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Department of Criminal Justice Services
Commonwealth of Virginia

TRANSCRIPT OF

SEMINAR ON CRIMINAL JUSTICE

LIABILITY MANAGEMENT

JANUARY 10 AND 11, 1985



DEPARTMENT OF CRIMINAL JUSTICE
SERVICES
805 EAST BROAD STREET
DEPARTMENT RICHMOND, VIRGINIA 23219

THE INSTITUTE FOR CRIMINAL
JUSTICE AND PUBLIC SAFETY
RESEARCH OF THE VIRGINIA
COMMONWEALTH UNIVERSITY
DEPARTMENT OF ADMINISTRATION
OF JUSTICE AND PUBLIC SAFETY

# COMMONWEALTH of VIRGINIA

CRIMINAL JUSTICE SERVICES BOARD

*Department of Criminal Justice Services*

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July 26, 1985

Dear Seminar Participant:

The following pages contain a transcript of the speakers' comments from the Seminar on Liability Management held January 10 and 11, 1985. The seminar was cosponsored by the Department of Criminal Justice Services and the Institute for Criminal Justice and Public Safety Research of the VCU Department of Administration of Justice and Public Safety.

Part one contains the remarks of Mr. Emory A. Plitt, Jr., who is an assistant attorney general and general counsel to the Maryland Department of Public Safety and Corrections. Mr. Plitt outlined national trends and noted that the concept of blanket immunity is falling increasingly into disfavor. Mr. Plitt outlined the key areas in which criminal justice agencies have been found vulnerable to liability litigation. These include hiring and retention, training, discipline, direction and supervision, and entrustment.

Part two is the presentation of G. Patrick Gallagher. Mr. Gallagher is the director of the Institute for Liability Management in Washington, D.C. Mr. Gallagher's remarks involve what he calls a "quality circle." The circle begins with establishing clear agency policies and procedures. These are made a part of the agency's training curricula, and the agency's management must assure that they are adhered to at all times. Breaches of agency policies must be consistently met with discipline, and, finally, the circle is completed by an ongoing evaluation of policies which should lead to changes when circumstances dictate.

Part three is the transcript of a presentation by Stephen W. Bricker. Mr. Bricker is a private attorney with the law firm of Bremner, Baber, and Janus in Richmond, Virginia. Mr. Bricker spoke on the plantiff's perspective of liability issues and legal actions. In Mr. Bricker's view, the increase in liability suits is not occurring because of any general decline in public support or appreciation for law enforcement and criminal justice. Instead, he attributed the increase to the fact that the people who suffer some injury or loss because of the action of criminal justice agencies are suing more frequently.

The last section contains brief summaries of the three workshop sessions. The summaries capture the key issues and discussion points from each of the workshops. The workshops involved (1) training issues, (2) personnel issues, and (3) management issues.

Participants in the training workshop dealt with five major areas of concern: coordination of training with agency policies; evaluation of training and test validation; improving the quality of trainers and instructors; record keeping; and training in the use of force.

The workshop on personnel covered selection standards, affirmative action and equal employment practices, equal pay for equal work, use of probationary periods for new employees, employee discipline, termination procedures, and personnel record keeping.

The management workshop discussed the need for maintaining proper records, the importance of management's setting and enforcing policies, the difficulty smaller agencies have in assuring that employees fulfill minimum training requirements, and overcoming management's resistance to change.

We appreciate your continued support of the Department of Criminal Justice Service's programs. We plan to hold a follow-up conference on liability management during the 1985-86 fiscal year.

Sincerely,

R. N. Harris
Director

# SEMINAR ON CRIMINAL JUSTICE LIABILITY MANAGEMENT

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Mr. James L. Hague

The first speaker of the day is Mr. Emory A. Plitt, Jr., who is an assistant attorney general and General Counsel for the Department of Public Safety and Correctional Services for the state of Maryland. Mr. Plitt is a lawyer who received his Juris Doctorate degree from Baltimore School of Law. He is a member of the bar for the state of Maryland for the Supreme Court of the United States and the United States Court of Appeals, 4th Circuit and the United States District Court in Maryland.

Prior to his association with the state of Maryland he was in private practice and specialized in employment and compensation and trial litigation. He also served as counsel to the Maryland State Police and in that function was responsible for all the legal affairs of that agency including civil liability defense, labor relations, equal employment opportunity litigation and related matters. As of May 1, 1980, he became general counsel, his current position for the State of Maryland, Department of Public Safety and Correctional Services. In that position he has very broad responsibilities for all legal matters for state police, for state correctional services, Maryland prison system, Maryland parole commission, Maryland division of parole and probation, Maryland correctional standards commission, Maryland correctional facilities, including local jails, Police and Correctional Training Commission, civil defense, and the State Fire Marshall and other agencies within that department. In addition, he is generally responsible for all the legal affairs of Maryland's elected sheriffs which is quite a different set up from what we are used to here in Virginia.

During his career he has received numerous awards and citations from such organizations as the International Association of Chiefs of Police, Americans for Effective Law Enforcement, Maryland State Sheriffs' Association, Maryland Chiefs' of Police Association, and others. Presently he is Chairman of the Criminal Law and Legislation Committee of the International Association Chiefs of Police. He, like Pat Gallagher, has lectured nationally and has participated in over a 100 of these kinds of workshops, many of which he has conducted himself. The types of things he has been doing certainly suggest his broad spectrum of expertise for our purposes today and it is a great pleasure to introduce him to you.

Mr. Emory A. Plitt, Jr.

Thank you. In putting together a program like this, when you know that what you are going to do is talk about national liability trends in about two and a half hours, one is forced to make a lot of very difficult choices as to what to talk about and what not to talk about. Despite the flowery introduction, you all know that an expert is one who travels more than 50 miles and carries a briefcase. I am what is referred to by our officers as one of those civilians they have to put up with. I have been involved in defense of this kind of litigation for 14 years. When I started we had three lawyers doing this kind of work. Today we have a staff of 13 lawyers. We had, in the last six years, approximately 800 lawsuits filed against employees of our department. In a department with 8000 employees, including correctional guards, state troopers, and parole and probation agents as with anything that

has to do with public safety and corrections, the trends have been clear. According to national statistics regarding police liability (the last time they were collected was the period 1977 through 1981), the odds of a police officer being sued at any time in that officer's career were about 1 in 2.1; the odds of a correctional employee either in a prison system or parole and probation were about 1 in 1.5. So you should not feel upset when someone comes around to your door and lays the papers on you.

I think it is important just for a little while to consider how we got to where we are today. Civil liability today in the criminal justice system has become a management function of the department or should, in the same way that budget preparation, general administration, and personnel are functions of a Criminal Justice agency. We spend close to 1 million dollars a year to defend employees of our department, which encompasses everything in the state having to do with criminal justice. This includes salaries, library, cost of depositions, etc., a substantial cost of doing business. Despite the tremendous number of law suits, despite the somewhat large six figure judgments that have become commonplace today, it has remained consistent since the early 70s that we win about 80% of all lawsuits filed against us. That's a pretty good batting average. There are a lot of other professions which would like to have that kind of batting average. Our friends in the medical profession would be very happy to win 8 out of every 10 suits on a national basis.

Well, what relevance does this have? We are doing something right, somewhere. We are not doing everything wrong. The problem is that 20% of the cases we lose are usually big ones or significant ones or ones

that touch on public policy issues. They are ones that make politicians nervous. They are ones that make budget administrators lose sleep at night wondering where the money is coming from. They are ones that make officers and employees very disturbed in the sense that here I am trying to do my job and trying to do it the best way I can and here is this slug that nails me for $25,000 when I was only doing my job as I was taught to do it. So they do have implications, this 20% we lose, and they become more significant against the background of the function of criminal justice and the rest of governmental policy and administration.

Well, lets talk for a minute about why we got where we are. I think it is important to understand what has happened in this country, to have a full appreciation of the liability problem in criminal justice. I use as a water mark the year 1961. Let me explain why 1961 was so important. In that year, the Supreme Court decided one of the most significant civil rights cases of the 20th century. One that had far reaching consequences that were not realized in 1961. Perhaps, with Brown vs. Board of Education, the 1954 case that abolished separate school systems for blacks and whites, this case probably ranks second but gets very little publicity or discussion outside of the criminal justice system. The case was called Monroe v. Pape, a case that you probably heard about somewhere along the line.

The incident actually started in 1959 during a raid on an apartment by officers of the Chicago police department. Suffice it to say there was a lot of shooting; they didn't have a warrant; they thought they were at the right place. A lawsuit was ultimately filed, and the attorneys for

the plaintiffs thought that they would take a gamble. They wanted to get this case into federal court. (I will talk a little bit later about why at least in this state and my state and many others you really are better off to sue a criminal justice employee in federal court.)

They were in the city of Chicago. They decided they didn't want to pursue the case in the old Illinois state courts because they'd get nowhere. They wanted to get to a federal court. Their case was based on statutes that were adopted by Congress after the Civil War. They are generally referred to as the the Ku Klux Klan Acts. They were originally designed by Congress to implement the 13th and 14th amendments to the Constitution which, as many of you know, were adopted after the Civil War. In fact one of the greatest political documents that this country has ever seen was the Emancipation Proclamation. A lot of people, when you talk about the history of American law, talk about the Emancipation Proclamation because it freed the slaves. It did no such thing. It was a speech. It had no force in law. It wasn't until the Constitution was amended, and these statutes that I am going to talk about were passed, that legal change actually came.

What happened? The plantiff's lawyers found these statutes and said, "Wait a minute maybe we can use these as grounds for a lawsuit against the Chicago Police officers. After all, didn't they deny our client the right to be free from unlawful search and seizures? They broke into the apartment. They did not have a search warrant. They thought that the people were going to be there, but all they had was some phone call from some informant. They really didn't have probable cause. They knew they

couldn't have gotten a search warrant. So let's argue that they denied our clients their Fourth Amendment right to be free from an unlawful search and seizure." The Federal District Court in Chicago and ultimately the Federal Court of Appeals for the Sixth Circuit said no. They knew that since 1899 the Supreme Court had refused to apply these statutes to the states. Nevertheless, they asked the Supreme Court for review, and, in 1961, the Supreme Court changed the law. For the first time in history, these federal statutes, which had originally been passed to guarantee equal protection and fair treatment to citizens were applied to state and local governments. That case opened the floodgates for lawsuits which no one has yet found a way to close against criminal justice personnel.

The police were first. Then came corrections. Someone got the bright idea that if you can use such a statute to sue a police officer for money damages, for violating a citizen's Fourth Amendment right, what about the Eighth Amendment? The Eighth Amendment says that people should be free from cruel and unusual punishment. If you have a "bunk with a buddy program," as we refer to double celling, in one of your institutions and your cell is 40 square feet, with one toilet to share and no decent meals, isn't that cruel and unusual? It depends on your point of view. Let's try. Since they were successful against the police, let's try to use it on behalf of inmates. They did and were successful. It went beyond that. Now, it has reached into parole and probation, and every other part of the criminal justice system.

Let's talk about traditional state lawsuits. Let's review for a minute what it used to be and what in many respects, it still is. In state court we are talking about a thing called a tort suit. It comes from the Latin word tortuous meaning twisted or twisted conduct. One type of tort involves negligence--the failure to exercise the proper degree of care a person who is reasonably prudent would have exercised in a similar circumstance. For example saying that anybody who was paying attention would have stopped for the stop sign. You wouldn't have run into the car in front of you if you had been looking at what you were doing.

Also there is gross negligence, an aggravated form of negligence where the wrong doer acts with reckless disregard; a complete lack of care; a complete lack of regard for the rights of others.

Finally, there are intentional torts--where someone willfully or deliberately does something. These were always available under state law to someone who wanted to sue criminal justice employees, and are still available. Almost all law suits in state courts against criminal justice employees fall under one of these three.

Now, what was such a big deal about that? Why do you have to go into a federal court when these remedies are available in state court? Well, here is the reason.

Most of our states with the exception of Louisiana, based their law on English common law. To this day, there are many, many defenses available to criminal justice employees in a state court which are not available in a federal court.

For example, immunity. Virginia still recognizes immunity in some forms. So does my state. So do most others. In a state court when someone sues a police officer or a correctional employee somebody dressed just like me in a three piece suit without a beard or moustache and who carries an ordinary briefcase (that's how you spot defense lawyers) comes in and says "it may be true, it may very well be true that this officer put a slug through this 15-year-old kid without any probable cause at all, but we are all immune." Let me give you an actual case.

