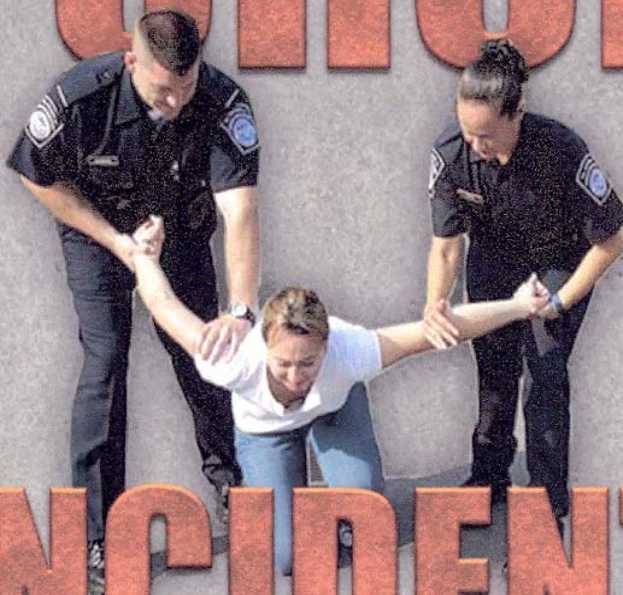


MANAGING THE USE OF

FORCE



INCIDENT

FOR CRIMINAL JUSTICE OFFICERS,
SUPERVISORS, AND ADMINISTRATORS

HOWARD WEBB

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Howard Webb is the executive director of the American Council on Criminal Justice Training (ACCJT), a 501(c)(3) nonprofit public safety training institution. Prior to founding the ACCJT, Howard was the Director of the Montana Law Enforcement Academy. A nationally and internationally recognized use of force expert and criminal justice trainer, he has developed over seventy training courses, instructor development programs, and academy training curriculums. As a Lieutenant for the Oregon Department of Public Safety Standards and Training, Howard developed the National Police Corps academy curriculum and managed the first Police Corps Academy. He was an original member of Macho Products' Redman Advisory Board. As the director of training for DHB Armor Group, Howard developed the Hitman simulation-training suit. He is a police liability consultant and expert witness, who has testified in over three hundred excessive force and officer misconduct lawsuits in state and federal courts.

INTRODUCTION

The Los Angeles Police Department is considered one of the most progressive law enforcement agencies in the United States. The L.A.P.D. developed D.A.R.E. and created the first police S.W.A.T. team. It has been the law enforcement muse for countless television dramas and blockbuster movies. However, because of an improperly managed use of force incident, the public primarily remembers the Los Angeles Police Department for the Rodney King incident.

A Google news search of the phrase “police excessive force” identified 1,199 newspaper articles that mentioned lawsuits involving the alleged use of excessive force by police or corrections officers. Keep in mind, these are only the lawsuits that the news media deemed noteworthy. According to a study conducted by the U.S. Department of Justice, law enforcement agencies annually receive, on average, 430,000 complaints of excessive force. Do you think law enforcement agencies are having a problem managing their use of force incidents?

Managing the Use of Force Incident reveals a new and innovative approach to law enforcement liability management. Rather than recite the traditional reactive remedies to department and officer liability, the novel solutions presented in this tome underscores the proactive strategies that officers, trainers, supervisors, and administrators can implement to prevent lawsuits and create an effective preemptive defense against citizen complaints and excessive force litigation.

This proactive liability management philosophy is the product of a professional career spanning over two decades reviewing use of force incidents, consulting with police defense attorneys, and defending criminal justice officers as a use of force expert. The insights into the pitfalls, trends, and strategies explained in this book were developed from an analysis of over nine hundred use of force incidents as a litigation consultant and a defense expert witness, who has testified in over three hundred civil and criminal trials alleging the use of excessive force by police and corrections officers.

As a result, *Managing the Use of Force Incident* addresses excessive force litigation with four inventive strategies:

1. *Understand Causation.* To minimize excessive force litigation, officers, supervisors, and administrators must develop an understanding of the underlying causes of police misconduct lawsuits. An officer's use of sarcasm, vulgarity, or his inability to properly manage perceptions at the scene promotes civil rights litigation by creating a negative perception of the officer's use of force. A supervisor's failure to address an officer's lack of professionalism, poor work performance, or abusive behavior creates liability that could have been prevented. An administrator's inability to predict the negative consequences of a newly written use of force policy, the failure to clearly define management's expectations regarding the use of force to department personnel, or the implementation of a new use of force option without first considering its possible consequences bring about litigation through a lack of administrative foresight. These are just a few examples of the causative issues that are addressed.

