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LEAGUE OF CALIFORNIA CITIES CITY ATTORNEYS' CONFERENCE

Shots Fired! How to Respond to an Officer Involved Shooting

5/9/2019

PRESENTED BY:

**J. Scott Tiedemann & James E. "Jeb"
Brown**

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Shots Fired!

How to Respond to an Officer Involved Shooting

League of California Cities City Attorneys' Conference | May 9, 2019

Presented By: J. Scott Tiedemann and James E. "Jeb" Brown

Types of Investigations

- Officer involved shootings commonly result in:
 - Criminal investigation
 - An administrative investigation as to policy compliance by involved officers
 - A civil investigation to determine potential liability

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Impact of Officer-Involved Shootings on a Police Department

- Negative publicity and community relations/protests
 - Public Records Act requests
 - Media
- Civil liability
- Administrative Response

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City Attorney's Checklist

☐ Establish a protocol in advance
☐ Roll out?

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City Attorney's Checklist

☐ Circumstances

☐ Facts and circumstances are subject to change
☐ Special considerations
☐ Static Event v. Ongoing Investigations

☐ Status of Involved Officer(s)
☐ Status of Subject(s)
☐ Injuries to bystanders

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City Attorney's Checklist

☐ Notifications

☐ Who

☐ City Manager
☐ City Council

☐ How?

☐ Whose responsibility?
☐ Written or verbal
☐ Brown Act

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City Attorney's Checklist

☐ Media Relations

☐ Contact PIO
 ☐ Press release?
 ☐ Media updates

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Disclosure of Identity of Involved Officers

- Identities of officers involved in a shooting are subject to disclosure under PRA unless specific threat to officer safety outweighs public interest in disclosure.
 - Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59

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SB 1421 – Eff. 1/1/2019

- Requires disclosure of records/information relating to certain incidents in response to a PRA request:
 - Records relating to the report, investigation or findings of an incident:
 - Involving the discharge of a firearm at a person by a peace officer or custodial officer
 - In which the use of force by a peace officer or custodial officer against a person results in death or great bodily injury

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AB 748- Eff. 7/1/2019

- Requires agencies to produce video and audio recordings of "critical incidents"
 - "Critical incidents" = an incident involving the discharge of a firearm at a person by a peace officer or custodial officer, or an incident in which the use of force by a peace officer/custodial officer against a person resulted in death or great bodily injury.

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City Attorney's Checklist

- ☐ Debriefing of Incident
 - ☐ Who conducts the briefing?
 - ☐ When? 24/48 hours
 - ☐ Privileged?
 - ☐ Written report

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City Attorney's Checklist

- ☐ Collection of Evidence
 - ☐ Criminal Evidence
 - ☐ Civil Evidence
- ☐ Statement of Involved Officer(s)
- ☐ Defense of Civil Litigation
 - ☐ Who is going to handle?
 - ☐ Timing of retention?
 - ☐ Conflict issues

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Civil Liability for Officer-Involved Shootings

- Civil Liability
 - Tort theories (e.g., assault, battery, negligence)
 - Most prevalent - 42 U.S.C. § 1983

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Criminal and Administrative Investigations

- Rights under POBR do not apply to officers under criminal investigation, including criminal investigation conducted by their employers
 - POBR only applies to investigations where are “concerned solely and directly with alleged criminal activities.”
 - *Van Winkle v. Ventura* (2007) 158 Cal.App.4th 492

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Criminal and Administrative Investigations

- Do not “intertwine” administrative and criminal investigations
 - *Cal. Correctional Police Officers Assn. v. State of Cal.* (2000) 82 Cal.App.4th 294

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Criminal and Administrative Investigations

- Active criminal investigation will toll the statute of limitations on the administrative investigation even if criminal and administrative investigations conducted by same agency
 - Dept. of Corrections and Rehab. v. State Personnel Board* (2016) 247 Cal.App.4th 700

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Rights of Involved Officers

- Right to Representation
 - Government Code Section §3303
 - Reasonable requests for legal or union representation should be honored
 - Upland POA v. City of Upland* (2003) 111 Cal.App.4th 1294
 - Must "choose a representative who is reasonably available to represent the officer, and who is physically able to represent the officer at [a] reasonably scheduled interrogation."