How would you like to come home from work one day. You have had a long day. You want to come home and get a drink as I sometimes do, you pull up in front of your house; you get ready to get out of your car; you look over, and you don't see your house. You see a car parked in front of yours that has city license plates on it. There is somebody sitting in the car reading a racing form. This person sees you pull up; approaches you very sheepishly and says,"Do you live here?" You flash a smile and say you think you did. He says, "Well, I got something to tell you." The story goes that it seems there was a demolition order by the city for a particular dwelling and "Gee, we got the right street but we got the wrong block." You, with some degree of calm, say "What does the city intend to do about this?" at which the point the answer is "you have to talk to the city attorney, I am not authorized to talk about that."

You find out the city says they are immune because that was negligence. "We didn't knock your house down on purpose, we just basically made a

mistake." You say, "You caused the accident--you pay." The city says, "Wrong; we don't pay because in state court we have immunity. We are only responsible if we act intentionally." You say, "Who is going to pay for my house?" Answer--"Your insurance company." Well, if you are a legislator or a member of a city council or a county council, how would you like to have that citizen come to you. You are trying to make your mark in the legislative body. You stand up with righteous indignation. Who will argue with you about the government not being responsible for what it's employees do in the same way that you are in your personal lives. It's a different standard in state court. Immunity is a stumbling block to claims. Certain things are recognized in federal court that might not be recognized in state court. There is a "new" tort called intentional infliction of emotional distress that is one of my favorites. Everybody can say it, but nobody knows what it is. It is like the back which we call the "gold mine of the anatomy."

Another state court obstacle to plantiffs is what I call the "home game syndrome." If I represent somebody who claims that they were somehow injured by a criminal justice employee, why would I want to play a game on the defendant's home court. I watched my alma mater lose one last night by one point to North Carolina. Maybe it will be different when the Tarheels come to College Park. I don't want to play in Carmichael Auditorium, I know that much. Well, it is the same idea in state court. Police officers appear in these courts all the time. All the judges know them, all the clerks know them. Why do I want to play a game on their court? I want to play on neutral turf, and I also want to get it away from a jury made up of the people that are in that city or county.

I know if I can get into a federal court, I am going to get a six person jury, not twelve and they are going to come from the entire federal district not just the city or county where I am not going to have the home game problem.

I also don't have to worry about political judges. Federal judges are the closest thing to God that man has yet created. Remember, they serve for life during good behavior and there is no definition of good behavior. So federal judges are absolutely insulated once appointed and confirmed by the Senate from any kind of political influence. State court judges aren't always insulated as you have politics in state court--as long as judges are elected.

You also have a problem with discovery. Discovery is what is used to find out what each side has against the other. It would probably be difficult for me in your state court to get the officer's personnel records, or the records of internal affairs when I cast out my line to do a little fishing. In federal court it is much easier because the rules of discovery are much broader. In a federal court, I can attach in my federal lawsuit a state law claim because Congress has said, "That if the federal court is already hearing this case and there is a related state law claim, we'll let the federal judge hear the whole thing." I can tack a state law claim on the back of my federal lawsuit and use federal discovery.

Perhaps the greatest impetus for these suits, since the Monroe decision, occurred in 1976. In 1976 Congress passed what is called the "Civil Rights Attorney's Fee Award Act of 1976". The way this law has been

interpreted by the courts is that if you win in the federal court on any issue--you can have 14 theories but you need only win on one--then you are entitled to attorney's fees. The attorney's fees bear little relationship to the amount of damages actually awarded.

I, unfortunately, have a case that is pending not far from here in the Fourth Circuit. To give you an idea of what can occur, this is a case involving an inmate in one of our prisons. Two guards went in his cell one day to get him because of a fight. They just dragged him out and put him in segregation. They didn't get around to giving him a hearing until a couple of days later. In the confusion, some of his personal property was destroyed, quite by accident I am sure. He filed a civil rights suit. The federal judge gave him $50 for his destroyed books and $100 day for each of the two days he had been in segregation without a hearing. The judge must have really liked him because he gave him another $200 in punitive damages because he thought that our correctional officers really acted excessively. Four-hundred-fifty dollars, that's not bad. I can sell that to the budget department. Then, the judge gave his lawyer $27,000. It is tough to explain why we are only paying $450 in damages when maybe we could have settled the case for $200 and gotten it over with. Now we have a $27,000 attorney's fee award on which interest is running since our appeal has not been heard. If we lose it on appeal it is probably going to cost us $42,000 by the time it is all over. A $1 verdict is very common in federal court. Yes, your rights were violated but you suffered no actual injury. We'll give you a buck and we'll call it nominal damages. Then we'll give your lawyer whatever he or she can prove he or she spent on your defense. You can see now how since 1976 there are added incentives for a lawyer to take one of these cases.

Now, in state court we have various kinds of relief that people have traditionally sought. These are available both in state court and federal court today. For example, injunctive relief, which says you can't do something anymore, or must do some things from now on. As one judge just said on one of my cases recently, "Within one year from the date of this decree you will train all your correctional officers so as to minimize the offensiveness of opposite sex searches." Injunctively, the court orders you not to do something, or orders you to do something in the future.

There is also declaratory relief, which is quite different from an injunction. We have a tendency to lump them together. They really are different. Declaratory relief is where the judge declares that something was wrong. They may not issue an injunction. They simply declare that what you did was wrong. Neither one of these involves a payment of any money however. It is important to note that an order to do or not do something or a finding that what you did or did not do was wrong do not involve payment of any money. Yet in federal court, it would entitle the plaintiff to attorney's fees.

When it comes to money damages we have three kinds.

Nominal damage is where the plaintiff can't prove any actual monetary loss, no lost wages, medical expenses, or permanent injury--but the court or the jury finds that the criminal justice employee did something wrong. If they find there are no compensatory damages (which we will discuss next) then they must give the complainant a dollar. That's true. If they find in favor of the plaintiff they must give him a buck. We call that nominal damages.

The big bucks are provided by compensatory and punitive damages.

Compensatory damages are monies awarded to compensate, to pay back the actual loss sustained, to restore the plaintiff to the status quo ante, the status that the plaintiff enjoyed immediately prior to whatever occurred. It includes medical bills, lost wages, compensation for permanent injury. Compensatory damages aren't taxable. Juries aren't supposed to make these rewards or bonuses. They are supposed to compensate. When the family sues on behalf of a 25 year old man with a wife and two children who was shot and killed by a police officer, it would not be unusual to see over 2 million dollars in compensatory damages awarded including how much it would cost to send the kids to college, etc.

Punitive Damages. Punitive damages are something that we in law enforcement have a particular exposure to. "He did it intentionally or willfully your honor, tell the jury they can give my client a bonus to punish that conduct." These awards are also called exemplary damages. The words suggest that they really are to serve as an example to others not to repeat the same kind of conduct. These are available in both a federal and a state court.

Another thing that we have to be aware of, and that I think there is some confusion about, is what it takes to win a civil case against a criminal justice employee. You are familiar with criminal law because you work with it all the time. Every time a criminal justice employee--police, corrections--it doesn't matter, is sued for the first time there

is a tendency for the employee to equate the lawsuit with the criminal law because it is something we work with, something that we are used to. In the criminal law we have this thing called beyond a reasonable doubt or to a moral certainty. This is a very high standard of proof, certainly above 90%. In a civil case, that is not the situation at all. The plantiff's burden of proof is a preponderance of the evidence or only 51%. It is much easier to prove a civil as opposed to a criminal case. To understand this helps someone who has never been involved in such a case to understand why we lose civil cases. The civil standard of proof is sometimes called whoever produces the most credible evidence, not most credible in the sense that is the most believable, but the most evidence that is also the most believable. A tipping of the scales. You don't have to prove that beyond a reasonable doubt standard to win a civil suit against a police officer in either a federal or a state court. It is like that in every state in the country. As I said before, this helps people understand why we lose these kinds of cases.

The same burden of proof applies in Administrative actions--your disciplinary hearings and things of that nature that aren't tried in the courts. This varies depending on the state, depending on the procedure that is followed, but generally that is also a preponderance of the evidence test. Who produces the most believable evidence. So you have the burden of proof that is important to understand.

What has occurred in terms of national trends?

Immunity is now disfavored. Legislatures all over the country are taking shots at the last vestiges of immunity. Many states have

adopted a state tort claim act as a way of getting around immunity. The legislature says you may now file a claim against a public employee, and we have this procedure we are going to use.

The concept of a public employee not being accountable for the negligence or other intentional actions that he or she commits--to the same degree as you are in your private lives - does it make sense? When you think about it, it is illogical.

Here is the government--big brother--big brother says in sort of a conceptual fashion - you are all responsible for all of these things, but the people who work for me are not. It is becoming politically unpopular, and going down left and right. That's what has become part of the national trend. It is part and parcel of the idea that now the state courts are waking up, state legislatures are waking up, and saying to themselves, why have we sat here since 1961 and by our own inaction let the federal courts take over? That is exactly what has occurred. You have 17 states now of the 50 that have said by appellate court decisions that federal civil rights violations, allegations of violations of federal civil rights, may now be tried in state courts. Mine did it two years ago. Why? Well, they want to take some of these cases away from federal courts. I already mentioned how immunity is going down in flames. The point is that we are slowly but surely, at the local level, adopting the idea that public employees are to be held accountable for their wrongful acts in the same way as anyone else. Sort of a logical thing. Look for it--it's bound to happen--it is inevitable.

Another thing that has developed in terms of national trends has to do with the court in Washington that we refer to as the Supremes. They sing a lot of tunes over there. There is a commonly held belief, especially among police officers, that the Supreme Court, the so-called Burger court, referred to by some as the Hamburger Court, is a very conservative police oriented Supreme Court. When it comes to criminal law, that is probably true. After all, the exclusionary rule, as you probably know, has one foot in the grave and the other on a banana peel. It is almost gone--but not quite. I read in the newspapers, which are always great sources of definitive Supreme Court law, that supposedly on Monday they voted 9 to 0 that police officers can stop and search anybody they want, anytime for anything. Now I think I know the court well enough that there is no way they would do that. I think I will wait to read the opinion to see what the Supreme Court really said.

Now what has the Supreme Court done? Well let me explode a myth for you. The Burger Court has done more to make it easier to sue a state or local criminal justice employee than Earl Warren ever dreamed possible. Believe it or not the Burger court has been the most liberal in terms of opening the flood gates for civil liability against criminal justice employees. Let me give you a few examples.

In 1978, in a case involving the firing of a police chief, the Supreme Court said that governments may no longer escape civil rights lawsuits by claiming that they acted in good faith. This struck a blow to the heart of all of us who defend these cases on behalf of the government

because for 17 years one of our main defenses when the city and the county and sometimes the state was included as a defendant in the case--as they are more and more today, was to say that the government acted in good faith. Could this be the conservative Burger court? Governments may no longer plead good faith immunity and get out. A second example: Last year they heard a case called Smith v. Wade. It was a simple kind of case. A correctional officer in a prison was working 4-12. An inmate was brought from another part of the jail. The inmate was acting cut. There were cells along the tier and the officer was supposed to put the inmate in a cell. He had one empty cell, and the others all had somebody in them. He took the inmate and put him in a cell with someone else and left the one cell empty. Maybe he thought he might need it later. For those of you involved with corrections, you know we have the magic "administrative vacancy" rate we have to keep. The guy who is the buddy in the bunk when he puts him in, is somebody he has had trouble with before. They get into a fight, the guy gets injured. All right, so he sues claiming a civil rights violation by the correctional officer for denying him due process--failing to protect him from assault. Well how dreadful. Well you had one empty cell, you knew this guy was combative and assaultive, knowing that you still went ahead and put him in there. So the jury comes back and they give the inmate $5,000. By our standards that is not a big deal but they also give him $25,000 in punitive damages. The officer, the agency, and the public attorney are saying that this is a transaction that took a couple of minutes. They brought him down, we put him here. How was what we did willful or malicious? The judge says well, I am going to let it go to the jury. The jury finds against him, awards punitives, it goes to the

appeal and its off to the Circuit of Appeals. Then they ask the Supreme Court to look at it because the Supreme Court has never said definitively what is the test for punitive damages in a federal civil rights case. Many circuits had adopted a "reckless" or "willful" standard. That is you don't get it unless you prove one of those things.

Remember proving willfulness or recklessness or gross misconduct is proving a state of mind. One doesn't prove states of mind, only psychiatrists do that. Juries are allowed to deduce what the defendants state of mind is but that is not a certainty. So once again this conservative Supreme Court comes back and says that the test for punitive damages against a criminal justice employee in a federal court in a civil suit for money damages is now "recklessness." Let me tell you that that is a lot less than willful or wanton or deliberate.

They used the term deliberate indifference, and the majority opinion said that in essence the same test for compensatory damages will be applied to punitive damages, that it is going to be up to the jury from now on. Our exposure increased dramatically. Now we face a claim for punitive damages in every one of these cases, because this conservative Supreme Court has considerably lessened what we previously assumed to be, wrongly in hindsight, the test for punitive damages.

