

POLICE PRACTICES REVIEW

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-
- 1 **CIVILIAN OVERSIGHT**
DC Complaints Board Records Busy Year
 - 2 **CONSENT DECREES/
MEMORANDA OF AGREEMENT**
Cincinnati Monitor Issues Quarterly Report
Cincinnati Breaches Agreement, Monitor Says
Slow Progress Reported in Oakland
 - 4 **ACADEMIC RESEARCH**
 - 5 **COMMUNITY POLICING**
COPS Issues Intelligence-Gathering Guide
 - 5 **FORCE MANAGEMENT**
New Flashlight Policy in Los Angeles
 - 6 **STANDARDS & TRAINING**
Training Academy Statistics Published
 - 6 **LEGAL AFFAIRS**
Dog Sniffs Allowed During Traffic Stops
 - 7 **NEWS BRIEFS**
DOJ Investigates Alabaster (AL) Police
Stun Guns to Record Video Data
 - 8 **PRESIDENT'S PERSPECTIVE**
 - 10 **INTERVIEW**
Los Angeles Police Department
Inspector General Andre Birotte, Jr.
 - 16 **CONFERENCES & MEETINGS**

CIVILIAN OVERSIGHT

DC Complaints Board Records Busy Year

The Office of Police Complaints (OPC), the independent agency that investigates misconduct complaints against the District of Columbia's Metropolitan Police Department (MPD) and Housing Authority Police Department, has issued its fiscal year 2004 annual report. The OPC and its governing body, the Police Complaints Board—formerly the Office of Citizen Complaint Review and the Citizen Complaint Review Board through 2004—were renamed “in order to more clearly convey [their] mission.”

The OPC closed 312 formal complaints in 2004, more than in any other of its three prior years of operation. For the first time in its history, the OPC “closed more complaints than it opened during the course of the year,” said the report, “in significant measure because of increased efficiency and productivity.” This reduced the number of open complaints from 359 to 321 between the end of 2003 and the end of 2004.

Adjudication, dismissal, and successful mediation of complaints also led to an increase in cases closed; a total of 186 complaints were handled in such ways, a 71 percent rise over 2003. The OPC completed almost twice as many mediation sessions as it did in 2003, said the report, “giving the complainants and officers involved in these complaints the opportunity to meet face-to-face in an attempt to resolve the issues raised in the complaint.”

As for the types of allegations within the complaints, 37 percent were allegations of [inappropriate] language/conduct; 27 percent were for harassment; 20 percent for excessive force; and 8.6 percent for discrimination. The breakdown was similar to allegation types in 2003. The agency plans to hire new investigators intended to help further expedite

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investigations and reduce the number of open complaints, the report noted. The full 2004 annual report can be accessed online at <http://www.policecomplaints.dc.gov/occr/site/default.asp?occrNav=131080>.

CONSENT DECREES/ MEMORANDA OF AGREEMENT

Cincinnati Monitor Issues Quarterly Report

The eighth quarterly report on the City of Cincinnati's and Cincinnati Police Department's (CPD) compliance with the 2002 Memorandum of Agreement (MOA) with the U.S. Justice Department, and the Collaborative Agreement (CA) between the City, Fraternal Order of Police, and Plaintiffs, was made available in January. The MOA requires reforms in police use of force, handling of citizen complaints, risk management, and training. The CA mandates implementation of Community Problem Oriented Policing (CPOP), mutual accountability between the CPD and community, bias-free policing, and creation of the Citizen Complaint Authority to, among other responsibilities, review citizen complaints and investigate certain incidents.

The quarterly report (covering the period from July 1 to October 31, 2004, as well as some developments through January 5, 2005), highlights a report to the Conciliator—a magistrate judge—submitted by the Monitor, stating that the City has committed several violations of the Collaborative Agreement. The Independent Monitor Team, led by Monitor Saul Green and Deputy Monitor Richard Jerome, asserted, "The City's non-compliance with the CA is a material breach of the Agreement." The Team submitted the report in its role as Special Masters in the litigation. (See next article for more details.)

The quarterly report did commend the CPD for compliance in several areas. Once again, the Monitor praised the Department's Mental Health Response Team (MHRT) program, which has trained 137 officers to respond to incidents involving mentally-ill persons. Of 1,083 MHRT calls in September and October, said the Monitor, the CPD cancelled 108 without MHRT dispatch. The Monitor, however, was "able to review each of these calls and determined

that all of them had been handled properly.” Not only MHRT but also CPD training in general complied with the MOA. Roll-call training continued to be conducted based on real scenarios, and the CPD worked on training revisions based on pending lawsuits.

The Monitor found problems with CPD use-of-force documentation. Eight of 16 reviewed Non-Compliant Suspect/Arrestee reports did not contain a supervisor’s evaluation of the officer’s use of force. The CPD also did not comply with MOA documentation requirements for Taser deployments. The reviewed quarter was the third quarter that the CPD made wide use of the stun guns, according to the Monitor. There were 198 Taser deployments during the quarter; the CPD claimed this has reduced injuries to officers and subjects by 47 and 37 percent, respectively, from 2003. The Monitor cautioned that Tasers are not risk-free and recommended the CPD ensure that officers consider alternatives to force and give subjects enough time to comply with commands before subsequent Taser applications. The benefits of Tasers “will be diminished if their use and the perception that officers display and aim Tasers at City residents unnecessarily, create added tensions in police-community relations.”

The Monitor noted improvement on the CA requirements regarding CPOP. A successful community forum was held, and two new neighborhood groups received CPOP training from the CPD. Though the Citizen Complaint Authority (CCA)—required by the Collaborative Agreement—has conducted thorough investigations, said the report, the Monitor expressed concern “whether the City will take appropriate action on CCA findings where the City Manager agrees with those findings.” The full report can be accessed online at http://www.cincinnati-oh.gov/police/downloads/policy_pdf9972.pdf.

