

AGENCY LIABILITY

How to protect more with less....



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TRAINING OBJECTIVES

KNOWLEDGE IS POWER

- Proper documentation
- Proper Investigation
- Proper Supervision
- Understand basis of actions against police
 - Policy Drafting
 - Supervision
 - Training

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According to Justice Scalia:



- We now have increasing evidence that police forces across the United States take the Constitutional rights of citizens seriously. There have been wide-ranging reforms in the education, training, and supervision of police officers. Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime of internal discipline. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have deterrent effect!

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

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42 U.S.C. § 1983

- To establish a claim under Section 1983, the plaintiff must establish:
 - The defendant acted under color of the authority;
 - The defendants deprived the plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States;
 - that defendant's actions were the proximate cause of the injuries and consequent damages sustained by the plaintiff;
 - the actions of the defendant which allegedly caused the injury or loss claimed by the plaintiff were intentional and purposeful

The Violent Crime Control and Law Enforcement Act of 1994

42 U.S.C §14141

It is unlawful for state or local law enforcement officers to engage in a “pattern or practice” of conduct that deprives persons of rights protected by the Constitution or laws of the United States.



42 U.S.C §14141

- Statute authorizes the U.S. Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “patter or practice” of misconduct.
- The “Special Litigation Section” of the DOJ Civil Rights Division is charged with reviewing and investigating allegations of a pattern of misconduct
- <http://www.justice.gov/crt/about/spl/findsettle.php>

42 U.S.C §14141

- “Pattern or Practice” investigations occur only in jurisdictions where there is sufficient preliminary evidence of a pattern of unlawful conduct or systemic practices underlying the misconduct.
- Steps Taken:
 - Investigation
 - Findings Letter
 - Civil Actions / Consent Decree

42 U.S.C §14141

- Primary Reasons for DOJ Intervention
 - Excessive Force
 - Ineffective Internal Affairs Systems
 - Patterns and trends of misconduct being ignored or not being addressed effectively
 - Policy Development
 - Supervision
 - Training
 - Discipline

Monell v. Department of Social Services

- U.S. Supreme Court (436 U.S. 658 (1978))
- Monell finds that Section 1983 applies to municipalities and local governmental units when policies or official procedure were responsible for violation of federally protected rights.
 - Failure of Policy
 - Failure to Supervise
 - Failure to Investigate
 - Failure to Train

Monell v. Dept. of Social Services (1978)

- Supreme Court held that local governments may be sued for damages as well as declaratory and injunctive relief whenever;
- “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance regulation, or decision officially adopted and promulgated by that body’s officers. Moreover...local governments... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s decision making channels.”

§ 1983 claim under Monell

- Thus, to prevail on a § 1983 claim under Monell, the plaintiff must prove:
 - (1) the existence of an official policy or custom of such longstanding to have the force of law;
 - (2) pursuant to which one or more municipal employees violated the plaintiff’s civil rights.

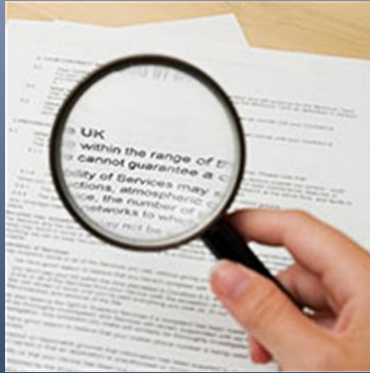
DELIBERATE INDIFFERENCE

- Deliberate indifference is:
 - A choice made from among various alternatives;
 - A knowing choice, usually made with some state of mind;
 - A choice made with some knowledge or appreciation of what the consequences of the choice will/might be.

Establish Agency Liability

- In one of several ways:
 - 1. Unconstitutional Policy
 - 2. Decision or Act by Policymaker
 - 3. Unconstitutional Practice or Custom
 - Failure to Discipline or Supervise
 - Failure to Investigate
 - Failure to Train
 - Failure to Screen

Start with the Policy....



Unconstitutional Policy

- Establish liability by proving that the alleged unconstitutional actions resulted from the execution of a formal policy statement, ordinance or regulation officially adopted by the municipality.
- An official policy is fairly easy to discern; it is usually found in written policy statements, ordinances, and regulations.

Unconstitutional Policy

- A policy is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.
- Model Policies Available
 - IACP and PERF Guidelines
- DOJ Civil Rights Division
 - Finding Letters
 - Consent Decrees

Unconstitutional Practice or Custom

- The plaintiff could establish municipal liability by proving that the municipality maintained a practice so consistent and widespread to impute constructive knowledge of the practice to policymaking officials.

