

EFFECTIVE COMMUNICATION WITH YOUR POLICE DEPARTMENT

Texas City Attorney Association Summer Conference, 2011

Source material provided by Joe C. Tooley

The topic of this presentation does not readily lend itself to a written paper. However, the following source materials are suggested as assistance to allow the City practitioner who might not be intimately familiar with law enforcement a better understanding of the legal framework related to representation and consultation with City police departments.

In dealing with your police department, please.....

Don't:

- Try to be *one of them* or “one of the guys”;
- Try to do their job. Just do yours;
- Ignore their knowledge of “their” areas of expertise;
- Assume they respect you due to your position. It has to be earned;
- Assume they know how to testify in civil matters;
- Assume they share your schedule;
- Give vague or deceptive answers (they are experts at spotting this). If you don't know, say so;

Do:

- YOUR job, not theirs;
- Remember they live on a different schedule;
- Remember in some areas, they are more knowledgeable than you;
- Give straight and honest answers. “I'm not sure” is acceptable;
- Treat them as equal partners in addressing whatever problem or issue is at hand;
- Recognize their limitations and yours;
- Understand their scheduling difficulties.

Some significant cases:

MUNICIPAL LIABILITY

Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

A government entity may be liable under 42 USC 1983 for the deprivation of a person's legal rights, but the government entity, rather than an individual employee or official must have caused the deprivation. A government entity only causes such deprivations through its policy, practice or custom.

Later cases add the requirements of (1) deliberate indifference on the part of an (2) official with final policymaking authority for the entity before liability may be imposed.

The most recent U.S. Supreme Court opinion addressing municipal liability is

Connick v. Thompson, 131 U.S. 1350, 131 S.Ct. 1350 (Mar. 29, 2011).

A failure to train claim against a prosecutor's office based upon failure to turn over exculpatory evidence in a criminal case. Here, the Supreme Court reaffirms the above requirements of imposing municipal liability in an overview of the legal theory and discusses the specific requirements of deliberate indifference in a failure to train situation.

USE OF FORCE

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989).

Fourth amendment standard for use of force: reasonable and necessary under the circumstances.

Fourth amendment only applies to seizures. When does the seizure end and a person becomes a pre-trial detainee? Depends upon what Circuit you're in. In the Fifth Circuit, see, *Valencia v. Wiggins*, 981 F.2d 1440, cert. den. *113 S.Ct. 2998 (1993)*. There, a much more officer-friendly standard is used for judging a use of force involving a pre-trial detainee rather than an arrestee.

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694 (1985). Use of deadly force under the Fourth Amendment (during a seizure).

Deadly force is allowed to prevent an escape from arrest if (1) there is *probable cause* to believe the suspect poses an immediate threat of serious physical harm to the officer or others, or, (2) if there is a *probable cause* that the suspect committed a crime involving infliction or threatened infliction of serious physical harm *and* the deadly force is necessary to prevent escape *if*, where feasible, some warning has been given.

If your PD written directive permits deadly force in circumstances broader than above (for example, under Chap. 9 of the Texas Penal Code), then it is strongly suggested that the Tennessee v. Garner opinion be reviewed in detail and revision of the PD directives be considered.

See, Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir. 1994) for the standard applicable to uses of deadly force involving a pre-trial detainee rather than an arrestee.

Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

“A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”

Does this expand *Tennessee v. Garner*??? The opinion can be read either way. The author submits that the Fifth Circuit does not view *Scott v. Harris* as an expansion of *Tennessee v. Garner*. See, *Lytle v. Bexar Co.*, 560 F.3d 404 (5th Cir. 2009). However, a definitive answer to this question must await further pronouncements from the Supreme Court.

EMPLOYMENT:

Garrity v. N.J., 385 U.S. 493, 87 S.Ct. 616 (1967). An officer may be required to give a statement during an administrative investigation as a condition of employment. However, the statement, since it is compelled, may not be used in any criminal prosecution of the officer.

Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951 (2006). Speech made pursuant to official duties is NOT protected under the First Amendment in an employment retaliation context.