This ruling creates another problem internally. The problem it creates is that many state, city, and county governments take a position that they will not pay a punitive damage award against a criminal justice

employee because it violates public policy to do so. Now we are going to see a lot of scrambling, and it has already started, because of the lowering of the test. This is the conservative Supreme Court that everybody talks about.

In awarding attorney's fees, federal courts can use the "Lode Star" test. It's like the International Harvester truck--spelled the same way and coming down the road with you standing in front. It works like this: If the attorney for the plaintiff in one of these cases against you can prove that his case was a novel one; that it wasn't popular; that he or she had to give up other cases because this one was so involved; that he was against big brother having to fight all these problems; the trial judge can give the attorney a bonus attorney's fee called the "Lode Star" factor. This means they can multiply the attorney's fee by what the judge thinks. There is one reported decision where a judge on the West Coast raised it from $750,000 which is what the attorney claimed was the value of the time he put in, and threw in another $750,000 for good measure. The judge figured the case took two years, was unpopular, was against the police department and the city, and was bitterly contested. The city fought the plantiffs all the way. The plantiffs got a little something for their trouble.

We ought to talk a lit e bit about federal courts and civil rights. The statutes - the Ku Klux Klan acts - the primary one we call 1983. (Really Title 42 of the United States Code Section 1983.) It is one of the shorter federal statutes and in some ways it is likened to the term due process--two words that have been litigated more in the United

States Supreme Court than just about any others in the English language. The statute reads: "Every person, who under color of law, subjects another person to a deprivation of any rights secured under the Constitution and laws of the United States shall be liable to the party injured in an action of law, suit in equity or other proper proceedings for redress." That is all it says. It implements the 14th amendment. The United States Constitution gets amended and you need a statute to implement it. This statute implements the 14th amendment and it counts for almost 1/3 of all reported federal decisions since 1961. This is the statute that was involved in the Monroe vs Pape case. Why was the statute required? It was passed to override certain kinds of state laws - Jim Crow statutes. It was passed to provide a remedy to people where state law was inadequate. It was passed to provide a federal remedy where there was a state remedy but the state remedy was inadequate. It was passed to provide a remedy in a federal court that would be supplemental to any remedy that a state may provide. It requires some very simple elements, and it doesn't apply to anybody but public employees. This statute doesn't apply to anybody but us. It doesn't apply to industry at all, it doesn't apply to ordinary citizens at all. Yes, there are some civil rights statutes that do apply to ordinary folk, like public accommodations and things like that. This one and its two companion sections: 1985 which allows you to sue public employees who conspired together to deny equal civil rights; and 1981--which said that black persons shall have the same right to contract and participate in affairs as white persons. Those three together are the primary statutes upon which all federal civil rights litigation, exclusive of employment discrimination against public employees is based.

Let's talk about what the statute requires. "Under color of law" requires that the public employee acted under the color of law. What does that mean? The public employee acted pursuant to state, county, or local law, rule, ordinance, custom, practice, or usage. It doesn't have to be written down before it can be the basis of a lawsuit. The officer says this is the way we have always done it. That is acting under color of law. Don't be hung up by this term, because this requirement has been interpreted to include policy, practices, customs, regulations, rules, statutes and ordinances. It is law in the generic sense. "Subjects or causes to be subjected," refers to the fact that the public employee did something. What? Maybe it was a false arrest, maybe it was an assault. "A citizen or inhabitant" refers to the fact that this statute is not limited to United States citizens. It doesn't require citizenship.

The statute says "any person who is deprived of any rights." What kind of rights? What statutes? Run through them, the 4th, 5th, 6th and 8th amendments; The right to be free from unlawful searches and seizures, the right to be free from self-incrimination; the right to counsel; the right against cruel and unusual punishment; and 14th amendment due process which says "No person shall person shall be deprived of life, liberty or property without due process of law. "Section 1983 covers rights guaranteed through the federal constitution and now, since another Supreme Court case, federal statutes.

In a 1981 case called Gomez v. City of Toledo, the Supreme Court said that any other statutes may now be used as the basis for a lawsuit. What kind of a federal statute? Justice Rehmquest who wrote a dissent,

gave a list from snail darters and all kinds of crazy things that we would never have any dealings with, but, now we are subject to all of these because, after all, federal statutes are laws passed by Congress, and Congress gets its authority from the Constitution. So you have some very simple elements that you have to fulfill to be a plaintiff. You have to be a person; acting under color of law as I explained it to you; the allegation must be that the plantiff was deprived of a right or privilege guaranteed by law or the Constitution, and that's it. You are in federal court. How tough is it? As an example, I represent a person who has been hit with a blackjack by a police officer. I say to myself, if I file this in a state court they are going to yell, self-defense. The guy was assaulting me as he laid on the ground and I had to get my blackjack. It was either that or shoot him. You say I'll buy that. Now he says I don't want to fool with state court. I want to get into federal court. How can I do it under that statute? I know--14th Amendment! The officer hit my client in the head before he gave him a hearing. That doesn't make any sense. The 14th Amendment talks about due process, and we always equate that with hearings and trials but the plantiffs attorney says the denial of due process was the fact that without any judge telling him you hit him twice with the blackjack. You deprived him of due process of law. He is not a prisoner so it can't be cruel and unusual punishment. The basis for a suit by a plantiff who has not yet been convicted is through the 14th Amendment. Maybe while he was lying on the ground he said "I want to talk to my lawyer," you said "sure and I want to be the chief of police." There's the 6th Amendment issue--denied access to counsel, the lawyer can't get attorney's fees in the state court because most states follow the

American rule--that everybody gets their own lawyer as opposed to the English rule which says that the loser pays everybody. A lot of people say if we had the English rule we would have a lot less lawyers. Probably true, and it might not be all bad either. He fulfills those requirements and survives a motion to dismiss when you came along and said that he failed to state a claim. Now we have you in a federal court. Also important in civil rights litigation, are the implications of these kinds of cases for supervisors. I want to read you what somebody once wrote about these implications. "Section 1983 lawsuits are particularly applicable to officers whenever the conduct of police action violates the civil, constitutional or statutory rights or privileges of another individual even though that individual is a suspect or in custody for the most heinous crime imaginable. Remember the individual must only show that his rights were violated by some person in authority. Section 1983 can be applied to supervisory or administrative as well as line personnel. Section 1983 is now also used in those instances where official policy or custom can be shown to infringe upon the plaintiff's rights, and results in subordinate officers violating the plaintiff's rights. Suffice it to say that most police conduct easily meets the test of being under color of law, the only step left for the plaintiff to prove that the police action was a violation of his constitutional rights."

We have what we call, for lack of a better term, the "deep pockets theory." Some of you have probably heard this before. Essentially it goes like this--the deeper the pocket the more money there is to pay a judgment. Who has deep pockets? Supervisors, administrators, and the

government. The trend we have seen in the last five years especially, is that it has become common for an attorney who does the least amount of research and has the least idea of what he is doing to allege and to name as a party in the lawsuit, supervisors, including the chief because what he wants to do is to pin the rose on the supervisors. Because it is more likely that the government will indemnify, pay judgments, and defend supervisors rather than line employees. Is this one of the reasons not to take the job? There seems to be a short life span for chiefs of police and heads of correctional systems. I read not too long ago where a head of correctional system lasts about 2.1 years and a chief of police about 3. That is not surprising based on what is going on. The trend is to try to prove that supervisors knew what the officers were doing and that the supervisors did something wrong.

So if we were to summarize, you have got three categories of problems, two of which we have dealt with, one which we won't. I made a conscious decision not to talk about police officers and criminal exposure. I think all of you will take it as a given that there are times when action that a public employee takes would also be criminal in nature. So again to summarize there are basically four things that all public employees involved in criminal justice have in terms of exposure, state court tort suits; federal civil rights suits; criminal cases; and administrative action.

Probably the most important issue in police civil liability right now is supervisory liability. Where does it come from? How can you find a police chief, a sergeant, or a correctional captain liable for an injury

done to someone by other officers in the department when the supervisor wasn't there?

We have an old English common law concept called responsdeat superior--a fancy latin name for what we call the master-servant or the employee-employer relationship. Common law held the master responsible for the wrongful acts of his servant--a very simple concept. You are driving down Interstate 95 and you are hit by a truck. Your assumption is that the driver is employed by the company that owns the truck and is on their business; therefore your first thought is that they are going to be responsible and that is true. However, the common law allowed that an exception for public officers and employees. Not many states ever applied this doctrine to public employees except to sheriffs.

In the case of supervisors there is a theory called "vicarious liability." If you look up the dictionary definition of vicarious, you will find that it is in essence a cheap thrill. You get the thrill without having been there or as someone said you get the thrill without being kissed. What is this theory that holds a supervisor responsible? All a plaintiff has to show is that supervisors were negligent in the manner in which they supervised their subordinates. The term vicarious is really a misnomer. Every court calls it that. Textbook writers call it that. What it really is and what it ought to be called is supervisory liability because the idea is to hold supervisors responsible for what their subordinates do. A plaintiff has to show that supervisors were somehow negligent in the manner in which they supervised their subordinates.

This has a relatively recent origin. In many states up until the 1900's husbands, for example, were responsible for the torts that were committed by their wives because wives were considered property in those days before the enlightenment. We had in this country a number of what we called marital property acts, going back a long time in English common law, that all of our states adopted. This however, is relatively new and, like I say, it should really be called supervisory liability.

Let's look at the theories that plaintiffs use to allege supervisory liability. There are really seven in number but I am going to add an eighth because of some recent court decisions which aren't on this transparency. Every case against supervisors where the supervisors were not present at the scene and did not participate in whatever went on, falls into one of these categories. 1) Negligent employment, 2) negligent entrustment, 3) negligent assignment, 4) negligent retention, 5) negligent supervision, 6) negligent failure to train (one of the most important) 7) negligent failure to direct, the eighth one I am going to add is called 8) negligent failure to discipline. Watch out for this one! There are already a few reported decisions where the plaintiff proved this police officer, this correctional officer, whatever, acted out of line. You the supervisors, you the chief, you the department head, you knew what happened, you didn't investigate it, you totally ignored disciplinary action. Had you taken disciplinary action, this incident may not have happened.

A good example is a case called Popow v. City of Hargate. It is a very simple case where you would think that the police chief acted

responsibly. It involved shootings. The facts are simple. In every shooting case where an officer shot someone, the local D.A. took it to the grand jury. The police really didn't do an internal investigation of it. At that time, there was a policy in that jurisdiction that the prosecutor took them all to the grand jury. The grand jury never indicted an officer in a shooting case. I am sure you don't find that surprising. Now along come two officers who get involved in a shooting. They kill someone. Both of these officers had been involved in previous shootings. The plaintiff says that the failure of that chief to discipline them resulted in his being shot by these officers. Had the chief taken disciplinary action it wouldn't have happened. The chief says wait a minute the D.A. took them all to the grand jury, there was nothing for me to do. The court said no, the mere fact that the D.A. took them to the Grand Jury doesn't relieve you of your obligation to investigate and where appropriate, take disciplinary action. It is difficult to argue that failure to discipline is a form of negligent supervision. It is a relatively new concept.

Negligent employment, very simply put is where the agency involved hires an individual to serve as a police officer, correctional officer or whatever, and that individual gets involved with something that injures a civilian. A lawsuit is filed. The allegation is that the department was negligent in the hiring of that individual. Well how can that happen. The plaintiff argues that the department, the supervisor the chief, the city manager, I don't care who it is, knew or should have known that this person was unfit for appointment but yet went ahead and hired him and hired a person that they should have known was unfit to be a police officer and this has resulted in an injury to a citizen.

Well how can you win a case like that? The biggest problem is the background investigation. Invariably in the cases where departments have lost a negligent employment case, there has been some problem with the sufficiency of the background investigation. It is not a question of you being judged after the horse is out of the barn. Because an officer does something doesn't necessarily mean that you were wrong in hiring him. It is what you should have known or done before you made the hiring commitment that exposes you to liability under this particular theory. It is absolutely imperative in terms of management of civil liabilities if not for good personnel practices to do sufficient background investigations. One of the things that has come out of this is the growing trend for psychological evaluations. It started in about 1975, in terms of the courts ordering this done, in a South Carolina case called Green vs. Cauthen where you had two black citizens beat up by a couple of white officers with no justification. The court was so outraged by the case that it ordered the department to institute psychological screening of police officers to try to ferret out, if you will, those who have a tendency towards assaultive behavior, inbred prejudice and things like that. You see a very clear trend today to do some psychological testing. It's been especially important in the police community and now we are starting to see it on the corrections side.

A plaintiff says to you, the reason you are responsible for this, you the chief, you the director of personnel, is the fact that you hired somebody that you should have known was unfit to do the job, knowing what a criminal justice employee has to do in stressful situations.

