LEGAL DEFENSE TRUST TRAINING BULLETIN

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APPELLATE COURT CONFRONTS ATTACK ON SHERIFF'S "ANTI-HUDDLING POLICY"

Policy Prohibits Multiple Deputies From Meeting Jointly With Counsel In Shooting Investigations

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Do law enforcement officers involved in a shooting incident have a right to jointly consult with their attorneys and representatives before speaking to investigators? The Association of Los Angeles Deputy Sheriffs ["ALADS"] is asking California courts to guarantee that right. The courts' initial inclination is to refuse.

The California Court of Appeal's Second Appellate District in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal. App. 4th 1625 affirmed the superior court's denial of a preliminary injunction that would have prohibited the Department from isolating the officers and witnesses from each other in conducting a shooting investigation. The superior court will conduct a full trial of the issue, but the appellate decision indicates that the Department might ultimately prevail in this dispute. But, there are strong arguments on both sides of this issue.

The Department argues that the integrity of a shooting investigation can easily be compromised by permitting the involved officers to consult jointly with their attorneys and representatives "to get their stories straight" before speaking to investigators. Not only can they conspire to concoct a false explanation that absolves them of culpability, but even when the officers act in good faith, the purity of their perceptions can be polluted with information that they did not truly have when they made their tactical decisions, according to the Department. They can lose sight of what information they actually had, and what they learned afterward from others.

On the other hand, a Department cannot isolate the officers from each other without interfering to some extent in their right to counsel and to union representation. This erosion of rights could lead to a slippery slope threatening other procedural rights for which unions have fought long and hard. And the enforcement of a policy of isolating the officers may create conflicts of interest

among counsel, which will often force unions to hire more separate counsel for individual officers than they would otherwise need, thereby increasing the unions' cost of defending these investigations.

The case arose when the Sheriff's Department revised its policy manual to prohibit deputies who participate in or witness a shooting incident from consulting "collectively or in groups" with counsel or union representatives before being interviewed by Department investigators. The revised policy does not jeopardize the officers' basic right to individually consult with counsel before speaking to investigators, but sought to prevent what was described by the court as "huddling" to share perceptions and coordinate explanations. ALADS sought temporary and permanent injunctive relief to prohibit the enforcement of this policy.

ALADS contended that the policy violated the constitutional right to counsel, as well as violating provisions of the Public Safety Officers' Procedural Bill of Rights Act ("POBRA") and the Meyer-Milias-Brown Act ("MMBA"). The MMBA claim was procedural in nature--a failure to properly meet and confer on a change in terms of employment before implementing the policy.

In affirming the superior court's denial of relief, the appellate opinion first clarified that the policy does not prohibit one lawyer from representing multiple individuals, it only prohibits "a group of deputies from meeting with the same lawyer at the same time." 166 Cal. App. 4th at 1632. The court acknowledged that its opinion is not the final adjudication of the case but only considers whether "pending a trial on the merits, the defendant should ... be restrained from exercising the right" being claimed. *Id*. at 1634. Because the trial court's ruling is discretionary and not final, the appellate court would only reverse the ruling if it "exceeded the bounds of reason." *Id*.

Generally, the test for a preliminary injunction entails two steps: a prediction of the probable outcome on the merits, and a balancing of the competing interests affected by granting or denying the injunction. A strong showing of immediate harm from denying the injunction can sometimes overcome a relatively weaker showing of probability of ultimate success on the merits.

Here, the trial and appellate courts examined ALADS' arguments under POBRA, the Constitution, and the MMBA, and found a low probability that ALADS would prevail on the merits. Given that low probability, the court found that ALADS had not shown a sufficient degree of immediate harm to its members from the implementation of the policy to overcome the low probability of ultimate success. The ruling essentially means the Department will be permitted to enforce the "anti-huddling policy" while the case remains pending for trial.

