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Chuck Remsberg  
Editor-in-Chief

### **Hitting our inbox: Readers react to post-OIS recommendations**

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The recommendations regarding OIS investigations from police attorney John Hoag to the DOJ's civil rights overseers, which we reported in *Force Science News* Transmission #199 [3/9/12], has stirred a spirited response from our readers. Here's a representative sampling, edited for clarity and brevity, with responses in some cases from Atty. Hoag:

#### **Veteran expert witness voices "vigorous" disagreements**

I agree with most of John Hoag's comments, but I vigorously disagree with the point on *never* permitting an involved officer to be audio-recorded and for the investigator to summarize the officer's testimony.

I have been very successful for more than 20 years as an expert witness defending officers throughout the nation in federal and state courts involving many areas, including deadly force and wrongful death in civil court and manslaughter in criminal courts.

It is my experience that an officer and his/her representative should ensure the interview is recorded in some manner for the officer's protection. Without exception, interview summaries by detectives are inadequate to catch the subtle and often critical details that assist in helping prove the officer's proper conduct and reasonable force response.

Summaries provide impressions and details the *investigator* believes are important to the investigator's own needs. It is the extremely rare detective who can understand and anticipate all of the needs the officer's statement will be required to fulfill for criminal (both local and federal prosecutor), administrative, and civil (both state and federal) purposes. To write a summary of the interview sufficient for each particular need, the investigator would need to be privy to all the concerns, tactics, and subtleties that each process requires. Instead, we often get distortions, conclusions, and interpretations.

I have found an officer's own words, verbatim as they were provided, are the best source of understanding the officer's mind-set and justification for his/her actions. It is often through the officer's nuanced original wording that the key point is able to be made by the defending attorney and expert in proving the officer's proper conduct.

Re: revealing the officer's emotions. I have seen and heard officers in recorded interviews who have been overcome with emotion in several cases. In each instance in which this was revealed in civil court, without exception it brought the officer's humanity to the fore with the jurors and was in no way detrimental to the outcome of the case. In our society today, the heartfelt sharing of the emotional difficulty an officer experiences in taking another's life is not damning in the least, but helps jurors overcome media-induced stereotypes of heartless, unfeeling officers.

My professional disagreement does not diminish my respect for Mr. Hoag's efforts in protecting the rights of those who risk so much to protect us.

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

**Atty. Hoag responds:**

*The practice I'm used to seeing is that an interviewer takes detailed notes of the interview and then writes the report. That report is by no means just a summary. After it is written, the officer who was interviewed proofs it and makes any changes as necessary.*

*Many times words do not perfectly reflect the officer's state of mind because very few of us can give a statement that exactly captures what we were thinking and why we acted in a certain way, especially if the event was highly stressful. Therefore, I don't view an initial tape-recorded interview as critical to an agency's OIS investigation. However, as you state, reasonable people can disagree on this subject.*

**Questions about recording & conferring**

I was most interested in the recommendations that OIS statements not be recorded and that officers are allowed to confer prior to giving statements.

Other than displaying an officer's emotions, what other reasons do you offer as to why these statements should not be recorded? Also, does allowing officers to confer prior to giving OIS statements mean officers who were actually involved in the incident or officers who witnessed it or both?

*Det. Vic Regalado  
Homicide investigator  
Tulsa (OK) PD*

**Hoag responds:**

*One could argue that an investigator's well-written report, which is based on the cognitive interview process and is reviewed and agreed upon by the officer before it is finalized, would be a better report than a recorded interview. Usually the request to confer is from the involved officers, whether or not some of them were the shooters.*

**The California view on Garrity warnings, walk-throughs, & recording**

Regarding Mr. Hoag's aversion to the *Garrity* admonition: *Garrity* (or, as we refer to the admonition in this state, *Lybarger*) has been a standard admonition in California OIS investigations since those decisions were handed down. I think there would be a major fight against the deletion of the warning from OIS interviews of involved officers here, largely driven by the police associations and their attorneys.

In California, the long-standing practice regarding OIS investigations is that criminal and administrative investigators commonly share information gathered in the physical examination of the scene, the scientific analysis of evidence, and the statements of law enforcement and civilian witnesses.

When it comes to taking a statement from any officer who was involved in the use of deadly force in the incident, however, the use of the officer's statement depends upon whether he or she chooses to voluntarily provide the statement to the criminal investigators (the ones who attempt to take a statement first). If voluntarily given, then the statement is shared by both investigative teams, and investigators from both teams participate in the taking of the interview.

If, on the other hand, the officer declines to give a voluntary statement (generally on advice of counsel), then the criminal investigators pack up and leave, whereupon the administrative investigators give the officer a "*Garrity/Lybarger*" admonition and then take a compelled statement which is used solely in the administrative investigation.

It is not uncommon for involved officers to waive their "*Garrity/Lybarger*" rights (in writing) after reviewing a transcript of their administrative statements with their counsel, whereupon those statements are released to the criminal investigators for unfettered use in the criminal investigation.

Many California agencies allow involved officers to delay giving a post-shooting statement for 48 hours or more.

While I advocate permitting involved officers to do a walk-through of the scene with their own counsel (and **no one** from the employing agency) before giving a statement, I am unaware of any California agency which does so, and, with the exception of San Diego, I am unfamiliar with any agency whose POA stands still for the conduct of a walk-through conducted **by** the agency.

Recording of statements of involved officers is so deeply ingrained in California that I doubt seriously that it could ever successfully be eliminated.