Cincinnati Breaches Agreement, Monitor Says

Cincinnati’s Independent Monitor Team filed a report with the Conciliator, U.S. Magistrate Judge Michael R. Merz, asserting that Cincinnati was in material breach of its 2002 Collaborative Agreement (CA) with Plaintiffs. The breaches cited by the Monitor included:

- Barring CA Plaintiffs from CPD ride-alongs.
- Denying Plaintiffs attendance at Mental Health Response Team training.

- Restricting U.S. Justice Department (DOJ) access to a demonstration of the CPD’s new risk management system.
- Failing to provide DOJ with CPD use-of-force reports.
- Refusing to allow a Monitor Team member to go on a scheduled ride-along.
- Declining a Monitor Team member’s request to observe management training conducted by Police Chief Thomas H. Streicher, Jr.

On January 26, 2005, the Conciliator ruled that the City’s actions were a material breach of the CA. The magistrate judge stated that a material breach “would be a substantial failure to perform some obligation which is of the essence of the Agreement, a breach which requires a court-directed remedy to enforce the Agreement.”

A week after the Conciliator’s decision, the Cincinnati City Council voted five-to-three to oppose the judge’s recommendation that U.S. District Judge Susan J. Dlott find the City in material breach of the CA. In his recommendation to Judge Dlott, the magistrate said “the Collaborative Agreement should be entered as an order of this Court to prevent any further breaches.” According to reports, the City Council is also set to vote on a resolution reaffirming support for the CA’s reforms so as to convince the judge to reject the magistrate’s recommendation. The Monitor Team’s motion and the magistrate judge’s decision can be accessed online at http://www.acluohio.org/issues/police_practices/police_practices.htm. http://www.cincinnati-oh.gov/police/downloads/policy_pdf9972.pdf; *Cincinnati Enquirer*, February 3, 2005; *Cincinnati Post*, February 16, 2005.

Slow Progress Reported in Oakland

The Oakland Police Department (OPD) is scheduled to have already completed 44 of a total 51 tasks from the 2003 Settlement Agreement (SA) between the Department, the City of Oakland, and private plaintiffs who alleged police misconduct in a civil lawsuit. To date, said the Independent Monitoring Team (IMT) in its combined report for the fourth and fifth quarters, the OPD has achieved policy compliance, the first of three steps (policy, training, and actual practice), with 22 tasks. During the reporting period, from April 16 through October 15, 2004, the OPD came into policy compliance with two

ACADEMIC RESEARCH

“Toward a better understanding of the hierarchical nature of police organizations: Conception and measurement,” an article featured in the January-February issue of the *Journal of Criminal Justice*, explores how the hierarchical structure of police organizations affects the distribution of resources and attributes in police agencies. The author, William R. King, proposes a series of hypotheses that argue for new conceptualizations of how researchers can measure police structure and culture. Additionally, King suggests ways in which police managers might influence these hierarchies to affect organizational change.

While traditional police scholars have characterized police structure as unidimensional, having only one characteristic, King proposes that, in fact, police structures are multidimensional. He argues that there are five hierarchies in police organizations: a skills hierarchy, rewards hierarchy, seniority hierarchy, status hierarchy, and authority hierarchy, and that each affects the perceptions and attitudes of members within police agencies. King also notes that there is a great deal of overlap between these hierarchies and that they may be interrelated.

The skills hierarchy is a differentiation of employees based on abilities. This often is informal and may not be recognized or rewarded by police managers. The rewards hierarchy is the differential allocation of rewards. These rewards are tangible and formally distributed. Rewards are things such as overtime pay, medals, or commendations. The seniority hierarchy is the stratification of employees based on tenure or seniority. Seniority can be recognized formally such as acknowledgment by the department for years of service or informally by the privileges given to more senior employees. The status hierarchy is the allocation of social honor or prestige. King states, “Simply, police employees differ in their status, and this differential distribution of status forms a hierarchy.”

Finally, the authority hierarchy is the differences in the formal distribution of power and authority. The distribution of formal authority in a police organization is often referred to as the rank structure, or chain of command. King argues that there are five components to the authority hierarchy. These are: rank structure, span of control, supervisory intensity, centralization of decision-making, and procedural due process. Span of control and supervisory intensity are both measures of levels of managers and supervisors compared to levels of employees. The centralization of decision-making is the distribution of decision-making authority within a police organization. The fifth indicator of the authority hierarchy is “the degree to which procedural due process limits the decision-making autonomy of managers.”

King notes the need to explore the depth to which all of these hierarchies and their components are interrelated. These issues are important to examine because research has shown that hierarchical positions can influence officers’ perspectives and attitudes, can lead to a deeper understanding of the distribution of power and authority within a police organization, and can help shape reform efforts. *Journal of Criminal Justice*, January-February 2005; Vol. 33, Issue 1.

of the 22 partially-completed tasks; the OPD complies in actual practice with a total of four SA tasks.

The SA addresses areas of policing such as: internal affairs; use-of-force reporting; personnel management; cadet and in-service training; and community policing. The combined report highlighted three specific areas of concern: training documentation, data collection regarding stops; and quality of investigations.

The IMT expressed concern over the OPD’s failure to track and document training conducted on new policies in order to ensure that at least 95 percent of relevant personnel are trained on them. The IMT emphasized that “to achieve compliance with the Settlement Agreement, OPD must provide training to its officers on how to implement the new policies and procedures.”

Another concern was the low officer completion rate of the OPD's stop data form, designed to capture information such as stop location and purpose, race/ethnicity and gender of the subject, and the outcome. The IMT reports that the Department "has sent mixed messages regarding this requirement" and notes that during August 2004, officers filled out the forms for only 37 percent of the citations they issued.

