



December 16, 2011

Chuck Remsberg
Editor-in-Chief

Editor's notes: **Congratulations** to the graduates of the most recent *Force Science Certification Course*-all now Certified Force Science Analysts-and a big thank you to the training division team at the San Jose Police Department.

At this past course we were honored to **welcome** Dr. Christine Hall to our Certification Course training cadre. Dr. Hall, a practicing ER doctor and clinical assistant professor in the department of emergency medicine at the Univ. of British Columbia, joins Force Science Certification Course instructors Dr. Bill Lewinski, FSI's Executive Director, Dr. Matt Sztajnkrzyer from the Emergency Medicine Dept. of the Mayo Clinic, Dr. Joan Vickers from the Univ. of Calgary, internationally recognized behavioral science consultant, researcher and author Dr. Alexis Artwohl, Mr. Chris Lawrence with the Ontario Police College, UCLA Professor Dr. Ed Geiselman, and veteran law enforcement attorney Mr. John Hoag. We're also looking forward to soon welcoming Dr. Laura Zimmerman, a leading expert on decision-making, to the team as well.

[Click here](#) for the 2012 schedule.

Readers react to court's limitation on lawyer aid after an OIS

In Transmission #192 [12/3/11], we asked for readers' reactions to a Canadian appellate court's decree that lawyers cannot help officers construct official reports after using deadly force and, further, that statements must be completed before the end of the shift on which the incident occurred.

Responses ranged from agreement that attorney assistance raises suspicion to arguments that many officers need help because of their limited articulation skills.

Here's a representative sampling of replies that filled our inbox. Some have been edited for brevity and clarity.

Experienced counsel can enhance clarity

I have been in an OIS where I shot a person attempting to kill me. I was also a detective sergeant for over 3 years where I was responsible for OIS investigations.

There is so much going on in the mind of an officer who has just been involved in a shooting. If he is forced to write a statement before end of duty, I think an attorney who is *experienced* in OIS incidents should be present to discuss the incident before that report is written.

The attorney should review the report and offer counsel before it is turned in. Attorneys generally provide better legal wording and can, *if they are experienced*, actually make the incident clearer.

Preferably, officers should not be forced to write reports regarding the incident. My department conducts a videotaped interview, with a detective and a DA investigator. The tape shows the officer and the emotions that come out, which help show the officer's state of mind at the time of the incident. A written statement doesn't show emotion. A follow-up interview can be conducted a few days later if necessary. If requested by the officer, the attorney is present before any interview to talk to the officer and during any interview to offer counsel.

*Sgt. Mark Foster
Armorer/firearms instructor
Napa County (CA) SO*

Why would an agency interfere with right to counsel?

The first obligation of an attorney after an OIS or other critical incident is to ensure that the LEO is physically safe. The attorney sitting alone with the officer may learn of unanticipated or undisclosed medical conditions.

The second obligation is to ensure that the LEO's rights are preserved. This includes the right to gather one's thoughts before submitting to questioning or memorializing the events in a report. Often the presence of the attorney allows the officer to reflect and organize her thoughts before putting pen to paper.

It is difficult to imagine why an agency would interfere with this process. Both the LEO and the agency benefit from a clear, complete, and accurate report. The notion that the LEO is violating her ethical or legal obligations by conferring with counsel prior to drafting the report is unsupported by the realities of the criminal justice and civil systems. The LEO's report will follow her and the agency for years to come. The attorney has an obligation to his client to ensure that statement is accurate in every respect.

*Atty. Lance LoRusso
LoRusso Law Firm
Atlanta, GA*

Rights & reliability: An investigator's view

As I read Canada's Bill of Rights, a person detained as a suspect in a crime has the absolute right to speak with an attorney *immediately*. If an officer is ordered to go to or remain at the station until he or she completes their preliminary notes, are they not being detained? Apparently the Canadian appellate court has either decided that a police agency's administrative rule requiring officers to complete their notes before the end of their shift and without the advice of an attorney overrides the federal constitution or simply that certain rights can be denied to individuals based on their occupation.

From 2005 through 2010 my primary assignment was to provide outside agencies a professional and impartial investigation of OIS incidents. Thinking back to some of the statements I have heard people, including officers, make immediately following a traumatic event I shudder to think that the head of Ontario's SIU believes "contemporaneity is a main indicator of reliability."

In every OIS incident I investigated I advised the involved officer to *not* make any written report of the incident until after he or she had at least 1 sleep cycle and the opportunity to speak with an attorney. I further advised the agency supervisor that any written communication generated immediately following the event should be limited to a public safety statement and a *preliminary* press release for the public.

*Special Agent R. A. Hunt
Illinois State Police*

Immedidate memories faulty

When I went through my first OIS, I was covered in the suspect's blood and was a mental wreck on scene and more so back at the station. After mandatory drug/alcohol testing I was at home approximately 12 hours later.

We educated our administration and the county prosecutor's office on the benefits of getting a minimum of 2 sleep cycles before submitting any statement whatsoever. Trust me it is worth it. I wrote down personal notes in a field notebook when I could within 4-6 hours after my shooting. When I was ready to submit my statement, I referenced them and they were *way off the mark!*

My attorney never offered "recommendations" on how to word my recollection nor did I ask for any. I believe it is suspect if one needs or takes legal advice on how to prepare their investigative statement prior to completing it themselves.

*Ofc. William Felt Jr.
SWAT/K-9
Ashtabula City (OH) PD*

OIS response requires special legal expertise

I have represented police officers in OIS incidents for many years. No attorney should undertake this representation unless he/she has been mentored by an attorney experienced in rendering assistance to emergency service officers. Even after mentoring, that attorney should have the backup of the more experienced counsel because you just can't imagine the variety and weight of sudden, tense, and dramatic circumstances that will be encountered when responding to such a call and the need to render very highly charged and sensitive legal advice under very trying conditions.