2. *Focus on Prevention.* If litigation is predictable, then it may be preventable. It is a given that criminal justice officers will use force. The question is whether the force is objectively reasonable. If a department employs an officer who is reluctant to "go hands on" with a suspect, that officer will eventually overact and use excessive force. If the same department, employs an officer who is hyperaggressive, that officer will eventually use too much force for the circumstances. Both these situations are predictable. And, therefore, preventable with the proper training and supervision.

The historical evidence shows that when cops are given new use of force tools without the proper forethought regarding the consequences of their implementation, it is like giving Donald Duck the atom bomb. The Taser is a classic example. The Ninth Circuit Court of Appeals restricted the use of the Taser because of law enforcement's inability to conclude, on our own, that shocking passively resisting people with a 50,000 volt electronic stun device is excessive force. Who could have predicted that? Chapter 10 provides the information necessary for officers, trainers, supervisors, and administrators to objectively evaluate the potential liability of less-than-lethal force options. Also, Chapter Ten will offer recommendations for the development of performance, training, and administrative solutions to prevent officer and department liability.

3. *Create a Proactive Defense.* Sun Tsu states, "If you know yourself and you know your enemy, even in a thousand battles you will never be in peril." It is impossible to prevent every lawsuit, but an officer and his department can approach every use of force incident expecting a lawsuit to be filed. Chapters 1 and 2 provide examples of the mistakes officers, supervisors, and administrators make that plaintiffs' attorneys look for and exploit in the use of force incident. With this information, you will get to know your enemy. Conse-

quently, you will learn tactics and strategies that build powerful preemptive defenses to excessive force litigation. Rather than play a reactive role against accusations of excessive force and misconduct—as an officer at the scene—you will learn to proactively manage witness and juror perceptions of the use of force incident. As a supervisor or administrator, you will learn to predict potential liability problems and make the necessary changes in policy, supervision, or training to prevent lawsuits. In addition, you will come to understand the importance of a proactive defense, in the event that a lawsuit is filed.

4. *Effective Use of Force Training.* Training does not prevent liability. Effective use of force training, which is well-thought-out, prevents liability. Officers are not sued for using a specific force option; officers are sued for making poor use of force decisions. A classroom use of force lecture does little to enhance an officer's use of force decisions-making abilities. Only a scenario-based use of force training program can effectively minimize officer and department liability. Accordingly, Chapter 12 provides you with a comprehensive overview of the Confrontational Simulation program. This program was the first nationally recognized scenario-based use of force training model.

Moreover, Chapter 12 explains the benefits of an integrated use of force training program. Customarily, training in the use of nondeadly force options (arrest and control tactics, baton, less-lethal impact munitions, pepper spray, and electronic control devices) occur in separate unrelated training modules. This disjointed approach to less-than-lethal and less-lethal force training can unintentionally create officer and department liability. The proactive solution to this liability problem is to implement an integrated approach to less-than-lethal force training. In an integrated use of force program, officers practice the transition from one nondeadly force option to another. This innovative training methodology circumvents a panic-induced overreaction. A panic-induced deployment of nondeadly and deadly force is a major cause of wrongful death litigation.

Managing the Use of Force Incident is the first treatise written that addresses the real world causes of excessive force litigation and provides real world proactive solutions. I will be the first to admit that the observations and recommendations presented in this book are vastly different than those offered in other publications or seminars regarding the use of force by criminal justice officers and liability management strategies for supervisors and administrators. What makes my perspective unique is that it does not originate from a solely academic, administrative, or theoretical understanding of the use of force. It is a culmination of over twenty years of professional experience as a liability consultant, expert witness, law enforcement officer, criminal justice manager, and use of force instructor.

Consequently, this book was written by a cop for cops. As such, the manner and tone in which the information is presented originates from a cop's perspective. This is not to say that the information contained within these pages will not benefit noncriminal justice professionals. The liability management concepts discussed in the following chapters will assist anyone who has a vested interest in minimizing criminal justice civil liability: attorneys, insurance authorities and companies, public administrators, and risk managers.

However, be forewarned, the examples and the dialogues used in my narratives are realistic representations of what occurs on the street and in the correctional facility. Cops are not saints, but they do spend their entire professional lives dealing with sinners (metaphorically speaking). As a result, *Managing the Use of Force Incident* was not written to be a children's bedtime storybook. Some of the examples contained herein may seem a little salty to the civilian reader or the reader expecting a purely academic experience. With that said, as you move forward into the following chapters, if you encounter an example that causes you to raise an eyebrow, I apologize in advance for offending your sensibilities, but not for the context or the purpose for which the example is given.

While preparing to write this book I was actually told by a book publisher (not the publisher of this book) that cops do not read books and their departments buy very few publications. At first this statement offended me. Then, after some reflection on the comment, I came to the conclusion that cops do read books. We just don't read romance novels, self-help books, or fiction. Mainly because cops believe that we have the romance thing nailed down, that we're OK—but everyone else has a problem, and that the real world is crazy enough without reading someone else's distorted fantasies. So, in step with that insightful observation, I would like to thank you for purchasing my book. You are living proof that cops do read, and you will be relieved to know that my next book will not be a romance novel, a self-help book, or fiction.