Finally, the OPD's internal investigations—those at the Division level and in Internal Affairs—troubled the Monitoring Team, which said "the poor quality of investigations is so pervasive that it diminishes the overall credibility of OPD's internal investigations process." The IMT reviewed all 72 internal investigations completed and reviewed through the Deputy Chief level in the first half of 2004 and found failures to identify and interview witnesses; failures to collect and use relevant evidence; and investigation dispositions contrary to evidence.

The IMT found that the OPD's Personnel Information Management System (PIMS) is progressing on schedule towards the SA's completion deadline of June 28, 2005. The Department was also commended for its self-identification of problems in tracking the issuance of OC spray to officers and for the "thoughtful and constructive recommendations" the OPD made for achieving compliance in that area of the Agreement. The IMT applauded the OPD for conducting a managerial risk assessment of its Bureau of Field Operations that was not required by the SA but that gathered useful information and showed a "commitment to reform that is necessary to implement the Settlement Agreement successfully." The full report can be accessed online at <http://www.oaklandpolice.com/agree/4and5qtr.pdf>.

COMMUNITY POLICING

COPS Issues Intelligence-Gathering Guide

Law enforcement executives told the U.S. Justice Department that they were looking for "new guidance for their agencies' intelligence functions in the post-September 11 world," says the Department's Office of Community Oriented Policing Services (COPS). In response to that request, COPS provided a new guide, entitled *Law Enforcement Intelligence: A Guide for State, Local, and Tribal Law Enforcement Agencies*

to help agencies improve their intelligence capacity and "enable them to be instrumental in fighting terrorism and other crimes while preserving hard-won community policing relationships."

The guide, authored by Michigan State University's Dr. David Carter, is directed at law enforcement officers, supervisors, and managers tasked with creating or maintaining counterterrorism capabilities. Its 12 chapters address topics such as intelligence and human resources management, threat assessment, and contemporary law as it relates to intelligence gathering and civil rights. Dr. Carter also included conceptual definitions and structures, sample policies, resources, and links to organizations and Internet newsletters in the COPS guide.

"Intelligence-led policing," the philosophy embodied in the guide, is not incompatible with community policing, as both rely on information from and communication with the public, scientific data analysis, and problem solving. Fear that intelligence activities abridge civil rights can be allayed through community policing initiatives, the guide states, "not only through the practice of ethical policing but also by reaching out to diverse communities to explain police practices, responding to questions, and establishing open, trusted lines of communication."

The author recommends that law enforcement agencies use the "R3" approach—reassessing, refocusing, and reallocating—to establish intelligence priorities. An agency should reassess information and data analysis, refocus its efforts to make policy changes, and reallocate its resources (such as personnel and equipment) as necessary in order to meet its priorities. "Each agency must have an organized mechanism to receive and manage intelligence as well as a mechanism to report and share critical information with other law enforcement agencies," Carter advised. The full guide can be accessed online at <http://www.cops.usdoj.gov/default.asp?Item=1404>.

FORCE MANAGEMENT

New Flashlight Policy in Los Angeles

The use of flashlights as impact devices by Los Angeles Police Department (LAPD) officers is officially discouraged in a January 2005 policy approved by the

Los Angeles Police Commission. Officer use of flashlights in the place of other weapons was questioned following a June 2004 televised vehicle and then foot pursuit of a suspect that ended with LAPD officers using force, including striking the suspect with a flashlight. After the incident, Los Angeles Mayor James K. Hahn appointed an investigatory committee, in which community leaders were involved; the Police Commission announced the new policy after discussions with the committee and LAPD officials.

The policy does not entirely ban flashlights as impact weapons but rather allows the LAPD to use them in exigent circumstances “when the use of the officers’ baton is not feasible.” Any use of force with a flashlight will be scrutinized, according to the policy, and the incident will be reported “with an explanation as to why the flashlight was used in lieu of other impact devices.” The policy can be accessed online in a Police Commission press release at http://www.lapdonline.org/press_releases/2005/01/pr05026.htm. *City News Service*, January 11, 2005.

STANDARDS & TRAINING

Training Academy Statistics Published

A total of 626 state and local law enforcement academies offering basic training exist across the country, according to the Bureau of Justice Statistics’ (BJS) *State and Local Law Enforcement Training Academies, 2002*—just released in January of this year. The report’s data come from BJS’s first Census of Law Enforcement Training Academies in the United States (CLETA), conducted in 2003 and 2004. City, municipal, county, regional, state, college, university, and technical school academies comprised the 626.

Approximately two-thirds of the academies employing full-time instructors had a minimum education requirement—33 percent required that instructors possess a high school degree or GED, 12 percent a two-year degree, and 11 percent a four-year degree. BJS noted that larger academies with 100 or more full-time trainers “were the most likely to have a college degree requirement (about 1 in 3) but were the least likely to require a 4-year degree (about 1 in 20).” The average law enforcement experience required of trainers was approximately four years.

Females comprised an estimated 17 percent of recruits who completed training in 2002, while racial and ethnic minorities made up 27 percent. Males had an 88 percent academy completion rate that year, with females a bit lower at 81 percent, said the report. In total, an estimated 53,302 recruits successfully finished the training in 2002. The money those academies spent per each basic training recruit ranged from \$5,400 to \$18,800. “Per trainee expenditures were much higher in city or municipal academies,” said BJS, compared to the other types of academies.

Among various topics covered by basic instruction, 99 percent of the academies covered firearms skills; 90 percent covered community policing; 64 percent devoted hours to problem solving; and 35 percent provided training in a basic foreign language. The full BJS report can be accessed online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/slleta02.pdf>.