You have the obligation to make sure, within reason, you have put the most capable officers you can on the street. And this is how they come after you when it does not happen.

In negligent entrustment, the agency entrusts an employee who is incompetent, inexperienced, or reckless. Three magic words. That's the key. Incompetent, inexperienced or reckless with some equipment. Almost all negligence entrustment cases are equipment cases which the employee uses improperly and harms someone. A lot of these, believe it or not, are off duty cases, especially in the police community. Off duty weapons. Other kinds of off duty activities. The plaintiff generally must allege and prove that the officer or the employee basically was either incompetent, inexperienced or reckless. Well, that's not too bad, but more important he has to prove that you the supervisor knew or, if you were doing your job, you would have known of this person's incompetency. And knowing that or proving that you should have known about it, you went ahead and let them do it anyway.

Very simply stated, you entrust someone generally with a piece of equipment where you should have been on notice that they were incompetent to handle it. Like putting a police officer on the street with a firearm even though the law says that you have a year to train them before the officers ever qualify. The officer qualifies with a pistol but you put him on the street and say, "by the way there is a shotgun in the front of the car." This will sometimes overlap with negligent training, but the point for the plaintiff's side is this: he's

only going to collect one judgment. He doesn't care which theory the jury accepts. This is sometimes called the shotgun approach. We'll put them all in. And if the jury likes one better than another or the judge likes one better than another, that's all well and good for the plantiff.

Negligent assignment is somewhat related. You can see there is a common thread that runs through them all. The agency gives an assignment to an officer or an employee when the agency knew or should have known that the employee was unfit, incompetent, or incapable of handling it. Very simply, the officer has been on the job for six months. Okay, fine. Now what we're going to do is we're going to, overnight, convert that officer into an undercover narcotics officer. He turns in his uniform on Friday and by Monday he's out on the street in that kind of an assignment. Has he been prepared for it? You gave him an assignment that you knew or should have known, if you were doing your job as a supervisor, that the employee was incapable of handling.

Negligent retention is the Hill Street Blues theory. J.D. in the motor pool. The agency retains a person who is unfit for employment. Unfitness has been demonstrated by inappropriate conduct. Best example, the alcoholic employee. That's why I use the Hill Street example, J.D. in the motor pool. Furillo did the right thing. Got to get J.D. off the street where he can't hurt anybody so we'll have him handle the garage and we'll take his gun away. This is a perfect example of a response to a negligent retention case. The City of New York had one of the first cases many years ago. An officer was twice pulled in and

talked to about his drinking. There have been reports about it. He's been counseled, he's been told he better cut this out. He never comes in to the precinct drunk. Sometimes he smells like he walked past a distillery. But he's never been found to be intoxicated on duty, but yet everybody knows he's got a problem with alcohol. A third incident happened. Someone sees him in a bar after getting off, and this time, this third time, his summons came from the Commissioner's office. Now, if you know anything about the New York City Police Department, you'll know that when you have a police department of upwards of 30,000 officers, being called in as a patrolman to the chief's office isn't small potatoes. The case is called McCrink vs. City of New York. The chief says to him, "Look you cut this out or you're going to embarrass us and get everybody in a lot of trouble." That was strike three. Now we come to what may be in retrospect should have been an out. But it's like little league, we're going to give him four strikes because he's still learning. So, he's out on patrol one night and a taxi cab stops and the driver is looking for a particular location and gets involved in a dispute with an officer who had been drinking. The officer blows the cab driver away. That cost the City of New York a lot of money. They said, you knew the problem and you kept him. And when you kept him you subjected the citizens and visitors of the City of New York to an unreasonable risk of harm. You ignored this guy's problem. Don't tell me that alcoholism is a disease. I know it is. Don't tell me that you can't do anything about an alcoholic officer. Sure you can. Refer him for counselling. I'm not saying fire him. There are employee assistance programs. There are all kinds of programs available. The proper response may have been to take the gun away, take the badge away, put him on some kind of light duty, and order him in to get some treatment.

Now, if you were on a jury and you had those two cases, which conclusion would you come to. Would you have any trouble finding against the officer in the McCrink case? But how about when the supervisors identified the problem and tried to act reasonably to correct it. There comes a point in time when you simply don't have any choice but to get rid of an unfit officer. You don't like that--most people don't, but it's a fact of life and should be done where it is appropriate. The knowledge of a tendency for misconduct can be actual or presumed--presumed knowledge that the administrators, the supervisors, know about. So, there's four, negligent employment, entrustment, assignment and retention.

Let's take a look at some more. The last three.

Negligent supervision, simply stated, is where the agency fails to adequately supervise an employee in performance of assigned duties with the result that someone is harmed. Remember, that we are talking about a situation where the supervisors weren't on the scene, but yet they have the supervisory responsibility for that employee--negligent supervision. You have the responsibility to make sure of what goes on. The plaintiff shows that the supervisor was under an affirmative legal duty to supervise subordinates, that he failed to do so; that his failure to do so was negligent; and that his negligence was the cause of the plaintiff's injuries. Really, a simple kind of equation, isn't it? You had the job; you were supposed to do the job; you didn't do the job; and somebody got hurt. Failing to supervise. The affirmative obligation. What is the supervisor's obligation? I'm not sure that agencies really know what a supervisor's obligation is.

If you said to me, pick the most important area, I would pick negligent failure to train. That might surprise you. You might pick one of the others, but, I pick failure to train every time. The agency fails to train employees in the safe and proper manner of carrying out their duties. A simple statement but with tremendous ramifications. In the City of New Orleans there is a call one night involving a potential mental subject. The police go to the location, a doctor's office. The doctor is having some problems. He's in his office and has broken up some of the furniture. When they get on the scene, he has a knife, a scalpel as I recall the facts of the case. There is a lot of activity. The doctor advances with the knife, and the officers just walk back, a lot of dancing around. All of you are familiar with those kind of situations. At one point, the doctor takes one step too far, comes with the knife, and an officer shoots him. "Clean" shooting it was called. Okay, he came at the officer with the knife, he was within striking distance and under traditional analysis the officer fired in self-defense. Clean case.

Okay, now comes the law suit filed by the survivors. Inferior training. How can they possibly win in a law suit against the officer, more importantly against the director of training, chief of operations, or police chief over this? A question to the director of training on the witness stand is, "What training do you provide your officers in dealing with mental subjects?" "Well, as I recall we show them a half an hour movie." "Where did you get it?" "You know, I don't really remember. I remember we were talking about this and well, we thought maybe we ought to show something about nut balls." "Well, are you aware that

department x provides five hours in training in handling mental subjects and basic entry level training and in-service training two hours every year. Do you think you ought to be doing that? Have you ever looked into doing that? "Well, no, we have this movie. I think we got it from the health department." "All right. You and the training division, do you get these police magazines and publications?" "Well, like what, the one with the girl in the middle?"..."Police Chief, New Centurion, and all those." "Yes, we get those." "Do you read them?" "Well, sure, we always look through them." "Are you familiar with nets." "Yes, I use them for fishing." "Are you familiar with the taser?" "I thought that was Batman's partner." Well, you are getting the point? Because what they got into was the availability of restraining nets. And of course, the leap of faith of the plaintiff's attorney to the jury was that, if they had a restraining net, which are available--the doctor had a knife, not a firearm--they could have thrown the net over him and got him out. If they had a taser they could shoot him with two electrodes of 50,000 volts, low amps, it surprises him but he drops the knife and they go get him. In the middle of the trial, they settled the case for $750,000 rather than let it go to the jury. Another defendant in this case was a friend of the doctor who was shot. He was the one who actually called the police. He was concerned. He was sued by the doctor's widow also. The jury let him off. The foreman of the jury told the attorney for the City of New Orleans after they came back that it was a shame they settled the case because the jury was ready to give them $3 million. For what? Because they didn't investigate new methods, didn't train their officers properly.

Los Angeles had a similar situation. As I understand it, every sector sergeant of the LAPD carries a taser in his trunk. They get a call about a mental subject, the sergeant appears on the scene; he has the thing that shoots the electrodes. They call it is the use of "least deadly force," which is what the plaintiff argues. Do you investigate new methods; go look at new devices? We are not required to because of the common law--fleeing felon rule. Or do you wait until the Supreme Court decides it for you.

Finally, there is failure to direct. The agency fails to have in place or fails to adequately promulgate clear and written policies, practices and procedures that tell officers what to do. There are two schools of thought on rules and regulations. Those who say we are better off to not have regulations at all, because if we're sued we can make them up. Then there is what I call the enlightened school of thought which says you better promulgate rules and regulations. Courts have held that it is per se negligent not to have rules and regulations because you are obligated to provide direction to officers--police or corrections, it doesn't matter--to advise them of the limits of discretion--to tell them what they ought to be doing. Your failure to do that, which results in the injury to someone because you have failed to give officers direction as to what they're supposed to be doing in certain situations, now subjects you, the supervisor, to liability because you have failed to direct. What's the common thread that runs through all of these? Supervisors were not on the scene. All these theories are separate and apart from what the officer did, yet, they all involve some management or administrative failure and they all involve management employees and supervisors.

One can say, I think, without being too far wrong, that in the majority of cases, first, second and to a lesser degree third line supervision makes or breaks you in a lot of supervisory liability cases. The reason it does is because the department has an obligation to tell the supervisors what they're suppose to do. Let me give you a quick summary of what a plaintiff does to win a case. We'll be following sort of chain in legal terminology so we can talk about the concept of causation. That is, showing that the injuries and damages suffered by the plaintiff in a particular case were, we'll use the term proximate cause, the result of actions of the officer. And again in talking about that, we think about it as a chain, an unbroken chain of events that start with the officer's actions and ends with the injuries.

We apply the same concept to supervisors. You've got a causation chain and what a plaintiff has to do, is link that chain between what the employee did and the actions of the supervisor. It boils down to two basic things. One, the plaintiff has to show a failure to act, and then show that there was a law or policy, custom, usage, practice, whatever which required action on the part of the supervisor--the supervisor's affirmative obligation.

If the plantiff can make these two links, under any of those theories, he puts you in the position of now having to show that whatever occurred wasn't negligent; that it was somehow excused; that you acted in good faith, or some other exculpatory defense. What occurs is that the plaintiff has the burden of proof to do this. We don't have to put on a defense, in essence, until the plaintiff has established these. The

establishment of this then puts the ball, if you will, into the defendant's court. The defendant can now go forward with any of the defenses that are available. For example, on the civil rights side of things--I told you I'd get back to this--one of the primary defenses that we have available to an individual officer and supervisors and one which fortunately for us the Supreme Court has reinforced, is the defense that the officer acted, at the time that the officer or supervisor did whatever they did, in a good faith belief that what they were doing under the circumstances was proper. If you prove that, you win in the civil rights case. Part of that defense is training and keeping officers advised as to what is going on.

There is a Fourth Circuit decision that involves the State of Virginia in a good faith case. What occurred was that there was a suit by an inmate and the court found that correctional employees in Virginia had acted properly, actually in a good faith belief that what they had done was proper. The plaintiff argued that the law had changed and that the Department of Corrections should advise their officers that in fact the law had changed to prohibit what occurred. There was about an 11 day gap between the Supreme Court decision which changed the law and what these two employees did. The Fourth Circuit in sending that case back for a new trial talked about whether or not 11 days was too long for the State of Virginia to advise its employees of a fundamental law change made by the Supreme Court. And, if the law has changed, the supervisors may be responsible because they failed to keep their employees advised as to what the changes in the law were. If that's the case then the officers can't say, or the supervisors more particularly, we acted in a

good faith belief that what we did was legal because the law had changed. Again, it is a very good defense that's available to us. This is one of the reasons why we're still able to win most of these, but the fact remains, we have to be careful.

What areas require specialized training. Let me try to run through some of these. Some of these are going to be fairly obvious. These come from firearms and deadly weapons. No question about it. Very serious problem. Less deadly force. Night sticks, kell lights, mace, handcuffs. There is a trick that plaintiffs use in kell light cases. In a kell case generally what happens, you all are familiar with those--the gigantic flash light police officers has to have--the officer testifies well I use a kell light because they are very reliable, they will not rust. The plaintiff's attorney asks the officer, "Does the department issue you flash lights?" "Well, yes." "Do you have to pay for them?" "No." "Why, don't you use that?" "I don't like it, it's plastic, and it's not as reliable. And besides that, it is only a two or three cell flashlight. I like something that has a more powerful beam." And the jury is looking at this thing on the table--a big five cell and the plaintiff's attorney has told the jury this is what creased his client's head. What the plaintiff's attorney does is pick up that kell light and walk over to the jury rail, and if you've never seen a kell light banged on a jury rail I recommend it. You don't hear a word in the court room. The jury's entire attention is riveted on that big piece of metal coming down on that jury rail knowing that this was what went into the plaintiff's head. And, knowing that they're making an argument that the department lets people carry these or gives them to

people but doesn't train them in their use as weapons. Very good. Very good tactical maneuver can be used a lot. People think, well, things like that aren't really guns, you don't have to worry too much about it.