SUPERVISOR LIABILITY:

Doe v. Taylor ISD, 15 F.3d 443 (5th Cir. 1994). Supervisors may be held individually liable for the actions of their subordinates in the same manner as a governmental unit (i.e., policy, practice or custom coupled with deliberate indifference).

Other sources:

Texas Police Chiefs Association;

North Texas Police Chiefs Association;

International Association of Chiefs of Police;

Texas Commission on Law Enforcement (Texas Commission on Law Enforcement Standards and Education otherwise known as TCLEOSE) This is the licensing agency for police officers in Texas and also the agency which sets training requirements for officers.

There are many excellent non-profit sources providing training opportunities for officers and management personnel which are too numerous to list here. Your police department management personnel will be familiar with most of these.

Joe C. Tooley

Attorneys & Counselors



Joe C. Tooley maintains an established litigation and appellate practice providing representation for government entities and officials, private businesses and corporations. An AV® rated attorney, Tooley adheres to a solid ethical philosophy when representing his clients' interests. In addition to litigation and dispute resolution services, he counsels and trains clients in loss prevention and related issues. Legal and practical experience in governmental relations and management, law enforcement, and public affairs are professional hallmarks. Tooley has trained and spoken to attorneys, public safety, law enforcement officials, and lay individuals in civil liability, litigation practice, law enforcement management and loss prevention.

A former police officer and police academy coordinator, Tooley completed his Bachelor of Science Degree in Criminal Justice at East Texas State University. He earned his J.D. Degree from SMU Dedman School of Law and was admitted to the bar in 1982. Tooley has been admitted to practice in Texas Courts; U.S. District Courts for the Northern and Eastern Districts of Texas; and the U.S. Court of Appeals, 5th Circuit.

Areas of Practice Government, civil litigation, civil rights, employer law, appellate and insurance

Litigation

- Government Defended tort and civil rights litigation against local governmental entities and officials, with an emphasis on issues involving law enforcement, employment and public safety. Also experienced in employment, premises, negligence, and other matters which may involve substantial publicity or sensitive political issues.
- Personal Injury Handled product liability claims for major manufacturers of automotive products, transportation products, industrial machinery, firearms, medical devices and various other products.
- General Civil More than 28 years experience defending a broad range of tort suits in State and Federal courts.

Education J.D. SMU Law School, 1982
Symposium Editor, *Journal of Air Law and Commerce*

Recipient - Hatton W. Sumners Scholarship
B.S., Criminal Justice, East Texas State University, Commerce, 1976
Van Alstyne High School, 1971, Valedictorian

Associations

- North Texas Crime Commission, law enforcement committee member; former member, board of directors; former general counsel
- Texas Civil Justice League, former member; product liability advisory board
- Member, Federal Bar Association, 5th Circuit
- Member, International Association of Chiefs of Police
- Member, Texas Police Chiefs Association
- Member, North Texas Police Chiefs Association
- Member, General Counsel, Texas Police Association
- Member, Texas City Attorneys Association
- Member, Texas City Management Association

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Past Employment

- McCauley, Macdonald & Devin, Dallas
- Fulbright & Jaworski LLP, Dallas
- Strasburger & Price, LLP, Dallas
- Texoma Council of Governments, Criminal Justice Coordinator
- Greenville Police Dept., Greenville, Texas
- Hunt Co. Sheriff's Office, Greenville, Texas
- Commerce Police Department, Commerce, Texas

Teaching/Training

- Active consultant for many Texas law enforcement agencies on a variety of management, training, internal affairs and written directive development issues
- Certified Instructor, Texas Commission on Law Enforcement
- Certified Peace Officer (inactive), Texas Commission on Law Enforcement
- Experienced police trainer in legal liability, management, patrol procedures, scene photography and tactical operations
- Former guest lecturer, product liability, SMU Dedman School of Law
- Former guest lecturer, various police science college courses
- Instructs at seminars for police managers, emergency driving instructors and public officials on civil liability
- Lecturer, legal seminars on public safety-related litigation and civil rights issues
- Trainer, Texas Municipal League Intergovernmental Risk Pool, Texas Police Association, Institute for Law Enforcement Administration, Law Enforcement Television Network and various individual law enforcement agencies.