The concepts explained in the following chapters may take you out of your managing the use of force incident comfort zone. This is a good thing. Because the status quo of liability management research and understanding has failed to successfully address the underlying causes of excessive force litigation. Conventional wisdom may be conventional, but it can be neither wise nor effective. If you contemplate the admonishments, concepts, strategies, and tactics offered in *Managing the Use of Force Incident*, you just might become a little wiser and more enlightened regarding the prevention of officer and department liability.

LETTER OF RECOMMENDATION

Northland Insurance Companies
400 Country Club Road, Suite 200
Eugene, Oregon 97401

To Whom It May Concern:

RE: Howard R. Webb—Police Liability Expert

Dear Sir or Madame:

I am the Assistant Vice President of Claims for an insurance company that has a significant public entity business. We provide first dollar coverage for liability exposures of Cities and Counties nationally. Police liability is a significant part of that exposure.

We try a high percentage of our police liability claims because of the nature of the business.

Over the last several years we have sought out the expertise of Howard Webb to assist in the evaluation of these difficult cases and to serve as an expert for us in State and Federal Court trials. We have found Mr. Webb to be extremely helpful in the evaluation stage because of his tremendous knowledge of the area and his ability to identify and analyze the issues.

In addition, we have found his expert testimony at trial to be crucial to our success rate in defending police misconduct charges. It is clear from the results that the juries and judges have found his testimony to be credible and convincing. He has demonstrated the ability to adeptly explain to the juries the basis for officers' actions and the training that supports the actions.

I would highly recommend Howard Webb to anyone in need of a trial expert or to merely review a case for liability analysis.

Sincerely yours,

James R. McWilliams, CPCU
Assistant Vice President
Branch Claims Manager

CONTENTS

	<i>Page</i>
<i>Introduction</i>	vii
<i>Letter of Recommendation</i>	xii
 PART I: UNDERSTANDING THE USE OF FORCE INCIDENT	
Chapter 1: LAWSUITS ARE PREDICTABLE, PREVENTABLE, AND WINNABLE	5
Chapter 2: THE IMPORTANCE OF PERCEPTIONS	43
Chapter 3: STANDARDS GOVERNING THE USE OF FORCE	67
Chapter 4: THREAT ASSESSMENT	101
 PART II: PREPARING FOR THE USE OF FORCE INCIDENT	
Chapter 5: THE FORCE CONTINUUM: TO USE OR NOT TO USE THAT IS THE QUESTION	143
Chapter 6: DOCUMENTING THE USE OF FORCE INCIDENT	180
 PART III: MANAGING THE USE OF FORCE INCIDENT	
Chapter 7: MANAGING THE USE OF FORCE INCIDENT FOR THE OFFICER	209
Chapter 8: MANAGING THE USE OF FORCE INCIDENT FOR DETECTIVES	224
Chapter 9: MANAGING THE USE OF FORCE INCIDENT FOR SUPERVISORS	240
Chapter 10: MANAGING THE USE OF FORCE INCIDENT FOR MID-LEVEL MANAGERS	270
Chapter 11: MANAGING THE USE OF FORCE INCIDENT FOR ADMINISTRATORS	304
Chapter 12: USE OF FORCE TRAINING	331
 <i>Final Thoughts</i>	
<i>Training Resources</i>	
<i>Bibliography</i>	

Chapter 1

LAWSUITS ARE PREDICTABLE, PREVENTABLE, AND WINNABLE

Lawsuits are a fact of life for the criminal justice officer. There are only two strategies that you can implement to prevent a lawsuit. Strategy # 1: Don't go to work. Strategy # 2: If you do go to work, don't talk to anyone, don't touch anyone, and don't drive anywhere. Of course, these are not realistic strategies for the prevention of lawsuits, but they make a point. If you are doing your job, the odds are that you will be—at some point in your career—a defendant in a lawsuit. In fact, the more enthusiastically you do your job, the more likely it is you will be sued. I am not suggesting that you go about your duties in a state of paranoia and fretting about being sued. However, I am recommending that you start every official action with the expectation that it will end with you being a defendant in a lawsuit. Or worse, with you being criminally prosecuted.