A developing area is emergency first aid. I've seen several cases. A lot of states have what's called a Good Samaritan law that protects emergency personnel, first responders, police, and fire fighters. A lot of them have a catch 22 which is that you can only take advantage of immunity if your certifications are up to date. Protection. This is particularly important in corrections but it has a side drawer to police.

What about the case where the wife calls the police department. "My husband is here, he's threatening to kill me, he is outside with a gun." "Don't worry lady, we'll get a couple of cars there, don't do anything foolish, we'll protect you." The cars are dispatched, however, the radio transmission is garbled and they get a wrong address. The car finally shows up 40 minutes later and she's dead. Failure to protect. When the department has assumed an obligation to protect--Many states have found this to be actionable.

There are additional Constitutional protections. We get into the First Amendment--freedom of speech, freedom of association. Police officers are called to the scene of a disturbance or a demonstration. This is especially important to supervisors. Somebody's saying something that they don't like and they overreact a little bit. So you need to do some training on basic constitutional issues.

Now, what kind of training records do you need. I'm sure Pat's going to talk about this more than I am - the content of the training. If you're called upon to defend a training program this is what at a minimum you have to put on to defend yourself. The content of what's taught. The appropriateness of it to the actual job. Is this appropriate? Is this something we need or should have?

In the case of instructors, do you just say, "Who wrote the last 20 DWI tickets.? We'll bring them in and have them teach." What are the qualifications? Is it somebody you can't find a job for any place else so you put them in a training division? Or were they actually qualified. Many states now require instructors to be certified.

Attendance and performance. Even now, in seminars and programs around the country offered by various groups you've seen a trend towards keeping records on how many sessions people attend. Why? For this very purpose, to prove that you were there. To prove that you in fact got the training. These are some considerations for your training records. And somebody always says, or a supervisor says, "How do I stay out of trouble?" Well, I can't tell you how to stay out of trouble. The only thing I can do is to give you some suggestions. When I say suggestions, I'll make you a bet. If you pick at random any 20 police or correctional liability cases, I'll bet you that in 15 of those 20 cases there is some supervisory failure. You're never going to avoid that. Human nature tells you that you can't. And we're never going to have a situation where we are totally insulated. The only thing you can do is tell administrators how to minimize and manage liability risks.

What does "provide good supervision" mean? Well, I suspect that there are three classes of supervisors. There's the supervisor who is the ambassador of the people he supervises to the idiots at headquarters. He or she runs interference for the people that he or she supervises. They think that one of their primary responsibilities is to keep headquarters off the backs of their squad or whatever.

There is the other kind who is the extension of the chief to the troops. You know the type who dots every i and crosses every t. If it says it in the book that's the way it is. They're stumped if something happens that is not covered in the book. If headquarters says that's the way it is, it must be so.

Then there is the middle way, which is really the correct one. The problem is that, again, looking at these cases not only will you find a supervisory problem, but at the root of them you will find perhaps more than likely a situation where the supervisor doesn't know what is expected or was expected of that supervisor. When I said that first, second, and to a lesser degree third line supervision makes or breaks you in liability, it's true.

Documentation. When you say to somebody, what they really ought to do is a memo. Their answer is, "Do you know how many pieces of paper I have to look at?" Say that to a desk sergeant. In a course of an eight hour shift, I wonder how many incident reports, criminal investigation reports, come across the desk of a sergeant, who has to review and sign them. What does that sergeant's signature mean on that document?

Believe me, I've been involved in cases where you argued for two days what that signature means. Does it mean that the sergeant is aware or should be aware of what's in that document? Does the signature mean approval? Did he read it? I've had sergeants testify, that they don't have time to read it because they have so many to sign. Well, my answer to that is: Tough; it comes with the territory.

Standards and procedures. There is, I think, in police training, probably no more important issue than standards, procedures, and rules and regulations. Yes, I know that people will argue that if you have rules and regulations you set a separate standard of liability with the department and you might have to wind up eating the regulations. I'll take that risk, I'll take that risk over the approach of well, we don't really need one or let's not have one. Maybe because then there is a clear standard, one can argue, a clear application of the responsibility to supervise and direct. Have them approved by someone with legal authority. Believe it or not, having them approved by legal authority under the right circumstances can be a complete defense to the officer.

That happened in a case in Florida. But it could be a lot of trouble, if you don't have a lawyer. Find one. You've got prosecutors that interrelate with your department. You have city attorneys. Ask them to take a look at it. It could be a very important thing to you later on.

It's not enough simply to have rules and policies. Somehow you have to find out whether or not they're being carried out. And, in terms of your personal liability, if you have a policy it ought to be followed.

If you have doubts, seek clarification. That is sometimes called "the kicking it upstairs theory." The way the sergeant gets out of it is by dumping it on the lieutenant. The lieutenant gets out of it by dumping on the captain. If he is sued later, he says, "Wait a minute, I told the lieutenant about this. That's all I had to do. At some point in time, somebody has to do something. But it is true that you should seek clarification if there is a problem.

Regular review. Again, this is a problem that may not seem to you to be readily apparent. The problem arises when you don't regularly review your rules and regulations to make sure they're updated. Finally, you must make sure that people know what is expected of them.

Let me give you three more suggestions. Re-emphasize maintaining good records. You don't have to write 4 and 5 page memos. One of the best things and one of the things that's most meaningful to a jury in defense of a criminal justice employee is some memorization, if you will, of what occurred and when it occurred. More than once, more than twice, more than ten times, the notes made by an officer, the notations or endorsements made by a supervisor at the time something occurred have made the difference between winning and losing a case. What would you rather defend: the case where you have some notations that were made at the time and it's now two and a half or three years later when you're trying the case; or, the case where the supervisors or people in charge are trying to recall from memory not only the incident but why they did that they did. They are sitting there by the jury--don't ever sell juries short. Sometimes you have the tendency to say, look juries are stupid, they don't have any idea what this is all about. Don't ever

underestimate a jury. My experience in the last seventeen years tells me that juries take cases very seriously. You should never talk down to them. And that's part of this. You've got somebody sitting there who has not note one; the department never made a record of this. Juries know what they're trying to do and juries are also impressed when you have the documents there. The sergeant noted this and told the lieutenant. A simple act like that can make all the difference in the world. Read the things. Don't just put them in a basket somewhere. See what they are. And if you read them you might find that there is some corrective action that has to be taken. Now you might say, well, that all sounds like common sense. You're right. That's exactly what it is.

In the last five years there has been, in effect, a geometric increase in the number of law suits filed by police and correctional employees against people who make phoney claims against them, against people who injure them. You see a lot of people who are involved as the plaintiff's attorneys in these cases, and I have some friends in the ACLU and other organizations like that, who are incredulous that a criminal justice public employee would think of suing one of their clients. Well, it happens. And now, we see a trend towards judgments. And they say, well, how do want to collect this judgment. Well, the judgment may be good for 12 years and they may not have any money now, but they might buy a car or they might try to buy a house. And more importantly, other people are going to hear about this and may not be as inclined to file a phony complaint. In fact, there are two publications now that deal exclusively with cases where public safety officers are plaintiffs. Libel and slander cases involving false complaints against

officers, and civil rights cases. We talked about the civil rights attorney's fee award act as a risk from all suits. Well, a defendant can get attorney's fees and expenses of litigation under that same statute. The problem is that the Supreme Court has not yet had a definitive case on this precise issue. But most of the federal courts that have had to decide the request of the winning police officer or correctional employee to have their attorney's fees and expenses paid against the loosing plaintiff have established what is called a "totally frivolous standard." Now, that's not good because it requires you to establish and convince the judge that the suit was filed against the employee without any justification at all, i.e., totally frivolous. If you can prove that you can get your attorney's fees and cost.

I'll give you an example, in New York City there was a case decided in October that got a lot of publicity. It was a private sector case but there is, I think, a lesson to be learned. It seems that a hotel in New York had fired some people. Fired two bellmen. One of the bellmen was forty-five years of age and the other was fifty. They went to a lawyer who filed an age discrimination case against the hotel claiming that these people were fired because of their age, of course prohibited under federal law. The replacements that were hired for these two people were both over the age of fifty. And the attorney for these two people knew that. But the law suit went along and they lost. The hotel asked for attorney's fees. What the court did was surprising, not surprising that the Court did what it did, but the amount of money. The Court ordered these two bellmen (you can imagine they are not making a whole lot of money) to pay $3,000 each to the hotel and ordered the lawyer who had filed the case to pay $10,000. That got some attention.

Now the arguments you get from the people who are involved in representing plaintiffs is that when a court does something like that it puts a chilling effect on the vindication of people's rights, and, in effect, denies them access to the courts because it exposes them to attorney's fees. The argument back is, well, what's good for the goose is good for the gander; i.e., you should not file totally frivolous law suits. And let's face fact, a good percentage of them, I won't want to estimate what it is, but a good percentage of them are in fact frivolous. We know that they are looking for a quick buck or whatever.

Another issue perhaps you should be aware of is the issue of payments, which relates to the question of insurance. Can an insurance company settle a case against you or your employees without your consent? The answer is yes and no--in typical lawyer fashion--because it depends on the terms of the policy. If the policy is silent, and there is a lot of this kind of insurance sold in Virginia, if the policy is silent, they do have the option of settling the case without your consent. They don't need your permission. If, on the other hand, the policy requires consent of the insured, there is at least one company in this State who might sell a policy that requires consent of the insured, they cannot settle without your permission.

A lot of chiefs and correctional administrators believe that they are covered just like their professional counterparts in medicine. It is very common in the medical profession, for medical liability policies to provide that a suit can't be settled without the consent of the doctor. The reason for that is the doctor's professional reputation. Settlements always imply guilt--no matter what. You know that by now. Every time

you settle a case, everybody takes that to mean an admission of guilt. It doesn't always mean that--a lot of times it does--not always. The board of public works in Maryland meets once of month and they have to approve settlements and payments of judgments, and I'm down there with the list and the media covers it because the Board also awards contracts. What I'm doing is relatively minor but you'll see something appear in the paper and right away it's, well, he must have been wrong because they agreed to settle the case. Usually, it's because we don't want to take a risk of a bigger judgment. But nevertheless, that is an issue that is becoming more important.

When an insurance company settles or doesn't settle or when your governmental agency decides to settle or not settle, is really a local issue. You have to see who your insurance carrier is, what the policy says. If your jurisdiction is self-insured, you should find out what the city charter says, what the city ordinances or city codes say. We have a state statute in my state that deals with it and we have to go to the employee we're defending and get his consent to settle even when we're defending him, which is most of the time. However, in typical lawyer and government fashion, the same statute says that if our employee unreasonably refuses to settle we can back out. We don't have to use that provision too often. But that is a concern to a lot of people now. So is the question of whether you should or shouldn't settle any cases. There are people who argue that you should never settle a case--that's wrong. If you've got a bad one and you make an honest appraisal of how much exposure you have it's generally easier to settle. Remember, you have a highly visible defendant; a police officer, a supervisor, a correctional officer, a correctional employee, a warden,

a police chief, a mayor, a city coucilman--target defendants as we call them. Juries think that governments have a lot of money. Let's face it. When you have defendants up there that the jury knows are governmental people, it's the government that's handling this case, it's in some respects a license to steal. The jury says to itself in the jury room, well, really we could do what we pretty much want here because, the government is going to pay for it. I say that is a factor to consider in making decisions as to whether or not to settle a case, I think any discussion of handling these things and their impact has to involve the complicated issues of settlement factors that go into it.

Of course it affects the morale of the officers. Often, when a case is settled, the officer goes back and tells the other people on his squad or in the precinct that they won't get any support from headquarters. "It doesn't matter what you do; they're going to settle it. They won't fight for us." Well, you have different considerations very often than they do.

There is one other issue I will mention that uniquely applies to police--the question of high speed pursuits. I would be remiss if I did not mention to you the national problem with high speed pursuits. In the course of two weeks in my state about 3 months ago one of the large police departments of the state, not mine but a county police department, had two citizen fatalities in high speed pursuit cases. One of those was an 18 year old pregnant woman who was out with her husband on the way to the store and the officers were chasing a speeder at 110 mph in a suburban neighborhood. Giving chase, that's a macho thing, no speeder will get away from me. Why do we put radios in the cars? Nevertheless,

the speeder they were chasing, who was also drunk, ran head on into the car in which this girl was a passenger. She was 8 1/2 months pregnant. She was killed right on the spot. How would you like to represent the speeder? The speeder wasn't wanted--no hit on the computer--just a speeder. It's a very, very dangerous practice.

