



LAW ENFORCEMENT NEWSLETTER

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RESOLVING CONSTITUTIONAL CLAIMS – DEFINING THE WIN

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The cops on the streets bust their tails to do what they were hired to do. Enforce the laws, make a good arrest. Everything is done by the book. Yet, a particularly difficult individual who was actually guilty managed to have the criminal charges dismissed. Now the cops are the defendants in the suit for violating the individual's Constitutional rights, false arrest, malicious prosecution, and excessive force! The arrest was handled perfectly by some of the best officers in the department. Yet, here we are in Federal Court, now the police are the defendants. We have to win this one!

to obtain a "win." There are really only two ways to completely win a Federal Civil Rights Case. One is through summary judgment where a Judge determines, based upon the law and undisputed facts, that the case does not warrant a trial and hence the case is dismissed upon application for the defense on written papers. If that application is denied, the only other path to a complete "win" is via trial.

Just as the officer faces hazards in the street and a perfectly good arrest might not result in a conviction, so too does the civil arena of civil rights liability have dangers lurking around corners that the lawyer-litigator must avoid, and like the cop on the beat, use the tools available

Proceeding to trial in a Federal Civil Rights case carries unique hazards. Federal Civil Rights liability cases brought pursuant to 42 USC 1983 hold an advantage for the plaintiffs that traditional State law civil liability cases do not: an award of attorney fees pursuant to 42 USC 1988 for the successful plaintiff. (If the defense for the police wins, they are not entitled to attorney fees.) This issue creates an on-going claim for increased damages the defense

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JAIL AND T.A.I.L.S. PROGRAM

Sheriff Kevin Henderson

In the winter of 2019 the Office of Sheriff partnered with the Ontario County Humane Society to start a program called Jail and T.A.I.L.S (Teaching Animals and Inmates Life Skills). Working with the Humane Society an 8 month old female border collie was selected to be our first dog to enter into the program. The corrections division staff were allowed to submit names that could be considered for the dog. It was agreed that the dog's name would be "Rosie" who was being named after Rose Marrow, former jail matron, and wife of former Sheriff Ray Marrow, from many years ago. Rosie was assigned to a vetted inmate, who had to go through an interview process in order to participate in the program. Rosie will live in the jail POD housing area for a period of 6 weeks, where she will learn obedience, socialization and other skills.

Once the 6 week program is completed, she will return to the Humane Society and will be put up for adoption. Another dog will be selected to replace her and will go through the same process.

The Humane Society's insurance policy protects our facility by naming it an additional insured on their policy. Each inmate participant signs a waiver of liability, accepting all risks associated with the program, holding the County harmless and agreeing to follow the rules and regulations of the program.

The goal of the Jail and T.A.I.L.S program is to help a dog become adoptable through behavior correction and training. It also teaches inmates skills in animal training, animal handling, animal grooming and general animal care. Inmates get life skills which can be utilized upon release from custody in a veterinarian tech setting or as a volunteer for animal care. As the following daily schedule illustrates, the program is tightly structured for the benefit of both the inmate and dog.

One to two times a week the Dog and Handler/s will spend time with a Trainer. Two to Four hours a week will be allotted for this. The Dog and handlers will practice their new skills during the time between trainer sessions. There will be one handler and one or two back up handlers assigned to each Dog. The backup handlers will attend all training sessions. They will also be utilized during time when the handler has conflicts such as medical appointments or inmate visitation and at any other times as necessary.

The program has proven to be a huge success. The housing area where Rosie was placed saw a significant improvement with inmate behavior modification. She also had a positive impact with staff moral and each day would leave a smile on people's faces.



T.A.I.L.S (Teaching Animals and Inmates Life Skills) Daily Schedule

- 0530 – 0630** Dog secured in crate in cell during inmate meal service. Morning meal for Dog; potty break to follow (Dog and Handler escorted outside by an available officer)
- 0630** Dog and inmate secured until 0700 headcount.
- 0700** Headcount; dog secured in crate in cell during lockdown headcount for a rest.
- 0800** Dog and Handler participate in exercise/playtime/practice on the exercise court connected to the housing unit. (Does not require Officer Involvement, this will be conducted at times no other inmates are using the exercise area.)
- 0900 – 1200** Dog and Handler spend time in the Common area. Potty breaks as necessary (Dog and Handler escorted outside by an available officer).
- 1200 – 1230** Dog secured in crate in cell during inmate meal service for a rest.
- 1300** Dog and Handler spend time on exercise court for play time.
- 1400** In the Common area until 1500 lockdown headcount.
- 1500 – 1600** Headcount; dog secured in crate in cell during lockdown headcount for a rest.
- 1600 – 1700** Dog secured in crate in cell during inmate meal service. Afternoon meal for Dog; potty break to follow. (Dog and Handler escorted outside by an available officer)
- 1700-1900** Free time - Dog and handler spend time in the common area, exercise court, and potty breaks as needed.
- 1900** Evening exercise on the exercise court.
- 2000** Free time until 2230 lockdown.
- 2200 - 2230** Final potty break, then dog secured in crate for the evening.