If I were persuaded of the legal correctness and efficacy of the deletion of the *Lybarger* admonition, I would be willing to take a laboring oar in trying to change the procedure. I think, however, that I will leave the tilting with the tape-recording windmill for someone else.

*Jim Wilson, certified Force Science Analyst  
Sr. Deputy City Atty.  
Police legal advisor & misconduct litigator  
Modesto, California*

**Hoag comments:**

*What we've negotiated in the Pacific Northwest is that the IA investigator sits in on a voluntary interview, then at its end the criminal investigator leaves and the IA investigator gives the Garrity warnings and asks any questions needed, usually related to policy issues. If there is a civil investigator and/or civil attorney also involved, they can also sit in and ask their questions at the end. This minimizes the needs for multiple interviews.*

### **IA shows up at the scene**

At our agency, we (Internal Affairs) do not interview anyone for at least 48 hours, but rather just show up to the scene to get an overview or a walk-through. Before coming to IA, I was involved in a shooting, so I know how it can be perceived when IA shows up, but this seems to help when we do our internal investigation later.

*Sgt. John Horch  
Clark County (WA) SO*

### **Jurisdictional differences may affect protocol**

As the Supervising Deputy Attorney General for the New Jersey Attorney General's Shooting Response Team, I don't disagree with what Mr. Hoag says, but it appears that his protocol is largely based on jurisdictional issues relative to Seattle. It's important to keep in mind that what works there may not work elsewhere.

While I agree with his conclusions about Garrity Warnings (I too can count on 1 hand the times it's been an issue for us), we do take recorded statements from everyone. Unlike Seattle, our findings do not become public record at the conclusion of our investigation because our data is typically protected as "criminal investigatory records." Likewise, we execute protective orders with civil litigants to keep our records under seal during civil litigation unless and until matters go to trial.

Because of these protections, we rarely conduct walk-throughs absent some exigent circumstances or our inability to understand the factual and physiological dynamics at play as gleaned from the multitude of statements, crime scene investigation, and forensic analysis.

*Steven Farman  
NJ Division of Criminal Justice  
Trenton, NJ*

### **Hoag responds:**

*A walk-through at a shooting scene is 1 way to facilitate memory and aid an involved officer in giving the best possible statement. Whatever other investigative procedures are followed, I don't see any reason for not doing a walk-through.*

*I do agree that 1 size may not fit all, but the recommendations I made to the DOJ were not based on any special Seattle issues. If you want the best possible interview of an officer, then following those recommendations seems currently to be the best practice, although other systems may also work.*

### **Prominent police attorney: Hoag "right on"**

Kudos to Mr. Hoag. His suggestions are right on and are not limited to the Pacific Northwest. My office provides a service to LEOs throughout Illinois where, for a small yearly fee, they have legal representation immediately following an officer involved shooting or other critical incident.

I, too, do not permit tape recording of officer statements. Some critics counter that Illinois statute requires electronic recording of criminal suspects in any homicide. I am shocked that this would even be an issue as I do not look at police officers I represent as criminal suspects. Instead, they are public servants who are involved in an incident as a result of

utilizing the very tools that we, as citizens of the state, authorize them to carry and use. Police officers involved in shootings should not be treated on the same level as citizens involved in shootings, as police officers are on a different playing field to begin with.

Like Mr. Hoag, I suggest a walk-through of the scene. This should only involve the officer(s) and the attorney(s). No video taping of the walk-through should be conducted for the same reasons for no tape recording of statements.

Generally, I suggest that there be at least 48 hours prior to an officer giving any statement as well. There have been exceptions when more than one criminal suspect was involved in the incident.

For example, officers may end up shooting a criminal suspect who was the driver of a vehicle occupied by 3 other individuals. Those other 3 individuals may have committed crimes resulting in their being detained by police pending their investigation. Police officers generally are not permitted to detain suspects for more than 48 hours (with some limited exceptions) without charging them. In those cases, I will present officers to the State's Attorney for purposes of a *very limited* interview regarding the charging of those other individuals prior to the expiration of the 48-hour time frame.

With respect to conferring with other officers, I always recommend having officers who are involved in the incident confer with one another. If the purpose of the investigation is to find out the truth of what happened, then having the officers confer is a logical step to assist their memory recall.

Unfortunately, there are department policies out there that prohibit officers from meeting together prior to giving their statements, even if they are represented by the same attorney. This is based on a negative assumption that the purpose of conferring is to collude. I like to look at conferring as a tool to uncover the truth. We need to change the mind-set of policy makers, but this will surely be a sticking point for some time.

*Atty. Laura Scarry, certified Force Science Analyst  
DeAno & Scarry, LLC  
Chicago and Wheaton, IL*

### **"The more I read, the more I liked"**

My reaction to John Hoag's recommendations was sort of like what you see on tv when they show what happens for a one-millionth customer: lights flashing, music playing, balloons being released, and confetti falling from the ceiling. The more I read, the more I liked.

Please know that, at the very least, you have 1 retired chief who would have absolutely no trouble adopting Hoag's suggestions exactly as written and incorporating them as policy. He has developed something I believe to be effective, reasonable, and just.

*Chief Bernard Wilson, (ret.)  
Los Angeles World Airports PD*

### **"Cutting-edge training needed more than ever"**

I want to thank Force Science for cutting-edge training. It seems to be needed more today than ever, especially with media spin, misinformation, and, yes, politics and political correctness getting law enforcement and military folks hurt--or worse.

*David Moore, USAF (ret.)*  
*South Korea*