LEGAL AFFAIRS

Dog Sniffs Allowed During Traffic Stops

In a late January decision, the U.S. Supreme Court ruled that the police use of drug-sniffing dogs to reveal the location of illegal substances, and no other information, during legitimate traffic stops does not violate Constitutional rights. In *Illinois v. Caballes*, respondent Roy Caballes was stopped by an officer for driving 71 miles per hour in a 65 zone. A second officer who arrived at the scene walked around the vehicle with a dog. The dog alerted the officers to the presence of drugs, and marijuana was discovered in Caballes’ trunk. The respondent was convicted for drug trafficking and sentenced to 12 years’ imprisonment and a \$256,136 fine, according to the U.S. Supreme Court summary of the case’s facts.

The six-to-two decision overturned the Illinois Supreme Court, which had held that the search violated the respondent’s Fourth Amendment rights because the officers had no reason to suspect the driver possessed drugs. Justice John Paul Stevens, delivering the U.S. Supreme Court’s opinion, noted the original trial judge found that the officers had not unduly prolonged the traffic stop and that the dog had provided the probable cause to search the vehicle. Stevens wrote that “conducting a dog sniff would not change the character of a traffic stop that is lawful at

its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." The U.S. Supreme Court has held that there is no legitimate interest in possessing contraband, he continued, and the sniff was performed outside of Caballes' vehicle while he was lawfully stopped for a violation. "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment," the Court majority concluded.

Justices David Souter and Ruth Bader Ginsburg dissented in the case. Ginsburg argued that, as the Illinois Supreme Court found, the officers did not note any evidence of drug possession. The expansion of the seizure in the case "from a routine traffic stop to a drug investigation," wrote Ginsburg, "broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment." Justice Ginsburg expressed concern that "every traffic stop could become an occasion to call in the dogs." *Illinois v. Caballes* can be accessed online at <http://www.supremecourt.us.gov/opinions/04slipopinion.html>. *Associated Press*, January 25, 2005; *Chicago Tribune*, January 25, 2005.

NEWS BRIEFS

DOJ Investigates Alabaster (AL) Police

A U.S. Justice Department (DOJ) letter sent to the Alabaster Police Department (APD) makes a series of recommendations to improve APD policies, practices, and procedures. The Special Litigation Section of the DOJ's Civil Rights Division opened an investigation of the APD in March 2003 but has not completed its investigation and has not yet made a determination whether "APD officers engaged in a pattern or practice of unconstitutional conduct," according to the letter. The DOJ explained that the letter provided assistance focusing on the written policies of the APD, whose 62 employees serve approximately 29,000 city residents.

Among the letter's recommendations, the Justice Department said the APD should create a process for regularly reviewing, updating, and distributing its policy and procedure manual and any revisions. Inconsistencies exist, noted the DOJ, between new and

old policies because of the way the manual is currently maintained. The letter also recommended the APD design a use-of-force continuum as a "tool in training officers to consider lower levels of force first, which protects the safety of both the officer and the civilian." The letter recommended that the APD develop an early warning system; make officers qualify regularly with all firearms APD uses; clearly proscribe when shooting at a moving vehicle is allowed; and require use-of-force reports for "all uses of physical or instrumental force beyond unresisted handcuffing."

The APD was commended for its recent purchase of tire deflation devices, or spike strips, for use during vehicle pursuits. The DOJ also praised the Police Department's revised citizen complaint intake policy, which is a "marked improvement... because it increases public access to the complaint process," said the letter. The DOJ letter can be accessed online at http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf. For more information about the Alabaster Police Department, go to <http://www.cityofalabaster.com/Default.asp?ID=22>.

Stun Guns to Record Video Data

Stinger Systems—a stun gun manufacturer—plans to sell stun guns equipped with video recording capabilities in the first quarter of 2005, according to the company's web site. The Stinger Handheld Projectile Stun Gun will come with the side-mounted, add-on "TruVu gun cam," a digital video recorder that "[captures] up to 2 hours of video at 30 frames per second with full audio." The recording limit can be extended to a total of four hours, depending upon the quality of video selected, and the gun also captures the time, date, and duration of each electric discharge. Stinger's video recording automatically begins whenever the weapon's safety is switched off. The stun gun fires darts connected to batteries by wires in order to provide an electric shock; it can also operate in "touch stun" mode. Taser International, the leading manufacturer of stun guns in the U.S., also plans to sell Tasers that will record video images by the middle of 2005, according to reports. *EE Times*, December 17, 2004; <http://www.stingersystems.com>; <http://www.taser.com>.

PRESIDENT'S PERSPECTIVE

By Merrick Bobb, President

A diverse group of police oversight experts met recently in Portland, Oregon to discuss common interests and share experiences. These experts serve as auditors and monitors of the law enforcement agencies in their respective jurisdictions, including Los Angeles County, Philadelphia, Seattle, Portland, San Jose, Omaha, and Boise, Idaho. During one of the sessions, Ellen Green-Ceisler, the Director of the Philadelphia Police Department's Integrity and Accountability Office, raised the issue of a recent subpoena she had received. Plaintiff's counsel had previously taken her deposition and was now seeking her testimony at trial.

Ellen found it worrisome that auditors and monitors might be vulnerable to a never-ending parade of deposition and trial subpoenas in civil cases alleging police misconduct. In a city with a large litigation docket, an auditor could find herself testifying nearly every day of the year. She accurately foresaw that her effectiveness could be quickly undercut if her work was used in court by private plaintiffs for their pecuniary gain.

Ellen is right, and every auditor or monitor should negotiate for as wide an immunity from testimony as the jurisdiction is capable of providing. In some instances, the auditor or monitor will not receive that immunity or will be subpoenaed in spite of it. In my capacity as Special Counsel to Los Angeles County, I monitor, investigate, and prepare public reports on the Sheriff's Department. I also have been subpoenaed many times to testify at deposition or trial or produce documents in private civil litigation. In all but one instance, those subpoenas have been quashed by state and federal judges who have recognized that a monitor should not be required to comply.