There are departments who yet today do not have a policy on high speed pursuits. You ask rank and file patrol officers as an experiment: Who controls a high speed pursuit in your department? See what they tell you. We put that on a promotions exam. The answer in our department is, the duty officer on the radio is the one who cuts off a pursuit. A lot of officers don't look at it that way. See if they know. Do you have a rule?

Finally, in terms of liability, there is a case you should watch in the Supreme Court this term. It was argued before Christmas. It has the potential of changing forever the face of the police community. It's called Garner vs. City of Memphis. It presents to the Supreme Court the issue of whether or not the so-called fleeing felon rule is unconstitutional. If you've read about it in the newspapers you know it involves the shooting of a 15 year old commercial burglary suspect by two Memphis police officers who rolled up to the scene. They saw the suspect going down the alley, as I recall, yelling to him, "Stop, police." He didn't, he was suspect of a felony, so they shot and killed him. He was fifteen years old; he had no weapons. The case has been tried three times. The shooting occurred in 1973, it's now 1985 and getting to the Supreme Court. The Sixth Circuit Court of Appeals from which the appeal was taken to the Supreme Court held that shooting a fleeing felon violates the 14th Amendment of the United States Constitution by depriving Mr. Garner of his life without due process of law.

If the fleeing felon rule goes down, and you think there's a lot going on in police training now, just wait. Almost every state in this country follows the fleeing felon rule. Some departments have modified their shooting policy. We modified ours for state troopers some time ago as did some of our state's larger departments--Baltimore City and Montgomery County. You may not shoot at fleeing felons anymore, only those who present clear and present dangers to the officers or other citizens. We elected on our own to restrict that. We were highly criticized by our officers. The fleeing felon rule protects us. We never know when they're going to fire. Well, if you see a weapon, it's a different story. But that's a very serious case in the Supreme Court.

Last year, they turned one down on a training issue that had to do with whether or not a negligent failure to train police officers in crowd control of is a constitutional violation. The case was called Hayes vs. Jefferson County. The Supreme Court decided not to hear that. You never know why. None of the Justices wrote a dissent on the failure to agree to review it. It takes four votes to review a case. A lot of times you don't even know what the vote was. Very often they won't take a case involving an issue they want to look at because they don't like the facts.

I won't make a prediction, but think about Garner. You have a 15 year old, late at night, no weapons, other officers in close proximity. All the kid was doing was running away. They know where he is. One could continue, another could go back to the car. They know the area he's in. And they fire. I'm not going to predict how it's going to come out--I won't dare. We could argue about that for a long time. However, just

get hold of that case and read the facts. I worry about it. And if the ruling goes against the officers, there's going to be a renewed emphasis on weapons training, and use of force and all that. It's going to change the face of the police community. I think it's the most significant case in a long time. This fleeing felon rule. They've turned it down for years and now its up there.

All right, one final thing. We didn't talk about this in any detail because of having to make the decisions about what we would talk about in terms of national trends. One thing we did not talk about, that I will mention to you, is what I call, the "internal law suit." That is, either the wrongful discipline or the discrimination case by the employee against the department. I've written a couple of articles on police discipline and let me just give you a little sample. In the last 18 months there are 30 reported federal decisions on police officer sexual activity. Thirty of them, not one, not two--30: Officer First Amendment rights, freedom of association, freedom to sleep with whom ever you want. Some of them involve such things as the chief imposing his morale code, the famous do as I say not as I do theory. I mention it to you because it is concerning.

Officer criticism of the department. The way officers are fired. Do you give them a hearing or don't you. Probation issues, 10 recorded decisions on probation. Probationers don't have any rights but if you fire a probationary employee and the reason becomes public and it attaches a stigma to that employee, something which could effect that employee in getting a job in the future, you have to give him a hearing even though your own state law doesn't require it because it stigmatizes him. That's if you let out the reason that he's dismissed.

There is a revolution in police discipline cases, correctional discipline cases. A federal court in New York in October wrote a 60 page opinion on the issue of strip searches of employees and said, bottom line, there will be no random strip searches of employees entering the jail unless you have a reasonable suspicion they're bringing in contraband. You have to watch those. You have to keep up on those as much today as you do the external kinds of liability cases. The false arrest, the malicious prosecution, the straight out civil rights liability cases. And that has become all the more important since one more Supreme Court decision that I'll mention. It's called Patsy vs. Board of Regents of Florida International University.

It says, and, again it is significant and has gotten very little publicity, that a public employee in a discipline situation who believes that a federal constitutional right has been violated may run directly into a federal court without going through the state, or city's administrative procedures. Which means, by way of example, that if there is an internal investigation of an officer and the officer says: "It sounds like what I'm suspected of doing could also be criminal. I'm not going to answer any more questions until I have my lawyer here." "Yes you are. This is an internal investigation and doesn't have anything to do with the criminal side of it. We're giving you a direct order to answer. If you refuse to obey that order you can be charged with violating a direct order, etc." "Wait a minute, unless you tell me that I'm immunized from any criminal charges, I'm not answering unless I talk to my lawyer. I don't have to answer at all." The next morning the officer is suspended by the chief. That afternoon the officer is in federal court under the Patsy case. He hasn't yet been charged

criminally. Instead, a federal judge issues an injunction to prevent them from asking him any more questions unless his lawyer is present or he is immunized. The court said he's right, Garrity vs. New Jersey, 1968. Okay, here's your injunction. In a space of 48-72 hours. The officer has not suffered any monetary loss, just one or two days of back pay. And then the judge orders the department to pay his lawyer $5,000 for getting that injunction.

The important point of Patsy is that the criminal justice community better pay more attention to the 14th Amendment and how the 14th Amendment impacts on the internal disciplinary process in a criminal justice agency. Because under Patsy now, there is what we call the "no exhaustion requirement." That was a controversial thing for a long time. Should the Supreme Court require somebody to exhaust whatever administrative procedures are available within the department or within the city before they going into the federal court? The Supreme Court said no. They will come right into federal court. This is the conservative Burger Court again at work on the issue of individual rights and liberties. So you also have to watch out, this is a kind of word of caution, about these internal cases. You see a lot of people disciplined. Officers living with people and they aren't married. Two officers in the same department living together--opposite sex. If you get the FBI Law Enforcement Bulletin there is an article about this that Danny Scofield wrote in the October 1983 edition. It catalogs 24 decisions up to that time. Police officers like their privacy too. That's what it comes down to.

Everyone of those generally was in a federal court. Not only does the department lose but the officer goes back to work and the Department pays his back benefits and it pays the attorney's fees. The officer then is able to show how he or she whipped the system. That is something you have total control over for the most part: your own internal procedures. You have total control. It's a little bit of prevention, paying attention to what's going on in that area might do you some good later on.

Okay, I've gone over my time for a couple of minutes, but I did want to get into a little bit about those administrative kinds of things. Thank you very much.

Kenneth McCreedy

Pat Gallagher will be the speaker this afternoon. I knew Pat in Florida, where he was the Director of the Department of Criminal Justice Standards and Training. He was responsible for many of the changes in upgrading training standards for both police and correctional officers in the State. Currently Pat is the Director of the Institute for Liability Management operating out of Washington, D.C. He is an internationally recognized expert on liability, especially liability in training.

He is also a senior associate faculty member for the Federal Emergency Management Agency National Emergency Training Center in Emmetsburg, Maryland. They are in the business of conducting conferences on such topics as terrorism, civil security, and public disturbances.

As I mentioned, prior to that he was the director of Criminal Justice Standards in the state of Florida. He was the first director of the police executive institute operated through the police foundation and has been at one time Director of Public Safety in the city of South Bend, Indiana.

Pat has a master's degree from New York University and has done Ph.D. work at Perdue University. Part of what he is doing now is conducting seminars similar to what we are doing here, and we are very pleased to have him. May I present Patrick Gallagher.

Patrick Gallagher

The first thing I'd like to do is correct something that's incorrect on the program. I live in Virginia and I work in Virginia. I don't want you to think about that saying about the three greatest lies: your check's in the mail, do you mind holding for a second, and I'm from Washington and I'm here to help you.

Now, there is a story that reminds me of a lot of criminal justice executives. It is a story about a guy riding along in a horse and buggy with a dog on the seat beside him. As he goes through an intersection, a truck runs a stop sign and slams into the horse and buggy and throws them into a ditch. Like any red-blooded American, when he recovered and got out of the hospital, he sued the trucking company for damages. The attorney for the defendant said, in court, "Is it true when you came to, your first words were 'I never felt better in my life?'" The guy said, "Let me explain." The attorney said, "Answer the question." The judge directed him to answer the question. So he asked the question be repeated. "Is it true that your first words were 'I've never felt better in my life.'" He said, "Yes, but ..." The attorney said, "We rest our case." During the cross-examination his attorney said, "Could you explain the circumstances under which you said this." He said, "Well, when I came to there was a car from the Richmond Police Department and a very efficient looking officer and he went over to my dog who had been seated beside me and my dog had a broken neck and he took out his gun and put him out of his misery. And my horse had two broken legs and he took out his gun and put him out of his misery. And he came over to me and said, how are you feeling?"

Now, I think too many executives are saying "I've never felt better in my life" because they, I think, are ignoring some of the potential problems, the potential management problems, the potential organizational trauma that they are going to face when it comes to the question of liability. "I've never felt better in my life. Crime is down." "I've never felt better in my life, the budget is going up." "The economic trends are up. I've never better in my life." Things seem to be going well and I think they're are overlooking this particular problem.

In directing the Institute for Liability Management, we're looking at the problem that executives have in managing liability. We don't say it is the institute for the elimination of liability, it's the institute for the management of liability. Because like every other force, like running an agency or organization we have to learn how to manage it. Ten, fifteen, twenty years ago we didn't have to manage liability; today we do. So we have the opportunity to go into agencies and do a liability assessment. We look at policies, procedures, practices, rules, regulations, citizen complaints, law suits and judgments, and training records and try to say that, just like health maintenance programs and preventive medicine, this too is a form of prevention that can cut down on the way and the force in which liability affects your organization. In one sense that's something you can do yourselves if you develop an approach and an openness to it.

The profession, law enforcement and criminal justice, is suffering from a series of what I call self-inflicted wounds. We have continuously taken out our weapon and shot ourselves in the foot. We continue to do

it because of certain practices, certain ways of going about things, certain ways of training people, that we refuse to give up in the light of circumstances. There is a case in your folder, Billings vs. Vernal City. The state says you don't have to train an officer for 18 months or a year; and the court says, in Oklahoma City recently, an untrained officer killed somebody. The self-inflicted wound comes from expecting that officer who is untrained to have to performed exactly the same as an officer who has been trained and has 5 years experience. Do you expect that officer who is not trained to say, when he gets a call about a robbery in progress, "Hey, get a real officer, get a full policeman. I wear a blue shirt because that means I'm a rookie and I don't handle that. I handle calls for service; you know the lighter type. I handle the other 80 percent." But that is a self-inflicted wound if we continue to allow that. There are states with training mandates similar to the one in this case. Florida allows a new officer to serve for six months before being trained, I think, Virginia allows it under certain circumstances for a year. Other states where we have been putting on programs will allow it for a year or under certain "critical circumstances" even longer. Now, you can always dig up "critical circumstances." That starts again every time an officer goes from one agency to another. So we have gypsy cops moving around who could be law enforcement officers seven or eight years and never be trained. More self-inflicted wounds.

The third point: we may feel that uniformity in what we do with everything spelled out, (and I make a strong plea to have policies and procedures written out), somehow decreases our autonomy. If all the agencies in the state had the same policies somehow the autonomy of this

police department or that police department is decreased. I would hold on the contrary, sounding very lawyerish, that uniformity in policy and procedures gives us more autonomy. Why? Because the courts, juries, and the expert witnesses as a result of judgments against law enforcement agencies, correctional agencies, probation and parole, are in effect imposing standards upon us. Because as we hear about one judgment, what do we do? We say, "We'd better not do that any more. We'd better change our policy. We'd better learn from their mistakes." And hopefully we do. But I feel that outsiders, the George Kirkhams of this world, the Dick Turners, by serving as expert witnesses attesting to certain standards are in effect imposing standards upon us. Until the profession gets together and has its own standards where a plaintiff's attorney cannot play one police department or one agency against another, we will have less autonomy. They do it differently from what you do; therefore, it appears that your procedure may not be correct. So, I would say, please, think this over--that uniformity does not equal a loss of autonomy, that if we were united as a profession in our standards and our procedures to a greater degree, that would be less chance for the George Kirkhams, the judges, the juries to find us liable. And that's the thought I want to emphasize later on also.

Emory said something this morning which made me want to raise my hand and make a comment. You know when we talk about liability it's a particular action performed by an officer, correctional officer, police officer, at a moment of stress where he has to act quickly and as result of that maybe his action is questioned in courts by judges who have all the time in the world, by attorneys who have all the time in world and who are paid magnificently to spend all that time. (I'd certainly become a slow reader if I were an attorney. It would be worth my while.)