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Rights of Involved Officers

- Reasonableness standard applied to representation also allows for "anti-huddling" rules
- Allows for rules preventing multiple deputies meeting with one lawyer prior to the initial interrogation
 - Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625

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Rights of Involved Officers

- Privileged Communication
 - Discussions with licensed attorneys are privileged as attorney-client communications
 - Discussions with agency reps/employee groups will be privileged only as to the discussion of non-criminal information (Gov't Code §3303(i))
 - Representative may be required to disclose information received from subject for criminal matters

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Rights of Involved Officers

- Meeting with Peer Counselors
 - No legal privilege for communications with peer counselors
 - Peer counselors should refrain from discussing the facts of any incident with an involved or witness
 - Union rights?

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Status of Involved Officers

- Paid Administrative Leave
 - Involved deputies may be placed on paid administrative leave following an OIS or death
 - Allows officer to obtain emotional/psychological support
 - Allows department time to assess/investigate the situation
- Unpaid administrative leave unlikely option at this stage

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Status of Involved Officers

- Employee subject to AL may be subject to the following:
 - Relinquish badge, ID, weapon(s)
 - Cease peace officer duties
 - May be reassigned to different shift
 - Remain available for contact

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Status of Involved Officers

- Department practice or policy may allow for temporary reassignment during pendency of administrative leave
- Be aware of Gov't Code §3303(j)
 - No officer shall be temporarily reassigned to a location or duty assignment if a sworn member would not normally be given that assignment under similar circumstances

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Fitness For Duty Examinations

- Examination must be job related and consistent with business necessity
- Gov't Code §1031
 - All peace officers must be "free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer."

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Fitness For Duty Examinations

- Gov't Code §1031
 - Physical condition "shall" be evaluated by a licensed physician/surgeon
 - Emotional/mental condition "shall" be evaluated by a licensed physician/surgeon or a licensed psychologist
 - Additional POST standards apply to qualifications

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Rights of Involved Officers- Notice of Nature of Investigation

- Officer shall be informed of the nature of the investigation. Gov't Code §3303(c)
- Officer should be informed "reasonably prior to" the interrogation—that is, with enough time for the officer to meaningfully consult with any representative he elects to have present.
 - Ellins v. City of Sierra Madre* (2016) 244 Cal.App.4th 445

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Rights of Involved Officers- Discovery of Investigation Records

- Deputies have a right to recordings, notes, reports and complaints *prior* to a second interrogation
 - Is a second interview needed?
 - Hold off on writing report until no further interrogations needed?
 - Santa Ana Police Officers Association v. City of Santa Ana* (2017) 13 Cal. App. 5th 317.

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Rights of Involved Officers–
Compelled Statements

- Lybarger Admonition**
 - If subject officer refuses to answer questions, *Lybarger* should be given and officer should be ordered to provide answers
 - Statements can only be used administratively
 - Usually *Lybarger* admonition given at outset of interview with admonition to tell the truth
 - If officer still refuses to answer, insubordination charges possible

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Rights of Involved Officers–
Interrogation at a Reasonable Hour

- Gov't Code §3303(a)**
 - Interrogation must “be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, **unless the seriousness of the investigation requires otherwise.**”
 - *Quezada v. City of Los Angeles* (2014) 222 Cal.App.4th 993

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Rights of Involved Officers– Limit
on Number of Interrogators

- Gov't Code §3303(b)**
 - No more than two interviewers may ask questions of an accused employee
 - Must provide names of interviewers before interrogation

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**Rights of Involved Officers-
Attendance to Personal Needs**

- Gov't Code §3303(d)
- Interrogation shall be for a reasonable period considering gravity and complexity of the issues.
- Officer under interrogation shall be allowed to attend to his or her own personal physical necessities.”
 - *Quezada v. City of Los Angeles* (2014)222 Cal.App.4th 993

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Questions?

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