Los Angeles County Counsel and private lawyers engaged by the County to represent me have come up with a number of winning arguments which are discussed below. Skip Miller and Andy Baum of the Los Angeles firm of Christensen, Miller recently filed a brief on my behalf in the California Superior Court which convinced the judge to quash a subpoena. I quote and paraphrase extensively from that brief in the paragraphs which follow. The case was entitled *Washington v. County of Los Angeles*. Case No. BC 214909, and it concerned the quality of medical care in county jails.

Subsequent Remedial Measures

My lawyers first argued that the "trial subpoena [was] barred by the public policy favoring remedial measures, which encourages the use of remedial measures by ensuring that those measures will not be subsequently used to establish culpable conduct. See Cal. Evid. Code § 1151; *Sanchez v. Bagues & Sons Mortuaries*, 271 Cal. App. 2d 188, 190 (1969)."

The lawyers went on to argue that "internal police investigations or reviews are remedial measures." In *City of Los Angeles v. Superior Court*, 33 Cal. App. 3d 778, 780 (1972), the plaintiff claimed to have been battered by a police officer and sought to discover whether the City suspended the officer as a result of this incident. *City of Los Angeles*, 33 Cal. App. 3d at 780. The Court held that any suspension would constitute a remedial measure and was not discoverable. *Id.* at 783.

Maddox v. City of Los Angeles, 792 F.2d 1408 (9th Cir. 1986) involved the deadly application of a choke hold by a Los Angeles police officer. The Ninth Circuit affirmed the district court's ruling that the internal affairs investigation which took place after the incident, and the subsequent change to the police department's policies regarding the use of a choke hold, constituted inadmissible remedial measures. *Id.*, at 1417; see also, *Luera v. Snyder*, 599 F. Supp. 1459 (D. Col. 1984) (holding that changes in police department policies after the alleged use of excessive force were inadmissible remedial measures).

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“There is no question that Mr. Bobb’s reports are remedial in nature. They were based upon observations made by Mr. Bobb and contain recommendations about how to prevent potential lawsuits and liability in the future. The County, the Sheriff’s Department and the public at large benefit from these reports. Mr. Bobb’s function as special counsel will be discouraged, however, if his reports or his testimony are permitted to be used in any way to show culpable conduct on the part of the County of Los Angeles or the Sheriff’s Department. This is precisely what the doctrine of remedial measures is designed to prevent. Cal. Evid. Code § 1151; *City of Los Angeles*, 33 Cal. App. 3d at 783.”

Privileges

Because I am an attorney and the County of Los Angeles is my client, my lawyers were able to argue that the plaintiffs could not subpoena documents I relied upon in drafting my public reports: “Such documents, along with any testimony beyond the substance of the public reports themselves, are protected from disclosure by the attorney-client privilege and work product doctrines.”

“Mr. Bobb’s retainer agreement with the County of Los Angeles confirms the privileged nature of the information provided to Mr. Bobb:

1(B). As counsel to the County of Los Angeles, Special Counsel shall have access on an attorney client basis to such confidential records of the County of Los Angeles, its Departments and Officers as may be material and relevant to his inquiry. All public reports shall preserve all statutory and constitutional requirements of confidentiality with regard to records and individuals. Such information will be information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public within the meaning of Evidence Code § 1040.

1(C). Consistent with such confidentiality, any reports concerning specific individuals shall be made solely to the Sheriff on an attorney client basis.

1(D). While protecting confidentiality, Special Counsel shall provide to the Board of Supervisors and the Sheriff six progress reports for dissemination to the public... at six month intervals...”

My lawyers further pointed out to the court that I had fully protected the confidentiality of the information I obtained as Special Counsel. “This information was not disclosed to any third-party and was not revealed in the reports themselves. Mr. Bobb was careful in his reports to speak only generally of the instances or circumstances which he opined might lead to liability in the future.... Any references to specific Sheriff’s Department personnel in this regard were made in an anonymous fashion (i.e. the ‘Deputy’ or ‘Deputy X’)....”

“By seeking documents beyond just the public reports themselves, and in particular the documents Mr. Bobb may have used to prepare the reports, plaintiffs seek documents which are absolutely protected by the attorney-client privilege. See Cal. Evid. Code § 954; see also *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 371 (1993) (city’s attorney-client privilege applies to communications made concerning potential litigation even if such litigation has not been threatened); and *Vela v. Superior Court*, 208 Cal. App. 3d 141, 150 (1989) (city’s attorney-client privilege applies to the investigation of ‘incidents or occurrences which could lead to the possible institution of a civil action against the City’).”

“To the extent that this information was not disclosed in Mr. Bobb’s public reports, such information constitutes Mr. Bobb’s work product and is absolutely precluded from discovery. See Cal. Civ. Proc. § 2018.”

continued on next page

Official Information Privilege

My lawyers concluded their arguments noting that my testimony and my documents were further protected from discovery by California's official information privilege. Official information is defined as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public...." Cal. Evid. Code § 1040(a). Such information may not be disclosed if:

Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interests of justice. Cal. Evid. Code § 1040(b)(2).

"The information provided to Mr. Bobb by the Sheriff's Department and the County was confidential information not available to the public. Mr. Bobb's retainer agreement with the County confirms that the information he received is 'official information' within the meaning of Evidence Code § 1040.... The County's need for preserving the confidentiality of the information provided to Mr. Bobb outweighs any potential need for disclosure in this case. Mr. Bobb advised all County employees with whom he interfaced that the information he obtained was privileged and confidential. As a result, Mr. Bobb was provided with every document he requested.... He was also able to conduct frank and candid interviews with [the] Sheriff's Department.... Such cooperation will hardly be forthcoming in the future, however, if Mr. Bobb is compelled to disclose the information he has received as special counsel. See, e.g. *City of San Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1024 (1999) (noting that 'human experience' teaches that disclosure of information will have a chilling effect on the provision of such information in the future)."

