaches something else. It is important to remember that “policy” is the driving force behind the training,

*Every force investigation, and particularly of major or lethal force incidents, should contain a section where the incident is fully explored from the policy and training perspective.

* “Use of Force Review Boards” or “Shooting Review Boards” are common today, and they are an excellent methodology for ensuring that the policy and training component is fully considered. It is recommended that these review systems, or “boards” be employed in any shooting case, custodial deaths if other than natural causes, and in use of force cases that result in major injury requiring more than outpatient treatment.

ATTACHMENTS:

“After Rodney King: What Have We Learned?”, by Greg Meyer

“Coping With Vulnerability: The Dynamics Of Fear In Critical Incidents and Training Implications”

“Post-Shooting Trauma: Its Effects and Some Administrative Guidelines”

-both articles by Dr. Roger M. Solomon, Ph.D., Department Psychologist, Washington State Patrol

“Taking the Fifth”, Parts I, II, and III, by Michael P. Stone

but it is the training (or lack of it) which establishes the actual policy. For even where there is no formal policy statement and no effective training, there is a policy--it is known as “deliberate indifference”, and it leads to liability for the use of unreasonable force by members who have not been trained. Systematic review of use of force cases by the trainers will help to close the gaps--a common language of force emerges, permitting integration, so that the policy flows into the training and runs with it.