



TRUST EXPERIENCE
OFFICER INVOLVED SHOOTINGS, CRITICAL INCIDENTS, AND EARLY INTERVENTION TECHNIQUES TO CONTROL CITY EXPOSURES



Introductions

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- Craig Wheaton, JD, Litigation Manager – Bickmore
- Tom Kline, ARM, Risk Control Manager - Bickmore



Critical Incidents:

- Officer Involved Shooting
- Law Enforcement Related Death
- High Profile Use of Force/Arrest Incident
- Other Unique Serious Injury or Death Incident



“Failing to prepare is
preparing to fail.”
-John Wooden



What Is Your Plan/Strategy?

If a public entity/police agency does not have a good plan/strategy in place about how to deal with a Critical Incident, once an event happens, it might be too late!



Planning Ahead is:

- Absolutely critical to controlling and/or limiting exposure,
- For the public entity and those involved, and
- To be able to handle the incident as smoothly as possible.



Steps to Take Now: PREPARATION:

- 1) Identify a Police /City Spokesperson, not the Chief of Police, who can handle any press related issues (initial press release, press conferences, etc.) and prepare to be consistent with the message and the messenger.



Steps to Take Now: PREPARATION:

- 2) Agree to a Control Group of key City employees to be involved in early discussions meetings (i.e. City Manager, City Attorney, Police Command Staff, Outside Counsel) following a Critical Incident.



Steps to Take Now: PREPARATION:

- 3) Have an Attorney Present at Key Meetings (City Attorney/Outside Counsel) to ensure the attorney-client privilege is invoked to protect discussions shortly after the event.



Dealing with the Media



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Dealing with the Media: DO

- Any press releases should be thoroughly vetted by relevant City staff, including City Attorney's office or outside counsel.



Dealing with the Media: DO

- Less is More
 - Pithy and informative information better than lengthy and detailed information



Dealing with the Media: DO

- If situation calls for it, consider retaining media or public relations consultant to assist with the message regarding the incident.



Dealing with the Media: DO

- Ensure public servants (i.e. City council members, Mayor) are not involved in any information exchange with the media (which can sometimes be for personal gain and not in the interests of the public entity).



Dealing with the Media: DO

- Monitor the “Comments” sections of media reports or social media posts of public entity or police agency to see what the chatter is about.



Dealing with the Media: DON'Ts

- Resist some urges:
 - To put out multiple press releases
 - To respond to reports by family members or attorneys
 - To release key evidence (i.e. body camera footage, dispatch recordings) before prepared to do so.



You Cannot Win the Case in the Media (But You may Lose It).



Public Information Officer (PIO) Example



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Type and Extent of Investigation:

- LEIFI Protocol in Contra Costa County
- District Attorney's Investigation
- Independent Outside Investigator
- Grand Jury Investigation



Initial Considerations during Investigation:

- Open communications channels with District Attorney's office/investigators,
- Psyche of involved officers/departmental morale,
- Effect of any employee discipline/termination/criminal charges,
- Ensure to obtain writing that indicates no prosecution of involved officer(s).



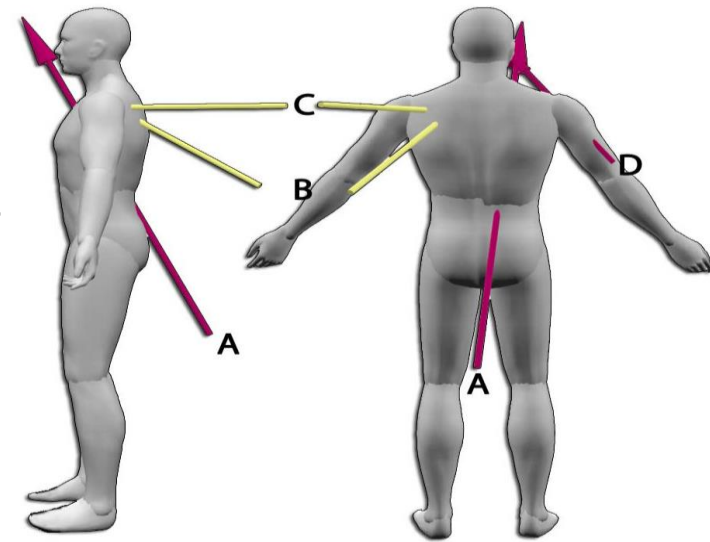
Control/Monitor the Investigation

- Ensure key evidence is preserved and key investigatory steps are taken.
- Consider other investigation steps (i.e. social media evidence collection with a company like Digistream, need for search warrants as part of criminal investigation, expanded toxicological testing, etc.)



Control/Monitor the Investigation

- Consider the hiring of outside consultants early on in the investigation (pathologist, shooting reconstructionist, toxicologist, etc.)



Control/Monitor the Investigation

- Consider the public relations perspective of some post-incident investigatory steps (i.e. involved agency executing search at decedent's out-of-area residence and coming into contact with mother of decedent, notification made at that time).



Control/Monitor the Investigation

- Have solid handle on background(s) of involved officer(s) (any public discipline, lawsuits, workers' compensation cases, other incidents, military service issues, Google your officers).
- Have counsel present for any Critical Incident debrief.



Unique Strategies and Considerations:

- Communication/meeting with family/family's attorney about incident?
- Provide any key video or audio evidence to the media? When?
- Hire outside private investigator to do follow up investigation for key eye or ear witnesses or more thorough interviews.
- Leica Scan (3-D Laser Scanning) of the scene for later re-creation and credible evidence preservation.