The cases, statutes, and arguments described above have proved to be powerful in convincing judges that more harm than good occurs when auditors and monitors are forced to testify in private civil litigation. One of the principal jobs a good monitor performs is to point out problems before they become significant liabilities. If plaintiff's counsel can use the monitor instead to establish liability, much of the benefit provided by auditors and monitors will be undercut. Deposition and trial subpoenas for testimony and documents from monitors should be quashed. If possible, each monitor should negotiate with the City in question for the broadest immunity from testifying as the jurisdiction can provide.

INTERVIEW

Andre Birotte, Jr. has served as the Los Angeles Police Department (LAPD) Inspector General since May 2003. Before his current appointment by the LAPD Board of Police Commissioners, Inspector General Birotte practiced white collar and general commercial litigation with a private firm. Mr. Birotte received his undergraduate degree from Tufts University and his J.D. from Pepperdine University School of Law. Following law school, he worked as a deputy public defender in Los Angeles and later joined the U.S. Attorney's Office, where he primarily prosecuted violent crime offenders. Mr. Birotte also investigated and prosecuted fraud and narcotics trafficking cases as an assistant U.S. Attorney. He received numerous awards and commendations during his tenure there. Inspector



General Birotte is a past Treasurer of the Langston Bar Association and has served as a judge pro tem. PARC recently spoke with Mr. Birotte about the Office of the Inspector General and his work in the LAPD.

PARC: *Please describe your relevant professional background and how you came to the Office of Inspector General (OIG).*

AB: *I'm a lawyer by trade and have had an opportunity to work at some unique and exceptional offices that provided the training and background necessary for this type of work. I was a deputy public defender in the County of Los Angeles for three years, representing indigent clients in criminal prosecutions. After that, I was hired by the U.S. Attorney's Office, where I was Assistant United States Attorney for the Central District of California. I worked in the Major Crimes Division on a variety of prosecutions:*

narcotics, violent crime, and white collar crime. After almost five years there, I went into the private sector at the law firm of Quinn, Emanuel, Urquhart, Oliver & Hedges, doing business litigation and white collar criminal defense. While out in the private sector, I had a yearning to get back to public service. As I indicated to my former boss, former Inspector General Jeff Eglash, public service is my true calling. By chance, there was an opportunity to work in the Inspector General's Office. I applied and was fortunate enough to be hired by Jeff as an Assistant Inspector General. And then when Jeff left, I was again fortunate enough to have the Los Angeles Police Commission pick me as his successor in May 2003.

PARC: *When and why was the OIG created?*

AB: This city has gone through its share of trials and tribulations related to public interaction with the Los Angeles Police Department, specifically how it handles complaints and uses of force. [Former U.S. Secretary of State] Warren Christopher chaired a commission to evaluate the LAPD soon after the Rodney King incident in 1991. One of his key recommendations was to create an office to provide oversight of the Department's disciplinary system. There was criticism at the time that the police couldn't police themselves and needed another set of eyes to watch over the Police Department. After the Christopher Commission made its recommendation, the legwork went into place in the mid 90s to get the OIG up and running. The IG's Office really became functional in early 1996.

PARC: *What are the OIG's duties and responsibilities? How is the Office organized to carry out those duties?*

AB: The OIG's primary responsibility is to provide oversight of the LAPD. The roles and responsibilities, however, have expanded significantly, particularly in the last three or four years. We now have three critical functions: oversight of the Department's complaint investigations; oversight of significant use-of-force investigations; and the conducting of a variety of

audits on various LAPD operations. And that is how the Office is structured—we have a complaint, a use-of-force, and an audit section. From an organizational perspective, our Office reports directly to the Board of Police Commissioners who are the head of the LAPD. As such, we are an entity that is removed and independent from the rest of the LAPD. The persons who are "direct reports" to the Board are the Chief of Police, the Executive Director, and the Inspector General.

PARC: *What are your priorities as the Inspector General?*

AB: My number one priority is to ensure that the Office has meaningful and independent oversight of the LAPD. What that means to me is the ability to get involved in a variety of LAPD matters—complaint investigations, use of force, etc.—at the front end of the process. It's critical to get involved at the front end so that our views, opinions, and insights are known early on. That instills some community confidence that there is another fresh set of eyes not only looking at what the LAPD does but also having meaningful input in the process.

There have been some changes in how the IG's Office

functions. I think, historically speaking, you could characterize a lot of what we do as after-the-fact. We would get complaint investigations when they had been completed. There's been some criticism that you don't have a lot of meaningful input when you're doing it at the end of the process. The damage has already been done, so to speak. While that hasn't been completely rectified, I'd like to think that in the last couple of years, our Office has really made strides to get involved in a much greater percentage of cases and incidents early on. I've really pushed for some of this, but some of this has been luck. I've been fortunate to have a police commission that is very supportive of the role and responsibilities of the IG's Office. I've also been fortunate to have a chief of police [William J. Bratton] who recognizes the value of civilian oversight within his organization; he appreciates the fresh perspective that we bring to incidents. There

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may be instances in which we disagree, but that doesn't preclude us from voicing our opinions and letting our thoughts be known.

One of the things I did when I first got the job was push to have our Office involved early on in the process, specifically by meeting with the Commissioners, letting my viewpoints be known, meeting with the Chief of Police and the command staff, and letting them know what I felt the benefits were for everyone of having our Office involved at the forefront of these investigations.