Gordon Graham, former California Highway Patrol Lieutenant, lawyer, and police liability expert, states in his seminars that if a lawsuit is predictable, it is preventable. I believe this strategic truth can be taken one step further: If a lawsuit is predictable, it is winnable. It is true that if you can predict officer or department liability; then you can take the necessary steps to prevent the actions, behaviors, or circumstances that create that liability. However, you can do everything within your power to prevent a lawsuit and still get sued. The best strategy for managing law enforcement liability is a two-pronged proactive defense. First, develop the power of foresight. To cultivate the ability to foresee the liability in a given situation is easier than you may think. As Oscar Wilde said, "The power of accurate observation is often called cynicism by those who do not have it." If you can accurately identify a potential liability problem, you can establish the policies or training programs to help prevent it. The second defensive prong emphasizes properly managing the use of force incident at the officer's level. An officer who prop-

erly manages the use of force incident does so proactively with the knowledge of how to positively influence the witnesses' and the jurors' perception of his use of force.

The traditional defense to a criminal justice lawsuit starts when the plaintiff's attorney files the civil complaint in state or federal court. At this point, your city, county, or insurance company attorney goes into evaluation mode. Your attorney reviews your written report and the reports of the other officers involved in the incident. He also reviews all witness statements. From the written reports and witness statements, your attorney evaluates the winnability of the case. At this point, the die has been cast. What you have done, said, and written is what your attorney has to work with. Next, your attorney moves into damage control mode. In damage control mode, your attorney seeks your justification for what you did or did not do, what you said or did not say, and what you wrote or did not write in your report. This is the traditional, after-the-fact, reactionary defensive strategy. You have done it. Now, you and your attorney have to defend it.

A more effective strategy is a proactive defense. A proactive defense consists of six components:

PROACTIVE MINDSET. You go into every situation with the expectation that you will be sued or prosecuted for your actions or reactions. If you go into a situation knowing that in the end you must explain and justify your actions to a jury, your actions will be—more often than not—appropriate and defensible.

Chapter 2

THE IMPORTANCE OF PERCEPTIONS

There are three perceptions that win police lawsuits: The jury's perception of the officer, the jury's perception of the plaintiff, the jury's perception of the witnesses.

—Lou Kurtz, Attorney at Law
(Personal communication, 2011)

Lou Kurtz was the police defense attorney who was hired to defend the Medford Police Department and the Jackson County Sheriff's Office against twelve federal court lawsuits. A local plaintiff's attorney had placed an advertisement in the newspaper asking people who believed that the police department or the sheriff's office had violated their civil rights to contact him. Shortly afterward, the attorney filled all twelve lawsuits in federal court on the same day.

I testified as Mr. Kurtz's use of force expert at trial in those lawsuits. The night before our first trial was to begin Lou and I were discussing my testimony. During our discussion, I asked Lou what he believed won police and corrections lawsuits? "The single most important element in winning a lawsuit is perception," Lou replied. "How so?" I asked. "There are three perceptions that win police lawsuits: The jury's perception of the officer, the jury's perception of the plaintiff, and the jury's perception of the witnesses," he explained. I wrote that quote down in my Franklin Planner; I still have that handwritten quote. For the past twenty years, Lou's explanation of what wins lawsuits has been the foundation of my use of force training. And, as you have probably noticed—as you read through Chapter 1, it is the foundation for this book.

Manage the Perception and You Positively Influence the Outcome

I touched on this strategy briefly in Chapter 1. In a lawsuit where there is no smoking gun regarding an officer's use of excessive force, a plaintiff's attorney cannot win the lawsuit when the facts are in dispute, unless he damages the officer's credibility. Fortunately for you, jurors have an inherent trust of criminal justice officers and an innate dislike of lawbreakers. To prove my point, I have included a summation of a newspaper reporter's interview with attorneys who specialize in litigating civil rights violations against criminal justice officers.

"Lawyers: Public Doesn't See Police in the Role of Bad Guys" was the newspaper article's headline in the metro section. The reporter interviewed several metro area attorneys who specialized in suing criminal justice officers. During their interviews, the attorneys made several observations that I feel are important to properly manage the use of force incident.

People Do Not Want to Believe that Police Lie

It is a professionally accepted truth among attorneys who defend cops and those who sue them that when an officer takes the witness stand, raises that right hand, and swears to tell the truth, jurors want to believe that the officer will be truthful. There aren't any empirical studies that explain why cops have inherent credibility with jurors. They just do. However, after twenty-five years of consulting on police and corrections excessive force lawsuits, I have developed a theory about the source of this inherent credibility.

In a country where its citizens rely more and more on the government for their personal safety and well-being, the average citizen—for his or her own peace of mind—wants to believe that the agents of our government are capable of keeping them safe. When a woman dials 911 for help, she wants desperately to believe a professional and well-trained police officer is coming to her aid. When that person sits on a jury, her belief in that responding officer's professionalism and competence is projected onto every criminal justice officer who takes the witness stand. As an example of this, in an incident where the officer shot and killed an unarmed suspect, the federal court trial ended in a hung jury. When the plaintiff's attorney questioned the jurors, three women jurors told the attorney that they believed that whatever level of force a police officer used it would be justified.