Unconstitutional Practice or Custom

- To establish the existence of a municipal custom, the plaintiff must prove:
 - (1) the existence of a continuing, widespread persistent pattern of unconstitutional misconduct by the governmental entities' employees;
 - (2) deliberate indifference to or tacit authorization of such conduct by the governmental entities' policymaking officials after notice to the officials of that misconduct; and
 - (3) the plaintiff's injuries were caused by acts pursuant to the governmental entities' custom, i.e., proof that the custom was the moving force behind the constitutional violation

Failure to Discipline or Supervise

- Liability may attach if there is sufficient evidence that a custom or policy encouraged the officer to believe that he could commit unconstitutional acts with impunity and, thus, have the explicit or tacit approval of the Department or its policymakers.
- A municipality may be liable where the municipalities' failure to supervise or discipline its officers amounts to a policy of deliberate indifference.

SERGEANT



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Areas of Concern

- **Span of Control**
 - an adequate number of supervisors are deployed in the field to provide supervision consistent with generally accepted professional standards. (1-8, 1-10)

- **Unity of Command**
 - Supervisors of field operation, investigation, and specialized units should provide daily field presence and maintain an active role in unit operations.

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Failure to Adequately Investigate

- Sergeants may be held liable if they fail to conduct adequate investigations.
- Difficulties investigating the actions of those you have worked with for years and developed social and professional friendships.
- Sergeants must conduct a complete and objective investigation.
- Internal Affairs and Use of Force Investigations

Failure to Discipline

- Failure to Discipline is a common theory of liability against a sergeant.
- If a sergeant has knowledge of an officer's misconduct, but failed to take corrective action, he may be held liable.
- **Shaw v. Stroud** 13 F.3d 791 (1994)
 - Fourth Circuit- Example
 - 1st Sgt- Ignored complaints of pervasive violent propensities harassing complainants.
 - 2nd Sgt- ride w/ officer, counseling, reporting

Supervisory Liability- Con't

- Liability of a supervisor may only attach pursuant to Section 1983, if:
 - (1) the supervisory official, after learning of the violation, failed to remedy the wrong;
 - (2) the supervisory official created a policy or custom under which the constitutional practice has occurred or allowed such a policy or custom to continue; or
 - (3) the supervisory official was grossly negligent in managing the subordinates who caused the unlawful condition or event.

Supervisory Liability- Con't

- The plaintiff must produce evidence to support his claim that the supervisor knew of the alleged conduct, that there existed a policy or custom under which unconstitutional practices occurred, or that he was grossly negligent in managing his officers

Supervisory Liability- Con't

- In view of the extensive discovery that necessarily results from a claim of municipal liability under Monell, there should be evidence of a municipality's policy beyond a mere single, isolated incident.
- A plaintiff must typically point to facts outside his own case to support his allegation of a policy on the part of the municipality

Supervisory Liability- Con't

- Police agencies approach to reducing liability as proactive, active or reactive.
 - Proactive Approach- Commitment to the selection and hiring of high quality candidates; along with sound policy and proper training
 - Active Approach- direct supervision
 - Reactive Approach- discipline, remediation, evaluation, analysis, audits and inspections to expose deficiencies.

Failure to Train

- The plaintiff must identify the particular deficiency in the training program of the Police Department and how that alleged deficiency caused his injury.
- The alleged deficiency in the training must be closely related to the alleged injury.

City of Canton v. Harris

389 U.S. 378 (1989)

- Held: Municipalities have an affirmative duty to train employees in core tasks.
- Inadequate law enforcement training may form the basis for a civil rights claim where the failure to train amounts to deliberate indifference to the rights of persons whom the police come into contact with.

City of Canton v. Harris

389 U.S. 378 (1989)

- The focus must be on the adequacy of a training program in relation to the duties the officers are expected to perform and the identified deficiency, in a city's training program.
- This will occur when the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been **deliberately indifferent** to the need.