PARC: *What are the advantages and/or disadvantages of the oversight model in place in Los Angeles?*

AB: One of the key advantages in our system is our unfettered access to the Department. Particularly in the last few years, I'd submit that the IG's Office has had a more proactive role in Department operations. Working with the Police Commissioners—my bosses—and the Chief gives the IG's Office a lot more access to what goes on in the Department. Historically speaking, there's been a lot of clash between my predecessors and the LAPD. As a result, there have been instances where there were reports of the IG's inability to get access. One of the advantages of the current system, specifically because we work within the LAPD, is having access to all the documentation. Given our existing model, I think we are doing a good job.

PARC: *Has the OIG's work or structure changed since it began operation in 1995?*

AB: When the Office was first created, the sole responsibility was to provide oversight over the LAPD's internal discipline system, basically over complaint investigations. The OIG's focus was solely on reviewing completed complaint investigations and providing its assessment to the Police Commission. Over time, the responsibilities have expanded so that we not only review complaint investigations but also review use-of-force investigations and conduct audits of different LAPD functions such as the issuance of

search warrants, booking, arrest reports, and confidential informant packets. The OIG has expanded significantly; a lot of that is due, quite frankly, to the implementation of the [2001 federal "pattern or practice"] Consent Decree. The Consent Decree mandates that our Office conduct a variety of audits of the LAPD. It also sets in motion how we get involved in the categorical use-of-force process. As a result of these changes, we've had to expand our Office into the three sections I described—complaint, use-of-force, and audit sections.

PARC: *What is a categorical use of force (CUOF)? Could you walk us through a CUOF investigation from the initial incident through any final report and how your office is involved along the way?*

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AB: A CUOF is a term that has been described in the Consent Decree. In simple terms, a categorical use of force is a significant use of force,

including: officer-involved shootings, law enforcement-related injuries that result in hospitalization, head strikes with an impact weapon, in-custody deaths, law enforcement activity-related deaths, animal shootings, accidental discharges, and even canine bites that result in hospitalization. Whenever there is a CUOF, our Office is notified. We go out to the scene, no matter what time day or night, and we meet with LAPD Force Investigation Division investigators to get a preliminary rundown of the events that occurred. We typically wait at the scene, and after the involved officers give a walk-through of the scene for their lawyers and representatives and other officers, describing what they did, our Office will then receive a walk-through to explain what the state of affairs is at that time.

Usually within a few days after the incident, the Chief of Police and I are briefed again by Force Investigation Division investigators so that we have the benefit of a complete picture. When we are at the scene, we are only getting the officers' perspective. The investigators will then go and canvass the scene for witnesses. When we get the briefing, we usually have the benefit of having additional witness statements, photographs,

and diagrams. The Department then prepares an investigative report that is submitted to the Department as well as the Inspector General's Office, which includes interview transcripts, diagrams, and a summary of the incident. An internal use-of-force review board within the LAPD is convened that consists of high-ranking command officers. The board hears the cases and makes recommendations to the Chief of Police, primarily in three areas: the draw of the weapon, where applicable; the tactics leading up to the incident; and ultimately the use of force.

We are present at and participate in the use-of-force review board. That has only occurred since my appointment as Inspector General. The IG's Office was at first excluded from this board, then was allowed to be present but not to ask questions, and is now allowed to ask questions. This makes sense because we're reviewing the incident. It's better to ask questions while all of the participants are there so that we can discuss the issues we think are important.

The board makes its recommendations to the Chief of Police, who reviews them and can adopt, reject, or modify the findings. The Chief's report is then submitted to the OIG. We review the report and its recommendations, and we'll create our own separate and independent report with our analysis for the Police Commission and whether we concur or disagree with the Chief's findings. We are thoroughly involved in the entire process.

For example, recently in Los Angeles, we have had two newsworthy use-of-force incidents—one last summer involved the televised pursuit and use of force on a car theft suspect, Stanley Miller, and the other earlier this year an officer involved shooting of a 13 year-old who was driving erratically in South Los Angeles. In the Miller case our Office was and continues to be actively involved in the investigation. We went to the scene, and we meet regularly with investigators on the case and provide our insight into the investigation. At the conclusion, we will provide a report to the Commission providing our analysis of

the case. In the most recent shooting, our office has begun a similar process. While both events created quite some controversy in the City, a silver lining so to speak was our ability to meet with the community and explain our involvement in an effort to ensure the community that another set of "fresh eyes" would be looking at these cases. I think it gave the community a better understanding of the role and responsibilities of the OIG.

PARC: *What are your main concerns and recommendations regarding the LAPD's complaint intake and resolution process?*

AB: The main concern for everyone involved is to make sure that the Department is receiving and intaking complaints of misconduct. The Department has, historically speaking, been criticized for not

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dealing with complaints from the public. I think the Department under Bratton's administration has done a good job trying to address that concern. The Department conducts what's known as sting

audits, where undercover officers attempt to make complaints. There have been times, quite frankly, where the Department has not done well in that regard. But it says a lot about the Department that the LAPD is initiating this effort on its own to constantly monitor itself and test to make sure that complaints of misconduct from the public are being accepted. While I don't know if I'd say it's a continued concern of mine, as far as there being a problem currently within the LAPD, it's something we will always monitor to make sure that complaints of misconduct by the public are being taken and dealt with appropriately.

PARC: *From your vantage point, what about the LAPD concerns you most?*

AB: The biggest challenge with a department of this size is to make sure that the message that the Chief and the top executives are sending gets down to the rank-and-file officers. The best way that this happens

is through the frontline supervision of the sergeants. Because this agency is so under-policed for the city's size, there have been times when there has been a disconnect between the message that is sent from the command staff down to the rank-and-file.

PARC: *What is the OIG's process for identifying concerns about LAPD policies or practices, making recommendations to address those concerns, and seeing that those recommendations are considered and, ideally, implemented?*

AB: There are several ways that concerns come to our attention. The first way is through contact from the public. The public is free to call our Office at anytime; we have a toll-free number, (888) 846-6066, that people can call to report any misconduct or to give commendations. The other ways are through our reviews of complaint investigations. We attempt to note trends and/or patterns when we review complaint investigations. With respect to uses of force, we do the same thing. And finally, the audits have become a very useful function for our Office for identifying problems. The audits give us an opportunity to take a random sample of, say, search warrants to see if there is probable cause and if a supervisor is signing off on the warrant.