LAW ENFORCEMENT DURING A PUBLIC HEALTH CRISIS



The recent COVID-19 outbreak provided many lessons for the law enforcement community.

Agencies serving large and small jurisdictions alike found that the resources they had on-hand were stretched thin. Big cities that have multiple layers of first response personnel were still overwhelmed by the demands of this fast moving, largely unseen health threat. Unsurprisingly, many smaller communities which generally live within a more restrictive resource and supply environment also fared poorly.

For most, this was a first experience with an event which quickly reduced the availability of necessary items like Personal Protective Equipment (PPE). The highly contagious nature of the virus placed police and other emergency responders in jeopardy, with significant numbers in some locations infected and unable to come to work. Concerns about spreading the virus to more vulnerable family members and associates increased the stress factor among those engaged in a job which is already among the most stressful in our society.

As with most human endeavors, the mistakes and shortcomings of a first experience provide information for better outcomes in the future. Improvements must occur to better meet future events. These range from access to critical supplies to the adjusting of procedures.

Begin now by developing an official law enforcement pandemic preparedness and response plan. Don't wait until a return to normal reduces the motivation and time required to sufficiently prepare for similar events in the future. A specific individual with appropriate training and authority should be placed in charge of a multi-disciplinary planning committee which includes Human Resources, IT, partner organizations, local public health resources and legal system representation, in addition to law enforcement. Determine who has overall authority to approve plans and allocate resources, and gain their commitment to the effort. Use the Incident Command System (ICS) protocols to establish roles and responsibilities among responding partner agencies.

With the many advisories you have all received, there is no need to describe the many cautionary practices we now are all familiar with, such as social distancing, sanitation, handwashing and personal protective equipment (PPE). But these are central to each department's overriding mission of keeping officers from having to be quarantined or sidelined because they are sick. Officers must remain able to respond both during the emergency and after it has passed, and whenever immediate response is needed. The required equipment, supplies and behaviors expected must be accounted for when planning.

Plan for the potential impact of a pandemic on your employees. There may well be high rates of absenteeism due to their own individual situation or of one in their care. Plan for compensation and leave policies that strongly encourage sick employees to stay home. Cross train for critical functions. Maintain a flexible work site approach such as rotational schedules and working remotely. Define a reporting mechanism for employees to immediately report their own illness.

Make sure good chain of command is in place during a pandemic by determining alternative individuals in case primary command personnel become incapacitated.

Law enforcement has always dealt with emergencies such as hurricanes, floods, large winter storms, etc. During such periods, altered procedures are the norm. Police typically move to a temporary footing at these times. That prior experience is now instructive for a more long-term event such as the recent pandemic. Formalize measures through the drafting of general orders designed for long duration emergencies. They should be reflective of the shift from proactive to reactive policing.

Some examples would be limiting calls to those requiring an immediate response; taking reports of property and other crimes which are no longer in progress by phone rather than in-person; and making traffic stops for only those violations which are a true threat to public safety. Additional training can be provided to dispatchers for screening calls to identify potential infection risks for officers who may respond. Discretionary arrests may run against the grain for a typically proactive police officer. However, in the presence of a contagion there is a domino effect related to every arrest due to the number of individuals exposed. The spirit of the law must at times supersede the letter of the law, and officers will need to be educated through in-service training. For example, rather than forcibly disbanding a prohibited social gathering, an alternate approach may be to cite and release those who refuse to withdraw. Likewise, enforcing minor warrants may not be worth the risks of exposure when making an arrest, booking, arraignment, etc. These adaptations in the short term can yield better results in the long term.

Exposure to fellow officers must be limited as well. Roll call and in-person department meetings can

be handled in a parking lot, a larger indoor area, or over the radio. When officers are on duty, car window to car window communications should not occur. Control the number of officers responding to any call while still assuring necessary backup response.

Make certain that all daily vehicle inspections include PPE checks. Limit the number of staff in the station at any one time. Create multiple command posts around the jurisdiction so that cross contamination is less likely. Fire districts may cooperate and have suitable facilities to serve this purpose. Be sure handwashing stations are identified, stocked and accessible.

Reassignments need to be considered. SROs will no longer be in schools, and are now available for other duties. Narcotics officers may be reassigned to more critical functions such as public safety and patrol. Even administration may go back on patrol based on defined criteria. Cross-train to bring flexibility to meet varied conditions.

To maintain safe spacing, FTO training should be suspended. Consider moving an officer on his/her last segment of FTO training into the full position. If they are not yet ready, move into the station for administrative work where possible. For other types of officer training, move to an online or tele-conference platform.