Chapter 3

STANDARDS GOVERNING THE USE OF FORCE

As a criminal justice officer, you are regulated by two governmental standards regarding the use of force: Your state's statutory guidelines and the United States' Constitution as interpreted by the Supreme Court and the applicable Court of Appeals for your district. An individual state can establish a more restrictive requirement governing the use of force, but not more permissive. In fact, it was the more permissive Tennessee state law governing the use of deadly force by police that gave us the definitive United States Supreme Court ruling of *Tennessee v. Garner*.

For the purpose of our discussion, I will only address the federal requirements for lawfully using deadly and nondeadly force. Although you can be sued in state court for a state constitutional violation or for simple negligence, the vast majority of civil rights lawsuits are filed and heard in federal courts.

Previously we discussed the proper management of witness and juror perceptions, now I would like to take a moment to explain how to positively influence the plaintiff attorney's perception of you as an officer. You may find this surprising, but many plaintiff's attorneys think cops are dumb. Most have respect for what we do, but let's be honest, it does not take seven years of college to be a police officer, not even to be a really good cop. So, naturally, based on their educational credentials they are going to look down on us as a profession. Because they spend seven years in college, their orientation is academic in nature: legal theory, conceptual rules, and well-established standards. It is for this reason.

QUOTING THE USE OF FORCE STANDARD IN YOUR JUSTIFICATION ENHANCES YOUR CREDIBILITY

Your written report is the first document the plaintiff's attorney will review in an incident involving the use of nondeadly force. At the Academy, it was pounded into you that your written report creates the first and most lasting impression of you as an officer. Unfortunately, that admonishment doesn't stay with most cops after they graduate. Further, in a deadly force incident, the first document the plaintiff's attorney will review is a written transcript of your audio/video recorded internal affairs' interview. With either document, the attorney will use the content of your information to evaluate how knowledgeable you are regarding the use of force and how effective your testimony will be on the witness stand.

Consequently, by quoting the legal standard in your report, during your internal affairs interview, and in your deposition, you create the perception that you are very knowledgeable regarding the use of force. The more knowledgeable you appear to the plaintiff's attorney the less likely he or she is to pursue the lawsuit. And if the attorney does continue to press the litigation, the more likely he or she will settle the case for a pittance. The following are examples of quoting the use of force standard in a written report and during a recorded internal affairs' interview:

Nondeadly Force (Written Report)

As Mr. Jones continued to ignore my verbal commands to "Stop! Get on the ground," he advanced toward me, at a faster than normal pace, with his fists clenched. I pulled my Taser, issued another verbal command to "Stop, get on the ground!" and deployed my Taser in probe mode. Mr. Jones fell to the ground incapacitated by the Taser shock. As per *Graham v. Conner*, an officer can use nondeadly force if the suspect poses an immediate threat to an officer or others. Furthermore, per *Graham*, an officer must take into account the severity of the crime the suspect has committed, and whether the suspect is actively resisting arrest. I deployed my Taser because Mr. Jones presented an immediate threat of serious physical harm to me through his superior size and strength—he is six feet and five inches tall, weighs two hundred and forty-eight pounds, and has a body builder's physique. Further, I feared for my safety because Mr. Jones had previously committed a violent crime by punching and kicking another patron in the bar—causing a serious head injury. Lastly, he resisted arrest through a verbal threat to assault me. I told Mr. Jones he was under arrest for battery. When I did, he glared at

Chapter 5

THE FORCE CONTINUUM—TO USE OR NOT TO USE THAT IS THE QUESTION

The benefit of using a force continuum to train police officers is that at trial it shows the jury that there is a reasoned thought process used in making use of force decisions. It shows that cops are not just a bunch of out of control cowboys out there using force on people.

—Robert Franz, Jr., Attorney
(Personal communication, 2011)

Recently, a philosophical movement has gained momentum regarding a change in the way use of force is taught to criminal justice officers. A small number of police defense attorneys are recommending that criminal justice agencies abandon the concept of a continuum of force with all its trapping and instruct officers in only *Graham v. Connor's* objective reasonableness standard. This training recommendation is based on the premise that the objective reasonableness standard is so vague that a plaintiff's attorney cannot exploit the discrepancies between the officer's actions and his use of force training.

Here is the flaw with replacing a force continuum model with the objective reasonableness standard: The strategy is myopic and shortsighted; it only provides your attorney with a tactical advantage at trial. Teaching only the objective reasonableness standard does not address the cause of excessive force litigation and all the problems associated with it.