POBRA CLAIM

ALADS' argument under POBRA is based on *Government Code*, section 3303(I), which provides that "whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation...." In *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal. App. 4th 1294, the Upland Police Department refused to postpone a scheduled interrogation of an officer whose chosen attorney first obtained a five-day postponement, then gave one hour's advance notice of being unavailable for the rescheduled appointment. The superior court found that the statute unambiguously

prohibited the Department from proceeding with an interrogation in the absence of the officer's chosen representative. *Id*. at 1304-1305. Reversing the ruling, the Court of Appeal held that the statute does not mean "that the time chosen for the interrogation is subject to the schedule of the chosen representative...." *Id*. at 1305.

The appellate court explained that this "infusion of a reasonableness requirement avoids the absurd result" that the officer could "prevent any interrogation by simply choosing a representative who would never be available." *Id*. The court recognized that a department "needs to conduct interrogations in a reasonably prompt manner, so that subjects can be interviewed and evidence gathered while memories are still fresh." Accordingly, the court held that an officer "must choose a representative who is reasonably available ... and ... physically able" to appear at a "reasonably scheduled interrogation." *Id*. at 1306. It would be the officer's responsibility to secure the representative's attendance, or to select another available representative. *Id*. The court also observed that the record indicated that one of the chosen attorney's partners would have been available for the interrogation. *Id*., fn. 7.

Applying the *Upland* case as precedent for imposing reasonable restrictions on the section 3303(I) right to counsel, the court in ALADS proceeded to examine whether the anti-huddling restriction was reasonable. ALADS argued it was unreasonable because it "interferes with how a client can interact with counsel before providing very crucial and potentially criminally and administratively harmful statements." *Id*. at 1637. But the court found the restriction was reasonable, as the Department's policies "expressly protect a deputy's right to meet with counsel individually" and had the objective "to assure the collection of accurate witness accounts before the recollection of witnesses can be influenced by the observation of other witnesses." *Id*., internal quotation marks omitted.

CONSTITUTIONAL CLAIMS

ALADS also challenged the constitutionality of the "anti-huddling policy" under the First, Fifth, and Sixth Amendments of the United States Constitution, relying principally on *Long Beach Police Officers Assn. v. City of Long Beach* (1984) 156 Cal. App. 3d 996, which invalidated a policy prohibiting officers involved in a shooting from consulting with an attorney or representative before making a written or oral report of the incident. *Long Beach* did not actually address the constitutional issue because it was decided under MMBA as a failure to meet and confer. See *ALADS*, 160 Cal. App. 4th at 1639.

Although *Long Beach* did not confront the constitutional issue head on, one of our own federal district court cases, *Watson v. County of Riverside* (C.D.Cal. 1997) 976 F.Supp. 951, recognized a constitutional right of a deputy sheriff to consult with counsel before, during and after preparing a report on a use of force incident. *Id*. at 957. Regardless which of these authorities may most persuasively be cited for the constitutional argument, however, it nevertheless requires a vast stretch to bridge the factual gap between the "anti-huddling policy" at issue in *ALADS*, and the total denial of the right to consult with counsel before making a statement, as found in the *Long Beach* and *Watson* cases.

ALADS also argued that the "anti-huddling policy" violated the freedom of association under the First Amendment. The court agreed that the constitutional right of association "includes a right to hire and consult with an attorney," 160 Cal. App. 4th at 1640, but rejected the argument that this right was unduly burdened by the "anti-huddling policy." *Id*.

MEYERS-MILIAS-BROWN ACT

The court also rejected ALADS' argument that the Department's unilateral implementation of the "anti-huddling policy" violated the Meyers-Milias Brown Act, which protects California public employee collective bargaining rights. *Government Code*, section 3505 requires the employer to meet and confer before unilaterally implementing changes in wages, hours, and other "terms and conditions" of public employment. See *ALADS*, 160 Cal. App. 4th at 1641. In *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal. 4th 623, 638, the California Supreme Court held that the employer's duty to meet and confer over changes in "terms and conditions" of employment did not extend to the "'implementation of a fundamental managerial or policy decision.'" *ALADS*, 160 Cal. App. 4th at 1642.