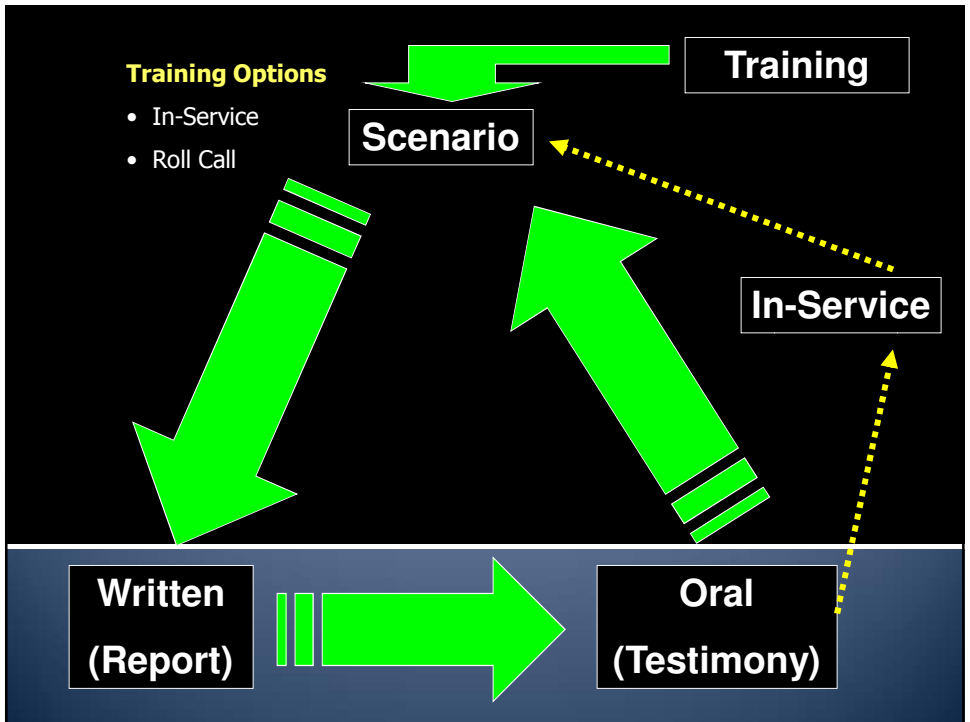
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Training

- *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991)
 - The inadequacy of the training program, which represented the county's official policy, constituted a deliberate indifference to the rights of others, as a matter of law.
- *Munger v. City of Glasgow*,
227 F.3d 1082 (9th Cir. 2000)
 - Is not enough for an agency to merely have a policy that governs officers actions; the agency must train the officers on the policy to effectively avoid liability.

Your duty to provide training for peace officers is not, in any way, mitigated by the lack of funds to reimburse your department for such training.

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Failure to Screen

- The final way in which the plaintiff could establish municipal liability is by proving that the City failed to screen an officer during the hiring process.
- A plaintiff seeking to impose liability on a municipality for failure to screen carries an onerous burden.

Risk Management System

- Collect and record the following information:
 - All uses of force
 - Canine bite ratios
 - Injuries to prisoners
 - Cover charges
 - Firearm Discharges
 - Complaints
 - Civil law suits
 - Criminal Proceedings
 - Vehicle Pursuits
 - Incidents involving the pointing of a firearm
 - Disciplinary action taken against an officer

Police Misconduct Protection



Seven-Layered Liability Protection System

- 1. Policy and procedure
- 2. Training
- 3. Supervision
- 4. Performance Management
- 5. Review and Revision of Policy
- 6. Legal Support and Update
- 7. Investigation and evidence

Policy and Procedure

- Agencies must develop sound policy based upon professional thinking, court decisions and statutes.
- Policy is to be developed and issued in anticipation of the foreseeable field incidents that officers can reasonably be expected to encounter
- Ten to twelve high risk/critical task policies in law enforcement that lead to 99% of liability.
Need to know

Training

- “Policy is only as effective as the training in the substance and requirements of that policy. If training is weak, unfocused or nonexistent, then the policy will not be followed.”
- Once policy is issued- Training must occur in the substance of that policy.
- Recommended method is hypothetical scenarios that would indicate the policy.

Supervision

- Supervision should take a positive approach.
- Supervision’s focus should be on “supporting superior performance rather than trying to catch someone doing something wrong.”
 - Officers who are observed following policy should be commended.

Performance Management

- Performance management requires a total commitment to the selection of qualified personnel, initial and continuous attention to performance planning and then to regular performance evaluation.
- Supervisors must discipline when they discover that a “properly trained” employee has violated policy.

Review and Revision

- A department must constantly review internal as well as external information in order to ensure quality performance and liability avoidance.
- Be aware of patterns- Notice
 - Internal affairs
 - Civilian complaints
 - Lawsuits
 - Use of force and injury patterns
 - Criminal charges

Review and Revision- Con't

- Policy-makers must stay abreast of changes in the law:
 - Legal Cases
 - Statutory updates
 - Contemporary research
 - Literature relating to policing.

Legal Counsel and Update

- New Trend- Legal Advisor
 - Lack of resources
 - Town Attorney
- Legal Update
 - Once a law is clearly established by a court decision or legislative enactment, agencies within the jurisdiction of the court will be charged with knowledge of the new law.

Investigation and Evidence

- Discovery Investigations
 - 911 tapes
 - Dispatch records
 - Video tapes / cover-up
- Highest priorities to investigations
 - Photographs
 - Evidence collection
 - Witness Statements

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The End....

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