But, with all those continuances, wouldn't it be nice if in similar circumstances the same process were available to the police. If an officer could say, rather than make a split second decision, "Look you're coming at me with a gun, let me ask for a continuance. Meet you back here in a week from now, if your calendar is free. Meet you back here and we'll continue this little thing. I'd like to check the policy, you know, back at the department. I'll check with my training officer or legal advisor or chief and then find out if I can shoot under these circumstances." That isn't possible. And there is not going to be any change in the way we have to train our people to act. There is going to be no change in the scrutiny given to their acts once they perform them. And there is going to be no change in the accountability required of them once they have acted. So the atmosphere in the arena in which our people act is not going to change and we can't hope for relief from that direction. The only way we can hope for relief, as I see it, is to get our act together and to improve our management of liability.

You know if you talk about national trends and if you've read Megatrends the author said something about "precursor jurisdictions." If you look for trends where do you start? Do you start in Little Rock, Arkansas? Do you start in Jasper, Indiana? No, there are definite precursor jurisdictions: New England, in particular Connecticut; California; Colorado; and Florida. And what that means is, not that they're doing everything right, but right or wrong things the rest of the country is going to face seem to start happening there. And if you identify something happening in those areas it probably means you have a couple of years of lead time to prepare for it. Washington now is written up

as the city having a most tremendous problem with PCP and Los Angeles discovered that five, six, seven, years ago. So look at the precursor jurisdictions. Share, get the most out of their experience for which they have paid very dearly. And we can learn, and that is the value of precedents and talking about things that have happened around the country. You may say, well, it hasn't happened here. It may, and you have time now to prepare for what I think is going to happen.

There's a Zen proverb which says, "We learn in order to better that which we already do well." So let's say that were doing a lot of things well. What we want to do is to learn how to do them better. And that's presumably why we're here. (Illustration shown.) I don't know whether this applies to your agency, your organization. "Are the premises protected by a false sense of security?" Maybe they are. We are going to try and eliminate a false sense of security by asking a question: "How do you spell relief?" (Illustration shown.) And we don't need Roger to tell us. But if we were to fill in the blanks and, I'll say more on it later, you spell relief by <u>policies</u>, <u>training</u>, <u>quality supervision</u>, <u>discipline</u>, and <u>evaluation</u> to see how well you're doing. If you read Governor Robb's State of the Commonwealth address and see his comments on the "Mecklenburg problem," you'll see procedures were not followed, in other words policies were not followed. There has to be emphasis on training and the recruitment of better qualified people. You know that's another step. Supervision was obviously lacking and I'm sure there will be more of an emphasis on discipline because some people have moved on to other jobs already. It is a question of evaluating how well you're doing and how you improve in the future. And all of these factors, in combination, spell relief.

As I said we'll go into a number of other steps and put down a number of other answers later on. But think of how you can spell relief. We will emphasize that it is through policy, training, supervision, discipline, evaluation. And that's what I call a "Quality Circle."

There should be an article in the handouts on that "Quality Circle." In a recent issue of Psychology Today a statement is made about police lawsuits, in an article about the stress factor and the causal relationship between lawsuits and stress. They said there were 22,000 lawsuits filed against police agencies last year. Well, that's a good figure; a nice round figure. Is it accurate? I would think not. I think there's a lot more. But there is no way of getting our hands on the exact figure. What we can say with certainty is that the LAPD in 1982 had 5,000 lawsuits. That's a nice round number. They had 27 attorneys working full-time because of lawsuits. The LAPD has gotten involved in some good ones and you'll find that one lawsuit generates others.

Let's talk about some self-inflicted wounds. There are self-inflicted wounds. We've done it for years. We've given a person a book and said go out and be a police officer. We are professional. Do we expect the other professionals that we deal with to have one year to learn their profession while they operate on us? How would you feel if the next time you took off from Byrd Airport the pilot, a new pilot, said, "I want to say that there is a regulation that I'm supposed to be trained in the first year of my flying planes, and within nine or ten months I will be in the aviation school." How would you feel? You'd say he has the power of life in his hands. Or a doctor says, "I'm going to go to

med school within the year," as he starts to operate on you. Why do we do it for law enforcement? Why do we do it for corrections? Convenience! We say the small agencies need the personnel immediately. But that is a self-inflicted wound and we're going to continue paying for it. (Illustration shown.) Thank you for flying Shoe String Airlines. In others words we've cut corners so much one of the first things to go in many cases is training. I think we should cut personnel before we cut training funds. I think better trained people can do a better job. We owe the public better trained people.

Another self-inflicted wound. Let me tell the tale of two cities. Richmond! Before anybody here has a coronary I'm going to talk about Richmond, California. There was a law suit, a civil rights suit, filed against three officers--Dukawitz, Mitchell, and Garfield. It developed that there was what they would call a deviant cult in the department, kind of a "Choirboy" syndrome. The group was called the Cowboys. They used to go out and have lots of fun in the hills around Richmond, the Bay Area. They also had a tendency for beating up minorities. Two of them, Roman and Gillory, they killed. There was a civil rights action. Interestingly, before the trial the attorney for the plaintiff said do you want to settle out of court for $750,000. They said, hell no, we're going to trial. Well, the jury thought differently. They said the city of Richmond should pay $3.5 million dollars to the survivors of these two men.

Mitchel and Dukawitz were the officers, Garfield was the chief. That is to say the former chief who retired very suddenly after the $3.5 million law suit. Was he there at 2 AM when these two gentlemen were being

beaten up? Did he wield a baton or anything else like that? No, he was home in bed. But the principle was that he knew or should have known what was going on. You can't have a deviant cult, you can't have officers doing something like this and the chief of police not know about it. He was liable. He was guilty because he knew or should have known.

Now, if you want some publicity for your department it's nice to get on national TV, nice to get on a network show like 60 Minutes. They had a show about a year ago on Richmond, California. And if you really want some nice publicity, nice image for your department, have Mike Wallace or one of those guys interview one of your sergeants and ask him, "What do you think of this law suit, this judgment?" And have them say on national TV and I quote, "Anybody can sue you. We don't have to pay." Now the point is if that attitude is so bad that he will say that on national TV, what is it like in the alleys, and the streets, the locker room of the Richmond police department. What is that indicative of? Two lives and $3.5 million!

Now, the tale of two cities--the other city is Richmond, Texas. We are talking about self-inflicted wounds. There were two Mexican Americans who drove off without paying for $11 of gasoline. There's not much going on in Richmond that night. Not one police car but two police cars took off in high speed chase. They're serious about people who drive off without paying for gasoline. One of the officers thinks, the truck is backfiring. The other officer thinks, "They're shooting at us." So he unlimbers his gun while he works the radio and the wheel, and he starts firing out the window at the truck. Now this agency has a little

bit different approach to a lot of things. They didn't issue weapons. You could carry any type of weapon you wanted. The weapon of choice for this officer was an Uzi. He's carrying an Uzi. I guess other guys had Magnums with 26 inch barrels with wheels on the bottom. Anyway, he killed one of the occupants. His chief said, "Hey, any red-blooded American officer would have done the same thing. He was being fired at and he fired back." The evidence that there was no gun and that the truck had a tendency to backfire was completely overlooked. But that says something about the way we do policing in this country. And that is another self-inflicted wound!

Let me tell you about another. If there was a moment of truth and we had complete honesty and candor, I'd ask law enforcement agency representatives here and maybe some of the correctional agencies, can your people carry saps or blackjacks. You'd say, of course not, there's a policy against it. Maybe. And I'd say people in your agency carry saps or blackjacks despite the policy. And particularly supervisors may say, yeah, I know a couple of guys. Let's just take a look at the sap problem. Somebody uses a sap on a person. You go into court and one of the first questions they ask are, "Was he trained in the use of the sap? Was he trained in the use of the blackjack?" "Well, no." "Any training record?" "Well, no." The point is, and I checked at the IACP Conference, I went to all these people who sell saps and blackjacks, and asked, "Is there any training?" They said there are no programs in existence where you can get training for one of your officers with a sap or blackjack. There is nobody who is a certified "blackjacker." There is nobody with a black belt in "blackjacking," or is a "first degree sapper." You can't get them. There's is no way you can get a person qualified or trained in the use of a sap or blackjack.

Now, let one of your officers use it. The person has concussions and he hears bells ringing all the time and everything else. How do you defend it? If you can't defend when you have records, when you have qualified training, how do you defend with no training? That is negligent training, negligent entrustment. Well, who is the suit against? The supervisors. Do you mean to tell me the supervisor didn't know that? Do you mean to tell me that since officers used to carry them and the uniforms they order still have the pocket here for the sap or blackjack, you mean to tell me despite the policy, despite the formal policy, your informal policy is to issue a pocket for a sap or blackjack?

One time when I was talking about this a chief got up and left the room. I said, what did I do to offend him. He came back in and said he had just changed the policy on saps and blackjacks. He issued a policy over the phone saying they all had to be called in. Because it is death, you might say, when it comes to liability. That is a self-inflicted wound as far as trying to manage liability.

In a small town in Florida, an officer arrested somebody and had some trouble trying to put him in the car. He bucked a bit and the officer nudged him with the thing he had in hand which happened to be a shotgun. The shotgun went off and removed about 10 or 12 pounds of ugly fat from this man's side. The officer at the scene when interviewed by a reporter said, "It's funny this thing I just found out is a shotgun, I didn't even know, I've never been trained in its use by the way." Mr. Reporter, I don't even know where the safety catch is." Now that's a question where, when the lawsuit is filed, it's game, set, match. You don't argue that. You take out a check book and say, "How many 0's do

you want. Tell me where I should put the period." That's negligent entrustment. Now, I have to say many agencies did that because the state did not require certification with a shotgun. They are going to and they do by now. Because we just didn't see, we don't extend the logic. If the handgun is a weapon we had to certify somebody in, why not the shotgun? Is the effect the same? Is the effect more deadly? Is this lethal force? Is this more lethal force? Is there a better chance of surviving a shotgun blast in the chest then a .38? We extended the logic to the point where we had to certify people in the use of shotguns.

Let's say something about a dirty word, a four letter word, "tort." It always gets people's attention. The legal definition is a duty owed according to a standard of care, a failure to meet that standard of care and injury or loss resulting from it. So, you have a policy on a high speed chase or "code 3," where you have to stop at a red light and proceed with caution at the intersection. Now, if an officer goes through that red light and doesn't stop, is there a tort? No, but if he hits somebody there's a tort. Injury or loss because a person didn't use the "standard of care." But note the words "standard of care." When the judge sits there, or a jury, and asks what the standard of care is when it comes to high speed chases or use of firearms, can you turn to the professional police associations and say, "Association, what is the standard of care that the profession has with regard to the duty owed to somebody in the use of a police car, in the use of a gun?" Does a standard of care exist that the profession has? No. So, who decides the standard? George Kirkham, Dick Turner, the judge and the jury.

As I said before, we expose ourselves to tremendous vulnerability because we do not have a degree of uniformity. So if you want to protect yourselves you have to get together, we have to get together, and have more uniformity. And that's how the profession will become more professional. Let's see this in operation.

About a year ago there was the Alvarey case. Officer Alvarey has since been terminated from the Miami Police Department, but I think he wants his job back. He was in a criminal action and he still has a civil suit and a federal civil rights suit to go. This is the first trial of three. While he was on trial George Kirkham testified that Alvarey had violated eight nationally accepted police standards. At the time, I said, "I'm the guy who is supposed to be in charge of police standards. Let me hear what nationally accepted police standards Kirkham has come up with." The nationally accepted standards were that he left his beat without permission; he cocked his gun; he was in too close proximity to Johnson; he failed to notify communications; he was handling a firearm in a grossly negligent manner contrary to police training and standards; and he left the scene without aiding Johnson. Are they nationally accepted police standards? No. But Kirkham comes down from the mountain top with these standards on stone tablets. Why? Because he has testified in 40 states, 200 odd cases, he has a Ph.D. in criminology and he is a reserve or part-time police officer in Tallahassee, Florida. He wrote a book, wrote a couple of books and he made some films for Motorola on liability. But now he testifies at the rate of $1,500 a day as an expert witness. But he is contributing more to establishing standards than is the profession--that's my point.

In one case, the LAPD paid out $1.8 million in legal fees to the A.C.L.U. $1.8 million! Their own legal fees on this one case were $1.5 million because their city attorney said, "I can't handle that." They went to a private firm. The settlement with the ACLU in the class action suit was $1.8 million.