The primary cause of excessive force litigation is poor use of force decision-making by the officer. How does only teaching officers that their use of force must be objectively reasonable based on the totality of the circumstances help them make proper use of force decisions? Hello, pull your head out of the group think tank—it doesn't. It is like telling a fat kid with diabetes to make healthy food choices without providing him with the nutritional

information regarding his food options. The secondary cause of excessive force litigation is the mismanagement of the use of force incident. If teaching officers the guidelines outlined in *Graham v. Connor*—a ruling made in 1985—was effective in managing the use of force incident, by now, excessive force complaints would be only faded memories.

Even if you do embrace replacing the force continuum with the objective reasonableness standard, you have to acknowledge the universal truth regarding the use of force: There is a continuum of force that starts with the officer's presence, escalates with increasingly more intrusive force, and culminates with deadly force. So, if the continuum of force exists, why not teach it?

The purpose of the force continuum is to provide an officer with an understanding of which level of force is objectively reasonable in relationship to a specific level of resistance. In addition, the force continuum conveys the department's standards regarding the proper use of force to the officer. How can you expect a new officer to make proper use of force decisions if you don't explain the hierarchy of force? A new officer has little, if any, law enforcement experience to draw from to determine what is an objectively reasonable amount of force to use in any given situation.

Further, how can you expect veteran officers to make proper use of force decisions if you do not provide a use of force blueprint for them to follow? Like the fat kid who will always choose cake over brand cereal without considering the long-term health consequences of his decision. The veteran officer, without a use of force model to guide him, will intuitively make decisions on the amount of force to use without considering the decision's impact on a potential lawsuit.

The main argument against using a force continuum model stems from the plaintiff attorney's ability to effectively challenge a poorly conceived force continuum and the officer's inability to explain the use of force generally. During the discovery process, the plaintiff's attorney will receive copies of the department's use of force training materials. Often included in those materials is a copy of the department's force continuum model. Most criminal justice agencies do not develop their own force continuum. They adopt another department's continuum model with little understanding of how to explain it. Or, if the agency does develop their own model, the developers do so not anticipating it would be used against their officer in an excessive force lawsuit.

Chapter 6

DOCUMENTING THE USE OF FORCE INCIDENT

To properly document the use of force incident, it is critical that you make the paradigm shift from being an objective reporter of the facts to a proactive defendant in a potential lawsuit. Properly documenting the use of force incident is crucial to building an effective defense against allegations of excessive force. Documenting your use of force occurs in four stages of the incident:

Stage One: As the action is unfolding, create a proactive defense by recording the Threat's behavior and your use of force with your patrol car's video camera or create an audio recording of your verbal commands and the Threat's volatile rants via your police radio.

Stage Two: After the scene is secure, document the physical evidence by properly photographing the crime scene, damaged property, and your injuries and the Threat's injuries.

Stage Three: After the evidence has been photographed, properly collect and package the physical evidence.

Stage Four: Create a written record of the incident in a properly prepared use of force report.

There is a difference between documenting the use of force incident and reporting the arrest of a cooperative suspect or recording the findings of a criminal investigation. In documenting the use of force incident, you are creating a foundational defense against a lawsuit that may not go to trial for up to five years. I know you are saying to yourself, "I know how to conduct a criminal investigation." I am quite sure you do. However, as you are aware, specific circumstances require special investigative knowledge. Accordingly, in this chapter, I will explain the specific documentation strategies, forensic techniques, and report-writing guidelines that are required to effectively memorialize the use of force incident.

Using the Car Video to Enhance Your Defense

If a picture is worth a thousand words, a video recording is equivalent to the Harry Potter series. Most jurors are visual learners, and they are in court to learn what happened in your use of force incident. Consequently, a video documentary of the incident can greatly bolster your defense. On the witness stand, you can describe the Threat's appearance, bizarre behavior, profanity, and menacing actions, but your testimony will not have one-tenth of the impact that a video has on the jury. However, a video recording can be a double-edged sword. When you properly perform on the video, you are almost guaranteed a defense verdict. However, even if your use of force is justified, if you pander to the camera, overreact, have an emotional outburst, or appear insensitive, the video may damage your defense beyond rehabilitation.

Here are guidelines for making an effective video documentary of the use of force incident with your patrol car video camera.

KEEP YOUR VERBALIZATION DIRECT, CONTROLLED, AND PROFESSIONAL. The more you say on video the more ammunition you give the plaintiff's attorney to shoot holes in your credibility. Stick to the script: give clear commands, present the Threat with his or her options, explain the consequences of not complying, and get a confirmation that the Threat will not cooperate: "Is there anything I can do or say to get you to comply?" When video recording a use of force incident, keep in mind that your verbalization provides the proper context for the visual images of the use of force.

The lack of audio on the Rodney King video damaged the officers' defense. If the video camera had recorded Rodney King making threats and the officers using proper verbal commands with each strike of the baton, the outcome of their criminal trial may have been different.