Determine whether officers will be allowed to engage in second jobs during the emergency. Issues such as possible infection if interacting with the public need to be considered, as does fatigue if absenteeism has reduced staff.

Protection of data when procedures vary from the norm must be carefully considered. Hackers and other bad actors in the cyber realm understand that security may not be as robust with many working remotely. Well-defined dos and don'ts must be communicated to your employees. Discretion is critical. Avoid texting or emailing confidential information using personal cell phones or computers. Be aware that staff using personal devices may open their device up to Discovery under certain circumstances.

The areas covered above are not all inclusive. They are intended to provide a basis for creating policies, procedures and developing appropriate staff training to meet future events. Now is the time to prepare.

must address head on. That is, a case that may have little value in terms of an award to the successful plaintiff may nevertheless have a big pay-out. Even if awarded only \$1.00 on a constitutional rights claim, the plaintiff can apply to recover the attorney fees incurred in obtaining what otherwise would be a paltry result. Thus, a jury may find a Constitutional violation and find it is worth very little in terms of a compensation award, say \$1,000.00. However, the plaintiff's attorney can apply to the court for an award for the attorney fees incurred for the "successful" verdict, even though the award was minimal.

While it varies from case to case, a Civil Rights case that goes from commencement through trial can readily rack up an attorney fee of \$100,000.00! The longer a case goes, the more litigation, the higher the attorney fees. That little \$1,000.00 verdict may result in a \$101,000.00 judgment when attorney fees are added in! Accordingly, from the outset, attorneys defending these Constitutional claims must not only value the initial claim, but the "exposure" of the cost of litigation and the attorney fee claim potentially foisted upon the defendants. Furthermore, claims against police officers usually include a demand for punitive damages. These are typically not indemnified by the municipal employer and excluded from insurance coverage, leaving the individual officer personally exposed in the event of an adverse determination!

Given that background, there are "wins" that can be had short of "summary judgment" or trial. While it may contain the dreaded word "settlement," a settlement is not a loss and indeed may prove to be a victory.

Mandatory Alternative Dispute Resolution

I have mentioned one way to pure victory is summary judgment. However, what if there is a fact question and the motion is denied? Can that loss be turned into perhaps not a win, but a victory? There are tools in the war chest to obtain "compliance" (i.e., ending the litigation, short of going all the way to trial with the concomitant risk of liability and attorney fees in the form of a judgment).

One such tool is alternative dispute resolution, or ADR. Many NY Federal and soon all the State Courts in NY are mandating participation in pre-discovery alternative dispute resolution (ADR) via mediation.

This is simply a program where a neutral mediator not involved with the case explores with the parties the prospects of resolving the case before trial. Why in the world would the defense consider paying anything to resolve a defensible case before trial? There are too many variables in each and every case to provide a complete answer, but one major factor is the risk of loss and a judgment for the claimant's excessive attorney fees. Another factor of particular value to the individual officer defendant is that a settlement cannot be used against the officer defendant in a later suit. Yet, if the officer has a judgment for violating an individual's Constitutional rights, no matter how minor it might seem to be, that judgment can be used against that officer, his or her supervisors, and the municipal employer in later suits. In short, the judgment will follow the Officer for the rest of their career. Therefore, amongst the duties the attorney defending the officer has, is to make every effort to eliminate the risk of a liability



verdict. Just as the officer cannot guarantee that every arrest results in a guilty finding, neither can any attorney guarantee victory in a Federal Civil Rights case.

The Federal Courts mandatory mediation program offers an opportunity for the resolution of a case without any discovery, without the officers being deposed by the lawyer for the plaintiff, and it can eliminate any possibility of an adverse verdict, attorney fees or punitive damages. This is a useful tool for that case where the summary judgment win is unlikely due to questions of fact. Nevertheless, the attorney must be careful to avoid settlements which "open the floodgates" and by settlement encourage more law suits. Likewise, settlement of a perfectly defensible case simply to avoid trial is not a victory at all. So settlement decisions require a delicate balance, just as the decision to arrest, what to charge, or exercise discretion and not make an arrest on the street in the first instance.

While no one wants to settle a defensible case, sometimes this mandatory ADR and an early, quick, cheap, and painless resolution can result in a "win" for the defense by avoiding discovery, avoiding officer depositions, taking the officer away from the important work of law enforcement, and ultimately eliminating all risk to the officer defendant. Of course, ADR is not always successful, and counsel can turn to additional tools in the box.

Offer of Judgment

They want to make an offer of Judgment? What? Why would we offer a penny? Sometimes the prospect of litigating a trivial constitutional case with the prospect of ongoing and mounting attorney fees to recover is just too tempting for claimants and or their attorneys. Blinded by dollar signs, they create a "question of fact" so summary judgment is denied, refuse to be reasonable at ADR, and threaten the defense with "pay me now or pay me later" (like the Fram oil filter commercials from years past. Only payment in the future means paying the additional attorney fees.)