ALADS portrayed the "anti-huddling policy" as a change in terms and conditions of employment, asserting that it affected working conditions because the Department had "tolerated huddling" for over 25 years. *Id*. at 1643. The Department argued, however, that its "express objective in implementing its policy revision was to collect accurate information regarding deputy-involved shootings." *Id*. at 1644. Accepting the Department's argument, the court found that "the purpose of the policy revision was to foster greater public trust in the investigatory process." *Id*. Accordingly, the policy revision "arose from the implementation of a fundamental managerial or policy decision" and the Department had no duty to meet and confer over it. *Id*.

BALANCING OF INTERESTS

In its effort to show harm from the implementation of the "anti-huddling policy," ALADS pointed out that deputies would be deprived of their chosen counsel, that unitary representation was more economical, that very few local law firms engage in this work, and that it would be logistically difficult for multiple law firms to respond to incidents in a timely manner since most shootings occur outside business hours and far from law offices. But the court noted that the policy does not force ALADS to retain a different attorney for every involved officer. It only requires the attorney to consult with one officer at a time rather than collectively or in groups. Nor did the policy preclude different attorneys from the same firm from representing different officers. *Id*. at 1645-1646.

In closing, the court recognized that deputies' constitutional right under the Fifth and Sixth Amendments to consult with counsel before being interviewed does not outweigh the public's interest in prompt and accurate collection of information about a shooting incident, and that "the Department's anti-huddling policy revision protects the right of every individual deputy to meet with counsel." *Id*. at 1647. Accordingly, the court found the denial of preliminary relief was not "beyond the bounds of reason," but noted that its decision did not preclude a future action by an individual deputy who may be able to show actual harm from the policy. *Id*.

HOW THIS RULING AFFECTS YOU.

From the initial rulings on preliminary injunctive relief, it appears that the California courts thus far find that preserving the integrity of a shooting investigation outweighs the erosion of the right to counsel and representation that results from isolating the officers. We cannot say the courts are wrong about this, but we applaud ALADS and its attorneys Dick Shinee, Helen Schwab, and Elizabeth Gibbons of Green & Shinee, for bringing and brilliantly arguing a court case raising this issue. It is a laudable public service to seek a court ruling on an important public safety issue where reasonable minds can disagree in good conscience, and

particularly to raise the issue in the abstract, rather than waiting to make the argument in the context of a particular shooting, where the litigation might arouse public passions in a way that would distract from the solemn judicial task of balancing the competing rights and interests.

Investigative techniques such as timely on-scene interviews with isolation of participants and witnesses should not necessarily be reflexively perceived solely as a threat to individual rights. The *ALADS* opinion acknowledges an argument by the union that the "anti-huddling policy" treats deputies like criminal suspects. *Id*. at 1646. But an equally important point is that prompt and effective investigation not only serves to hold wrongdoers accountable, but also to clear away any issues of misconduct.

We will continue to follow this case as it moves to trial, and look forward to seeing the issue more definitively resolved after a complete presentation of the relevant facts.

Our firm's attorneys "roll out" to officer-involved shootings and other critical incidents on an on-call schedule for a number of Southern California agencies. Based on hundreds of such events over nearly 30 years, we do not permit involved officers and deputies to "commingle" their statements, even if the agencies permit them an opportunity to do so.

There are good reasons for this prohibition in the interests of the officers themselves. In any major use of force, it is inevitable to confront differences of perception, recollection and sequencing among the involved officers. It is often said that in a dynamic, rapidly-evolving and violent confrontation, each involved officer has his or her own "tunnel", and that tunnel is not shared with any other participant.[1]

Necessarily then, multiple officers in a dynamic event come away with anywhere from slightly different to downright conflicting perceptions. This is to be expected. But when multiple officers share their differing perspectives *before* their individual accounts are developed, there is a tendency for their recollections to be confused or influenced by others' accounts. A purely innocent effort to reconcile different perceptions can lead to serious consequences if one participant, for example, adopts the view of another when that officer was in no position to have the same perspective. It is far better to keep individual recollections pure, and it is necessary that the officers be held accountable *only for what they saw or perceived*.

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[1] "Tunnel vision" occurs in the vast majority of these dynamic events. It is on the one hand helpful, because the phenomenon permits the officer to respond to vulnerability, harm or risk, by intense focus on the threat. But it also reduces the officer's perception and awareness of things happening "outside the tunnel."

STAY SAFE

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