DO NOT ANTAGONIZE, DEMEAN, OR DISRESPECT THE THREAT. Generally, jurors are not sympathetic to criminals, so don't say anything that makes you sound like a vindictive ass and the Threat appear as a victim of your dysfunctional personality. In a shooting of an unarmed drunk driver, the plaintiff sued for \$1,000,000.00. After viewing the patrol car's video of the incident, the jury awarded the plaintiff \$3,000,000.00. When the defense attorney polled the jury, the jurors stated that the award was increased because the officer antagonized and demeaned the plaintiff during the arrest. As a result, the jurors felt it was necessary to punish the officer.

SOFTEN YOUR PERFORMANCE—APPEAR COMPASSIONATE AND CONCERNED. Cops have a reputation as being cold and arrogant. When your actions are being video recorded, you do not want to be perceived as Robo Cop. To soften a jury's perception of you, immediately call for medical assistance and tell

Chapter 9

MANAGING THE USE OF FORCE INCIDENT FOR SUPERVISORS

As a supervisor, if I were to ask you: What proactive role do you play in minimizing liability for your department? What would you say? I don't know what answer you would give. But I know what answer you should give: I play the role of diplomat, mentor, performance coach, and use of force instructor. As a first-line supervisor, those are the roles you should play to proactively minimize complaints of excessive force and win lawsuits. Put another way, you must lead your troops by example to proactively manage the use of force incident. Supervisor may be your title, but leadership is what effective supervisors provide their officers in properly managing the use of force incident.

The Power of an Apology

As a supervisor, you play an important role in positively influencing perceptions at the scene of a use of force incident. As the on-scene supervisor, you are in a position to prevent potential complaints and lawsuits. Many potential use of force complaints can be circumvented at the scene by a supervisor skilled in managing the use of force incident. Unfortunately, as is often the case, supervisors—believing they are supporting their troops—miss an opportunity to prevent a lawsuit by simply offering an apology. The phrase “I don't apologize when my officers are right” has been the catalyst for more than a few lawsuits.

For example, in a lawsuit involving the investigative detention of a husband and wife, an apology by the supervisor would have prevented the lawsuit. The plaintiffs, who were building a decorative block patio, had made arrangements with the manager of a home improvement store to pick up several dozen-cement blocks after the store had closed. The blocks were left outside the security fence on a wooden palette. The plaintiffs, the husband a realtor and his wife a legal assistant, were loading the blocks into the back of a late model truck when the manager of a variety store drove by and observed the suspicious activity. The manager drove to the police department and reported the possible burglary in progress.

Several officers and a sergeant responded to the home improvement store. After watching the plaintiffs load cement blocks for approximately fifteen minutes, the officers moved in and high-risk handcuffed the couple at gunpoint.

As the officers ordered the couple to prone out on the ground, both the husband and wife told the officers that they had purchased the blocks and that there was a payment invoice on the truck's seat. It is important to note that the husband was wearing dress slacks and a dress shirt and the wife was wearing designer jeans and a conservative blouse. Not your standard burglar attire. Not to say they could not have been burglars, but the suspects did not fit the criminal profile. The couple was handcuffed, searched, and placed in patrol cars.

After the plaintiffs were detained, an officer retrieved the sales receipt that verified the plaintiffs had purchased the blocks. The couple was released without an explanation for their detention. The unhappy wife confronted the sergeant and asked for an apology for the inconvenience of being handcuffed and the embarrassment of being searched by a male officer. “I don't apologize when I am right,” the sergeant quipped. Then, the sergeant and the officers drove away. Feeling wronged by the officers, the homeowners filed an excessive force lawsuit.

All the homeowners wanted was an apology. An apology is not an admission of wrongdoing. It is an acknowledgement that the homeowners are entitled to be upset at being treated like burglary suspects. An apology does not cost your department a dime, but civil rights litigation can cost thousands, if not hundreds of thousands of dollars.

As one enlightened police supervisor told me, “I apologize to upset citizens all the time. I don't apologize for our tactics. I apologize for the inconvenience and the discomfort that we may have caused them. Most of the time, all they want is for me to acknowledge that we (cops) understand how they feel.” Furthermore, an apology by a supervisor should be accompanied with the background information regarding the incident, the justification for the use of force, and/or an explanation of the tactics.

In the incident with the homeowners, the officers did not do anything wrong, but neither did the homeowners. They were just victims of circumstance. When the officers discovered that the plaintiffs had purchased the blocks, the sergeant should have apologized for taking them down at gun-

Chapter 11

MANAGING THE USE OF FORCE INCIDENT FOR ADMINISTRATORS

I share your fate.

—Alexander the Great, Crossing the Gedrosian Desert

As an administrator, by the position that you hold in the organization, you are a manager of budgets, facilities, and resources. The management of things is not a difficult task and it comes with little professional or political jeopardy. An administrator's headaches, gastrointestinal problems, and public relations nightmares are not caused by things; they are caused by the people within the organization.