We try to have our recommendations considered and implemented by submitting reports to the Police Commissioners, who meet every Tuesday. Typically, we will file reports that relate to our audits and reviews of complaint investigations. Also, on a quarterly basis we are required under the Consent Decree to provide an assessment of the Chief's imposition of discipline. We will note any issues or concerns to the Police Commissioners. Audits where we find issues and make recommendations are also presented to the Commission. To the LAPD's credit, it has now developed a database that includes all recommendations, not only from the Department but also from our Office. They are tracked to make sure that they are eventually implemented or, if not, declined with an explanation.

PARC: *Does the LAPD, in general, cooperate with the OIG and your requests for access to documents or personnel?*

AB: Yes. We've been very fortunate during my tenure as Inspector General. In the past, the relationship between the IG's Office and the Police Department was at times very acrimonious. Key things that have changed the nature of the relationship are having the support of the Police Commissioners, who give me clear direction to go where the truth takes us. In addition, having a respectful working relationship with Chief Bratton—one in which we can disagree on

issues and not take that personal—has been important as well. As a result, the message coming from the top—from the Board of Police Commissioners and the Chief of Police—is that the

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IG's Office has a role to play in this Department, that the Department will not tolerate any stonewalling of the OIG, and that the Office is allowed access to any and all documents.

PARC: *How has the federal "pattern or practice" consent decree that requires specific LAPD reforms impacted your work?*

AB: The Consent Decree has had a significant, positive impact on our work, specifically because of some of the requirements it imposes on the City and the Department. As I mentioned earlier, our Office did not engage in audits of LAPD operations. The Consent Decree requires that our Office not only conduct audits of various LAPD operations but also review the audits that the LAPD conducts on its own to ensure their quality, completeness, and findings. In addition, the Consent Decree requires that we provide the quarterly report I mentioned earlier that assesses the Chief's imposition of discipline. Another impact is that under the Consent Decree we do a review of the Department's retaliation policy to ensure that members of the Police Department are not retaliated against for reporting misconduct.

PARC: *An Independent Monitor is responsible for assessing the LAPD's and the City's compliance with the Consent Decree. How has that monitoring affected your office's work? Do you and your staff work closely with the monitoring team?*

AB: We work very closely with the monitoring team. We meet at least on a monthly basis, if not more frequently, to discuss the work we're doing, the steps we're taking to improve the quality of our work, and the Monitor's feedback as it relates to the audit function of the OIG. The monitoring team has had an extremely positive impact on our Office because it has helped crystallize what we do on a day-to-day basis.

PARC: *What does your office need to do to comply with the Consent Decree's requirements?*

AB: We need to make sure that we can provide meaningful reviews and audits of LAPD operations. We continue everyday to strive to improve our reviews, and the Monitor has been very helpful in that regard.

PARC: *What do you think will be the long-term impact of the reforms required by the Consent Decree on the OIG?*

AB: The reforms will institutionalize best practices not only for the Police Department but also for the OIG. The hope is that when the Monitor leaves, the OIG will step into the shoes of the Monitor. So it's critical that we are able to provide meaningful, comprehensive oversight over the LAPD. We do that by conducting these audits. We do that by having extensive involvement in categorical use-of-force investigations. We do that by having extensive involvement in the complaint investigation process. The Monitor has been critical in helping us get the foundation to do that kind of work. When they leave, the hope is that the work will remain institutionalized in the OIG forever on.

PARC: *What are you most proud of having accomplished as the Inspector General? What are you most eager to achieve?*

AB: This is a difficult question for me because one of my mottos is "finding a better way everyday." I'm constantly trying to improve what we do in the Office. One thing I am proud of is the manner in which we have gotten involved at the forefront of a lot of

investigations. That has been very critical and satisfying to me—to be able to meet with investigators at the onset of an officer-involved shooting, to meet with investigators on complaint investigations that we deem important, to talk with them about our concerns, to be able to provide our input and insight. We have a staff here of very qualified individuals, ranging from former prosecutors to former law enforcement to public policy graduates. They all have a wealth of experience and insight that can help the Department. Having the ability for the OIG to be involved at that critical juncture has really been satisfying.

What we want to achieve in the future is just to get better and better each day. We want to improve the quality of the work, improve the caliber of the individuals we hire at the OIG, and give the community confidence that when the OIG's Office says, "This is the state of affairs as it relates to the Police Department," the community will feel that our work is done fairly and objectively.

CONFERENCES & MEETINGS

February 21-26, 2005 – American Academy of Forensic Sciences, 57th Annual Meeting, New Orleans, LA. Online at <http://www.aafs.org/>

March 2-5, 2005 – National Sheriffs' Association, Mid-Winter Meeting, Washington, DC. Online at <http://www.sheriffs.org/>

March 14-16, 2005 – Americans For Effective Law Enforcement, Critical Incident Response: Management and Legal Liability, Las Vegas, NV. Online at <http://www.aele.org/>

March 14-19, 2005 – Academy of Criminal Justice Sciences, Annual Conference, Chicago, IL. Online at <http://www.acjs.org/>

March 16-19, 2005 – Commission on Accreditation for Law Enforcement Agencies, Spring Conference, Birmingham, AL. Online at <http://www.calea.org/>

April 4-6, 2005 – Americans For Effective Law Enforcement, Public Safety Discipline and Internal Investigations, San Francisco, CA. Online at <http://www.aele.org/>

April 21-23, 2005 – Police Executive Research Forum, Annual Meeting, New York, NY. Online at <http://www.policeforum.org>