As mentioned, the prospect of ongoing litigation and hence ongoing attorney fees for the plaintiff can add exponentially to the "value" of the claim as a whole. The more work, the bigger the attorney fee claim, and hence increased risk to the defendants as the costs of the litigation mount. Summary Judgment and ADR have failed. Are there any other possible victories to be had? An Offer of Judgment provides such an opportunity. How can an offer of judgment be a "victory"?

As mentioned previously, Constitutional claims carry the ever increasing risk of mounting attorney fees being assessed against the defense. There is a procedure

available to the defense to reduce and potentially eliminate that threat. The defense may propose an Offer of Judgment to the plaintiff for a prescribed amount. If the plaintiff fails to accept and the case proceeds to trial, and if the plaintiff does not recover more than the judgment offered, then the plaintiff cannot recover costs or attorney fees from the date the offer was made. Moreover, the defense can recover its costs incurred after the

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Offer of Judgment was made. This is a hefty tool which can turn the tide. The Offer of Judgment forces the wise claimant and their attorneys to reevaluate the merits of their claim with the prospect of not recovering attorney fees and potentially exposing the plaintiff to pay some defense costs. This can lead to an early resolution and elimination of risk for all parties. How is this a "win?" I have used the tool of an offer of judgment several times and no claimant has ever accepted. Yet, it has afforded the defense protection at trial and often turned the tide forcing an unwilling plaintiff to settle his case for a fraction of what they insisted upon.

As a former police officer, I understand the realities of the streets, the frustration of being sued for doing your job, the anxiety brought about by internal investigations and the seeming double standard: the settlement of civil law suits with plaintiffs who should have been convicted. There are very viable defenses for the police in the Civil Rights arena and in each and every case I certainly endeavor to secure a total victory via summary judgment or trial. My ultimate responsibility is to keep the officers I represent from having an adverse determination against them. Sometimes, when summary judgment eludes the defense, victory can be obtained via settlement at ADR, which cannot be used against that officer in a later suit. When settlement cannot be had at ADR, an Offer of Judgment by the municipality can reduce exposure and transfer some of the risk from the officers back to the plaintiff. Indeed, there is more than one path to victory.



NYMIR's Online Law Enforcement Liability Training Program

Free to All Members All Training is Eligible for 1.5 hours of NYS Accreditation Credit



MODULE ONE:

Module One is an introduction to the course. After completing the module, the participant will understand these concepts:

- ◆ What is law enforcement liability?
- ◆ Loss trends
- ◆ Sources of legal liability and legal concepts
- ◆ What the program will cover
- ◆ Administrative issues

MODULE TWO:

Module Two addresses false arrest. After completing the module, the participant will understand these legal concepts and the exposures that arise from illegal or improper arrests:

- ◆ Elements of a false arrest claim
- ◆ Malicious prosecution and warrantless arrests
- ◆ Avoidance
- ◆ Training

MODULE THREE:

Module Three addresses pursuits. After completing the module, the participant will understand these legal concepts and the exposures relating to pursuits:

- ◆ Rationale for pursuits and parameters
- ◆ Authorized vs. unauthorized pursuits
- ◆ Risk variables
- ◆ Role of supervisors
- ◆ Pursuit termination
- ◆ Claim avoidance
- ◆ Officer training

MODULE FOUR:

Module Four addresses use of force. After completing the module, the participant will understand these legal concepts and the exposures relating to use of force:

- ◆ Force definitions
- ◆ Affecting the arrest
- ◆ Force paradigm
- ◆ Assessments
- ◆ Claim avoidance
- ◆ Officer training

MODULE FIVE:

Module Five addresses strip searches. After completing the module, the participant will understand these legal concepts and the exposures relating to strip searches:

- ◆ Definitions
- ◆ Parameters
- ◆ Inmate processing
- ◆ Search authorizations and procedures
- ◆ Claim avoidance
- ◆ Officer training

MODULE SIX:

Although not a law enforcement liability exposure, employment liability claims and lawsuits occur within law enforcement agencies. After completing the module, the participant will understand these legal concepts and the exposures relating to employment liability:

- ◆ Legal liability
- ◆ Sources of legal liability (federal and state laws)
- ◆ Definitions
- ◆ Workplace exposures
- ◆ Claim avoidance
- ◆ Officer training

MODULE SEVEN:

This module builds on the risk management techniques from the initial False Arrest Module. It provides further guidance for LE Officers in minimizing potential false arrest situations.

MODULE EIGHT:

This training module discusses the definition and legal parameters of consensual encounters. It provides guidance for LE Officers in how to properly handle these situations and minimize claims.

**For additional information contact
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