The reason administrators suffer from these problems is that they treat their officers as if they were chess pieces on a board. If you managed only inanimate objects and no officers, you would not have citizen complaints and civil rights lawsuits. But you don't. Criminal justice organizations are made up of people. Diverse groups of people with all the foibles and flaws that make us human. However, regardless of age, culture, education, or gender there is one intangible trait that human beings are drawn to and will rally behind: Leadership.

In my criminal justice career, I have worked under fifteen sergeants, three lieutenants, three captains, two chiefs, two sheriffs, four assistant directors, and eight administrators. They all were good managers, but only four of them were leaders: Jay Waterbury, Dick Robert, Bill Garland, and Tom Potter. I mention their names not to gain favor, but to call attention to their ability to bring out the best in their people.

The administrator's primary role in properly managing the use of force incident is to bring out the best in the troops through his or her personal leadership skills. When an administrator brings out the best in his or her officers, use of force incidents are properly managed, liability is minimized, and frivolous lawsuits are won.

There are hundreds of good leadership books (and a few great ones) available to an administrator who desires to enhance his or her leadership abilities. Additionally, private companies, government agencies, and institutions of higher learning offer criminal justice management courses and leadership seminars as well. Because of the vast amount of management information available, it is relatively easy to peruse the latest trends in leadership philosophy and wisdom. However, applying leadership theory to a real world criminal justice workplace will be one of the more challenging endeavors you will ever undertake as a public safety administrator. Many try, but very few truly succeed.

Where most leadership training falls short for the criminal justice administrator is that it is developed by civilians for civilian employees—not cops. As a criminal justice administrator, you don't herd lambs; you lead lions. To effectively lead a criminal justice organization, you must think back to what you respected as a patrol, line, or field officer: courage, dedication, technical skill, and warrior ethos. Consequently, providing effective leadership to a criminal justice organization will require you to seek out a historical heroic leader to emulate—not in accomplishments, but in character and leadership qualities. Realizing this, when I obtained a leadership position, I chose Alexander the Great as my leadership archetype.

Alexander the Great became king of Macedonia at the age of twenty. He unified Greece in less than two years after becoming king. Alexander invaded and conquered Asia Minor, Egypt, Mesopotamia, the Middle East, the Persian Empire, Afghanistan, Sogdiana, Bactria, and invaded India in a ten-year campaign that covered 10,000 miles.

By the time he was thirty-two years old, Alexander had conquered the known world. On Caesar's thirty-second birthday, he wept because he had only accomplished a fraction of what Alexander had at thirty-two. However, these accomplishments alone are not the reasons why I admire Alexander as a leader. What I find most extraordinary about Alexander the Great is that he accomplished all this with a democratic army. The Macedonian military machine was a volunteer army. His troops voluntarily walked 10,000 miles, fought major battles, crossed deserts, and braved unimaginable hardships. I believe that if Alexander can inspire that level of loyalty and commitment from his troops he has something to offer leaders of criminal justice organizations.

Alexander the Great led by example. He traveled at the head of his army. Alexander led every charge and always fought visibly from the front. He was wounded by every weapon, three times nearly fatally. Alexander shared the hardships of his troops: slept cold and ate sparingly. He insisted that the

FINAL THOUGHTS

America's criminal justice officers are entrusted with the authority and power to deprive a man of liberty, seize his property, injure his body, and end his life: robbing a parent of a son, a sister of a brother, a wife of a husband, and a child of a father. I hope you truly understand the honor and the privilege that has been bestowed upon you. For no other in our country is entrusted with such utter and complete power. Further, I pray that God gifts you with the strength to use your power and authority with restraint and wisdom. For what you do on-duty reflects on every one of us who wears or has ever worn the badge.

It is said that we are a nation of laws and not of men. But, the truth is that those who purport this noble virtue do so from behind the protection of the men and women in uniform who are tasked with the protection of those who write and live under the law.

For a nation and its laws are only as resolute and righteous as those who brandish the shield and wield the sword. For those who have sworn to protect and serve are the warrior guardians of a free society. For without the courage and dedication of those who answer to a higher calling, evil prevails, society collapses, and the laws of nations become only hollow words written on gilded paper.

For regardless of the eloquent oration of the ruling class, the philosophical rhetoric of learned men, or the impassioned ranting of the heretic, in the end, it is force that rules the day.

This book is dedicated to the men and women of law enforcement and corrections who willingly place their personal and professional well-being on the line every time force is deployed in the performance of their public safety mission. It is my most sincere hope that the information contained in these pages will be of assistance to you, as an officer, supervisor, or administrator, in properly managing the use of force incident.