What about Internal Investigation/Employee Termination?

- Most critical incidents also involved some administrative investigation by the police department.
- Re-interviews can potentially be discoverable.
- Some incidents can lead to employee discipline and/or termination.
- Rarely is an officer charged criminally but more likely now than five years ago.



Where does a Litigation Manager Fit in?



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Applicable Litigation Manager Experience/Responsibilities

- Experienced in managing litigated files
- Experienced in handling public entity lawsuits
- Understands the need to build faith and confidence with the public entity member
- Understands the need to have interactive exchange with defense counsel
- Understands the need to answer to the public entity board and to excess insurers



Lesson One:

What is a **Bad Fact claim/lawsuit** and how should the defense respond.

- Definition – where the ‘bad facts’ clearly outweigh the ‘good facts’
- Video – “The Horse Chase”
- Survey of Participants – Good or Bad facts?



Lesson One:

What is a **Bad Fact claim/lawsuit** and how should the defense respond.



General Bad Fact Truths

- **Bad Fact** incidents only get worse with time.
- Plaintiffs will often use the Bad Facts to generate adverse public entity opinions through TV/newspaper/social media.
- Plaintiff will most certainly emphasize **Bad Facts** during trial.
- **Bad Facts** can be used to generate punitive damages, not covered under self-insured's Memorandum of Coverage.



Bad Fact Opportunities

- Early resolution
- Horse chase – settled within one week for mid-six-figure amount
- United Airlines – Dr. David Dao removal
- Settlements were cause for media interest to decrease or cease altogether



Requirements for Proactive Public Entity Early Resolution

- Identify those within the public entity insuring framework who have settlement authority
 - City Council, City Manager, City Attorney
 - Public entity board members
 - Excess insurers
- Bring all forces to bear to obtain early settlement authority
 - Litigation manager/defense counsel authority presentation
- Have in place a defense attorney/litigation manager that plaintiff counsel knows is authorized to discuss resolution



Bad Facts Scenario – Part Two



Bad Facts Scenario – Part Two

- Participants survey – Good or Bad facts
 - Video does not reflect all the facts.
 - In this case, decedent had stabbed someone and lunged at the officer just before the shootings.
 - Only good memorialization of facts will counter what appears to be a **Bad Fact** scenario



Public Entity Preparation for Memorializing Incident

- Identify a risk manager who has the authority to ‘lock down’ an incident scene
- Secure all witness and participant statements as soon as possible
- Engage the services of legal counsel early for potential defendants
- Assume the incident has been recorded



Resolution Tools

- An early statutory offer
 - Helps to counter “the tail that wags the dog,” plaintiff attorney fees
 - ❖ The early use of Alternative Dispute Resolution forums
 - Mediation
 - ❖ All said within a mediation is confidential
 - Mandatory Settlement Conferences
 - ❖ Judge can exercise considerable authority



Permit Defense Counsel Work-up if Warranted

- Motion for Summary Judgment
 - Police action immunities abound
 - ❖ Experts
 - Defense needs to counter theirs
 - ❖ Depositions
 - Necessary or not?
 - ❖ Trust your defense counsel to have the public entities best interests at heart



Early Resolutions/Settlements:

- What is the process for an early resolution?
- Who needs to be intimately involved in that process?
- How to garner sufficient resources from pooling authority and/or excess coverage in swift manner?



Early Resolutions/Settlements:

- How to buy yourself time to garner a favorable early outcome?
- Pre-lawsuit mediation?
- Early mediations during infancy of litigation?
- Use a Magistrate Judge for Early Settlement Conferences?



Litigation Considerations

- Lawsuit (and Cal. Tort Claim) filing will likely lead to media exposure.
- If constitutional claims alleged, or some state law claims, attorney's fees exposure to the public entity.
- If case filed in state court, remove to federal court.
- If punitive damages alleged, responsibility of individual officer unless City later decides to cover issue pre-trial or post-trial.



Invasiveness of Litigation:

- Time and resource consuming for agency,
- Stress on department and involved officers,
- Discoverability of personnel files of officers,
- Potential personal liability of officers for punitive damages.



Unpredictability of Litigation:

- Will you win on a motion for judgment,
- Any grounds to appeal qualified immunity,
- Pretrial evidentiary rulings can have a major impact on flavor and tone of case,
- Background of officers or other admissible incidents,
- Jury full of strangers,
- Current climate of police cases,
- Effects of a bad outcome.



Critical Litigation Strategies to Consider



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Early Evaluation of Strategies in Litigation:

- Strong defense position towards trial,
- Seek an early potential resolution,
- Limit discovery leading up to first mediation,
- Seek bifurcation of any issues for discovery or trial,
- Early retention of experts,
- Use a Rule 68 Offer of Judgment.



Consideration of a Rule 68 Offer

- Entity interested in a Rule 68 Offer of Judgment,
- The appropriate timing of such a tactic,
- Steps and timetable to get authority for Rule 68 Offer,
- Entity's position on pre-trial indemnification of officer(s) for punitive damages exposure, may affect need for settlement or Rule 68 Offer,
- Post-Rule 68 Offer negotiations



Final Thoughts



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Ingredients for a Recipe for Success:

- Preparation for appropriate response to Critical Incident,
- Navigating the landmines through a Critical Incident and Investigation,
- Posturing City for best outcome if litigation ensues,
- Employing appropriate litigation strategies and techniques to ensure a successful outcome.



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