I have long advocated that every department, *bar none*, pre-plan for that terrible event and have experienced, competent, and trusted attorneys on a call list. To be effective and avoid costly errors, those attorneys should not be general practice attorneys without experience in the area of public sector emergency tort liability defense services. All attorneys who are willing to be on the list must be required to attend training sessions on the department's Critical Incident Response Policy before they are eligible.

The responding attorney must keep in mind that all of the Rules of Professional Conduct apply. Clearly, the attorney cannot participate in the writing of reports or statements, or anything else that would fall within the scope of the employment of sworn officers. But that does not mean the attorney cannot properly assess the condition of the officer and set certain rules or guidelines under which the officer will participate. Local procedures and the risks associated with violating them will come into play.

It should also be remembered that if anything went wrong someone will be thrown under the bus to take the blame. All too often the administration and the local elected and appointed officials will panic under the pressure of aggressive news coverage. Therefore, the responding attorney must be extremely careful about whom he or she talks to and what is said.

In one case, for example, an administrator was asked from what direction the bullet entered the decedent, front or back. The answer was, "We don't know for sure but it appears there was a lot of blood on the front of the decedent's shirt." The news report quoted the administrator as saying the decedent was shot while facing the officer. Of course, the autopsy found the entry wound in the back and the exit wound in the front. That error caused extreme stress and accusations of attempted cover-up and was probably the principal motivating factor in the wrongful death civil rights suit that followed.

*Atty. Joseph Marshall
Clinton, AR*

Proper action should be backed by strong articulation

I believe it is absolutely appropriate for legal counsel, a supervisor, or a use-of-force authority to assist an involved officer in writing his/her report. Many of our fine officers are just not very good at putting their actions down in writing. They should not be penalized for taking appropriate action but not documenting it well.

I have assisted many officers in their efforts to put their actions and observations down on paper. This exercise not only ensures a well-written, or at least better-written report, but it is also a great teaching moment for the officer in question.

The Canadian cases cited are setting horrible precedent. Let's hope this doesn't make it over the border!

*Ofcr. Ron L'Ecuyer
Training director/armorer/instructor
Fitchburg (MA) PD*

Court ruling "abhorrent"

Since retiring 11 years ago as an LAPD detective, I have been a practicing attorney for the LA Police Protective League, assigned to respond to all LAPD major uses of force to represent officers involved. I have responded to approximately 600 uses of force.

I find it abhorrent that a court would rule that a police officer is not allowed legal counsel to articulate his actions. LAPD's policy of forcing the involved officers to provide a walk-through as well as a complete, detailed verbal account of the use of force within a few hours forces the League to provide immediate representation. LAPD's policy is often detrimental not just to the involved officers, but also to a thorough and accurate investigation due to memory issues and sleep deprivation.

It has been the League's policy to provide legal representation within a short period of time to negate the agency complaining about a delay in reporting. If delay is negated, it is my firm belief that an officer should have the right to advice from counsel about legal requirements and other issues. Otherwise, LEOs in effect become second-class citizens.

*Atty. Gary Fullerton
Fullerton & Hanna, LLP
Van Nuys, CA*

"Redundancy and inconsistencies"

Why are officers often required to submit to an interview and also required to submit a written report? This creates redundancy and inconsistencies. Consider the relative strengths and weaknesses.

Written report: The worst skill most officers possess is the written word. To craft a well-written, comprehensive report is an undertaking that requires many rewrites and editings--and years of skill development. Most officers are public high school graduates, with only a cursory knowledge of how to clearly present a thought in written form. Their language and phrasing may be open to interpretation. Few will be given the time--or are motivated to take the time--to write what any critical observer would deem to be a "comprehensive accounting" of the totality of the events.

Interview: The officer is able to describe his/her beliefs, actions, and perceptions. The interviewer is able to inquire on any aspect of the officer's statement to gain more information and clarity. There is no functional time limit to the interview other than "reasonableness." So the interviewer is able to better explore and gain the officer's objectively reasonable basis for his/her responses to the suspect's actions and threatening behavior.

Agencies should be encouraged to have an either/or policy: Either an oral, recorded interview, or a written report. This will serve justice.

*George Williams
Director of Training
Cutting Edge Training
Bellingham, WA*

Point of view makes a difference

I would like to have a lawyer help me with my report in a shooting. But now I put my Chief hat on and I am opposed to the lawyer helping. Wow...very interesting.

*Chief Jim Lauria
Oakdale (PA) PD*

Time needed to regain "focus and memory"

No way should an officer be forced to complete his report by the end of the night. The folks in Canada are way off base on this one! When officers are involved in a critical incident it takes time for their focus and memory to come back into proper perspective because the body and sometimes the mind are in a temporary state of shock.

*Lt. Clifton Dean
Columbus (OH) PD*

Who cares?

What the hell do we care what Canada is doing! Our system is not their system, so we should not be dragging their laundry into our basket.

*Capt. Kelly Davis
Pecos (TX) PD*

Objectionable terminology

I am concerned with the terminology used in your last newsletter to describe the 2 OISs from Ontario. We continuously emphasize to our membership to articulate their actions in a clear, concise, and professional manner that can be clearly understood by the courts. The officers involved discharged their firearms to stop the threat and protect themselves. They carried out their lawful duties in accordance with Section 25(1) of the Criminal Code of Canada. The subjects didn't "take fatal rounds" and were not "gunned down".

*Cpl. Sean Darling
RCMP
Regina, Sask., Canada*