Does it cost a lot of money? Yes. It costs a lot of money. I saw a cartoon which shows a girl talking on the telephone, she says, "I'm married now, Mark, and I'd like to see how it works out. Why don't you call me in a week or two." That shows commitment. She's willing to try out marriage at least for two weeks. In many cases when we come up with new programs or we start out to manage liability we end up trying it out for a while, but our enthusiasm lapses and our commitment is not deep enough. And I'll say more later on that, but we have to have a total commitment to liability management.

How do you feel about management's new liability sharing programs? (Illustration shown.) You may not have heard about it before but management has a liability sharing program. You're it. You're part of the supervisors and the executives. You're sharing in liability. That's the whole idea of sharing liability.

I'm reminded of a cartoon which shows two employees at the weather bureau, one says, "How come you brought your umbrella today?" (Illustration shown.) Where are they working? They are working at the weather service and if they don't know what the weather is, if they don't know the signs, who does? The indicators are out there. People who feel they can avoid liability are in for a rude awakening.

We can get certain things done with the help of well placed law suits. We can argue for additional funds; a judge can say you have to have more training; you have to have this and you have that and it may free some of the fiscal resources. I would say that, rather than feel it's the worst thing that ever happened, feel that you can get some good out of it.

Now, Emory mentioned something about the "deep pocket." There was an article in Time Magazine about a year ago about deep pockets. It mentioned the Brentwood New York school system where a gentleman got in there with a rifle, held some hostages, shot the principal, shot a student and then shot himself. Too bad the order wasn't reversed. In a week there were $8.5 million in lawsuits against the Brentwood, New York school system. It's interesting to see professor Gary Schwartz, UCLA law school, talking about the deep pocket. He brings out the reason why the plaintiff's attorney will go after the officer, not so much the supervisor, but the chief and the city. Because there's more money there. He says, "Robbers and muggers do not have liability insurance and they do not have assets. The job of the lawyer is not simply to find the negligent party, but the negligent solvent party."

In the Biscoe case up in Arlington there were three plaintiffs. There was the driver of the car that landed on top of Biscoe, there was the bank robber, and there was the City of Arlington. They were all found guilty through a state statute that says if one or two parties can't pay the other party pays, which is the county of Arlington. So the judgment is exclusively in effect against the Arlington county. The idea is to find not just the negligent party, but the negligent solvent party.

They have examples of a California Highway Patrol officer who stopped a drunk in a station wagon. He's writing out the ticket and another car piles into the back of the station wagon. The occupants of the station wagon who are being driven by the drunk driver sue the California Highway Patrol and get $2 million; because the officer didn't keep the lights on in the car. He allowed the drunk driver to turn the lights off. The claim was that this other car piled into it because he couldn't see the station wagon on the side of the road.

If you think that's stretching it, you'll cry over this one. Two years ago a New Yorker wanted to commit suicide. You don't jump out of buildings any more because the windows don't open; you go down into the subway. You know, you stand there right on the edge of the platform, the crowds all around, you're waiting for the train to come so if you're going to commit suicide you wait until a train is close enough and then you jump down on the tracks. That's exactly what this guy did. The motorman's instantaneous reaction is to jam on the breaks and people go flying all over the eight cars behind him probably creating more law suits for the city. He stops <u>almost</u> in time, but an arm and a leg have to be amputated. Now, this 18 year old filed a lawsuit against the city for negligence. "The motorman didn't stop in time." (If you were trying to commit suicide the purpose was to get killed.) "But he was negligent. He kind of half killed me. He should have killed me all the way. I want to file a lawsuit." It's stupid. But they paid $750,000 to this guy.

That's the punch line. Maybe we ought to hire motormen with slower reflexes. We're going fire motormen because their reflexes were too fast. It would have saved us $750,000. That is the climate in which we are operating.

Richmond, California, didn't have any control over the jury there. They thought they did otherwise they would have settled for $750,000 rather than $3.5 million. That also is the climate in which we operate.

Let me mention this. About 40 years ago, in Wisconsin there's a little place called Little Bohemia Inn. It was not the most popular spot in Wisconsin on April 20, 1934. Since the guy hadn't had any business in a while, he knew this was going to be a big weekend, for in walk five couples. The innkeeper recognizes them because he'd been to the post office pretty frequently. "Good evening Mr. Dillinger. Oh, do you go by Mr. Baby Face Nelson or just Mr. Nelson?" Three of the top ten most wanted criminals on the FBI list or the Bureau of Investigation whichever it was at that time, walked in the door with their dates. A little bit of R&R away from the tortuous work of robbing banks, raping and killing people; they needed rest just like other ordinary people. They come up to the Little Bohemia Inn for a quiet weekend away from all that hustle of making money. The innkeeper got a little bit worried. He said to Mr. Dillinger, "Look, my son is here and I feel a bit scared about him." Dillinger said, "No problem, send him over to the neighbors." He sent him over to the neighbors with a message: "Get the Bureau of Investigation; John Dillinger and Baby Face Nelson are here." They did. Every FBI agent in the area converged on the place and surrounded the inn on one side.

Now, they know that Dillinger and Baby Face Nelson are inside plus three other guys and just when they all get lined up, their guns cocked, machine guns are ready and everything else, three guys come out the door. Their crime was they had dinner that night at the Little Bohemia Inn and they were shot down by the FBI; one was killed. Nelson and Dillinger--you have to give them credit for being pretty intelligent--said, "We're not going out the front door; we're going out the back door." They all got away because the FBI only surrounded the house on one side. Nelson ran through the woods to a police back-up car on another road, shot and killed an FBI agent, and escaped in the car.

Was there a law suit? No. People didn't sue police officers in those days. Maybe the FBI attended the funeral of the one man and that was it. They shook hands with the widow. (I shouldn't say FBI--they became the FBI in the following year in 1935.) No lawsuit. Were the same statutes on the books? Sure. Just like the KKK Act. It's been on the books for one hundred years. So it's the evolving interpretation of the statutes that have been on the books for one hundred years, that are now being reinterpreted much to our disadvantage. It isn't necessarily new legislation, it's old legislation being reinterpreted. So there are trends in the way old laws are interpreted. That's something we have to realize. It's a kind of dynamic unfolding of those statutes.

In another case in point, South Tucson is a city completely surrounded by Tucson, Arizona, 6,600 population. On October 11, 1978 they had a

barricaded subject; a guy with a shotgun. The 14 man police department didn't have a SWAT team--at least it wasn't available--so they called on Tucson. One officer, Garcia, came from Tucson. He tried sneaking up on the house and at that time the guy pokes the gun out the window and fires a round or two. The entire South Tucson Police Department opens fire. Officer Nouotny, who could be said to be a little overzealous, fired 17 shots. He reloaded twice. The only thing he hit was the house and Officer Garcia, who is now paralyzed from the waist down. Officer Garcia filed a suit against South Tucson and he was awarded $5 million. "That's kind of funny," the city officials said, "That figure is almost exactly equal to our entire city budget for one year. It also equals fifty percent of the assessed evaluation of the City of South Tucson. We can't pay this. Officer Garcia, we'll give you some land in South Tucson. You'll kind of own our downtown area; we'll give you a couple of parks and everything else. We can't pay you." Well, they ended up paying, but they had considered filing for bankruptcy.

Here's something interesting. The jury didn't say, "If this were Tucson with 600 officers we'd award $3.5 million in that case; but, since this city is only one percent of the size of Tucson, we're going to cut the amount down to one one percent of $3.5 million." No. They don't make the judgment on the basis of the size of the city or its resources. They just slap down a dollar figure and that's what you'll have to pay.

Now, the city manager said they have upgraded their training. They now have barricaded subjects training to improve their position if sued

again. Not to be more professional, but in case "they were sued again", presuming it might happen. The city manager said, "Juries compare training programs of large cities to those of small cities, putting smaller cities at a disadvantage. With smaller budgets we still have to provide state of the art training. Large cities set the standards." That's true, but the smaller cities have to comply because there's nothing that says a South Tucson will never face a barricaded suspect, will never face a terrorist attack, will never face all of these other incidents. They have to be trained to be total police officers. And that's another self-inflicted wound. We can't skimp on the types of training and say we're just a small department.

I think what has to be done is that we have to see ourselves as executives having to wear an executive bulletproof vest. The executive bulletproof vest is made of many layers. One layer is policy, another layer is training, supervision, evaluation, discipline and you can still keep layering on things. I would say that accreditation by the Commission on the Accreditation for Law Enforcement Agencies is another layer on your bulletproof vest. One layer cannot stop a bullet and one layer, just policy, will not stop a lawsuit. It's the multiplicity of layers that will provide you with the protection.

Emory made a good point earlier when he said that we have to break the chain of evidence that leads from the actions of that officer out there at 2 AM to our office. We break that, I think, by training. We have to indicate that we have selected, appointed, retained, supervised, trained, directed, and disciplined, and that the officer has acted

negligently in spite of all that. Despite whatever the reasonable man could have done, this officer acted negligently because of malice or because of some other reason. He might had been justified in taking the action, but as far as my being involved as an executive, I should not be--I'm protected because I've done all these things. We have to isolate the action of that officer and stop plantiffs from reaching into my city's deep pocket. Why are some chiefs of police putting their houses in their wives' names and hoping that their marriages stay together? Because they don't want those houses to be attachable assets. That's how serious some law enforcement executives are considering this.

Finally, there is a tremendous problem nowadays with officers suing their own agencies. I thought Emory was going to mention that under the internal lawsuits. There was one in New York City. An officer was guarding the police headquarters at One Police Plaza and the supervisor said to him, "Officer, go out and check the outside of the building. A group came in with another bomb threat. Just check the outside of the building. We've got threats all over town tonight. There were 6 or 8 of them." The officer goes outside and checks the outside of the building, comes to a package and kicks it. Well, that's the last thing he kicked with that leg because it was blown off. The officer sued the police department for $100 million. Is he going to collect $100 million? I don't think so. Is he going to collect? I think so. Negligent training. Why? "You never trained me on how to handle a bomb." Negligent supervision. "The supervisor never really directed me. He said it's a 'bomb threat.' We got these all over the city." Everything to indicate not to take it seriously. He also could say, "We've got a bomb squad, a special squad to go around in these funny

suits made out of steel cable, they've got these big hats, and they've got robots. They're the ones you have trained to handle things called bombs and you told me to go outside and check for bombs."

Now, in training we didn't say to him kick any bombs you see. Why did he kick the thing? We don't know. Now, you have a one-legged officer going into court claiming he was not properly trained. Or in a wheel chair--that has even more of an effect. Is a jury going to say, "We're not going to give him anything? There is enough of a valid case to say $500,000 or a million or whatever if they can give three quarters of a million to somebody who tried to commit suicide and failed. This is a police officer trying to do his duty. I think they are certainly going to be rather responsive to that. Now, some executives may say that they're not responsible. I want to share with you a question on a promotional exam for sergeants that talks about responsibility and what you're supposed to do. This is from England. Some of the references are a little bit English. The question is this:

> You're on duty on the High Street when there is a large explosion. This causes a large crater in the middle of this road and a car is blown over on to its side and viewers congregate to look into it. There is a man and woman both seriously injured. The woman is the wife of your sergeant who is away taking a course. A group of dogs come out and they start fighting in the middle of the street. None of them is licensed. They are encouraged by drunks who come out one of the pubs. Now in the middle of this a car and a bus collide. The car is driven by your chief constable and the bus driver gets pretty angry at this and he takes a shotgun and looks like he's going to use it. Somebody comes running out one of the houses shouting for a midwife and a woman says there's a fire over there in the garage around the corner. Then you hear a guy shouting for help from the canal where he was thrown by the original explosion. That's the situation. Here's the question. Bearing in mind the provisions of the Justice of the Peace Act, various Mental Health acts, and particularly sections 49-55 of the Police Act of 1964, what should your course of action be? The answer is: Immediately, remove your helmet and mingle with the crowd."

You're in a position where you can't do that. You're in a position where you have to accept the responsibility of your actions. That's exactly where we are now with liability. You're not only responsible for your actions but because you're in the supervisory line you're responsible for the action of subordinates out on the street. "Knew or should have known." You can't say I didn't know if in reality you should have known.

Another reason why there is such an increase in the number of lawsuits is the book put out by the National Lawyer's Guild titled Police Misconduct. It should be subtitled "How to Sue Your Local Police." What does it contain? It contains a statement that says police work is difficult. It's impossible. In fact, it's impossible to enforce the law without violating people's rights. In other words, if you are enforcing the law you are going to be violating people's rights. So they are saying to attorneys who buy this book, look at almost any action that the police do and you can find some violation there and you can sue.

Do they make it easy? They make is so beautifully easy. All sorts of sample interrogatories, sample requests for reproduction of documents, etc. I guarantee that anybody in this room can take this sample for request for reproduction of documents and tie up a department for a couple of man-weeks when it comes to what they ask for. An example:

> Any board of directors' reports, memoranda, scripts, regulations summaries issued by the City of New Lancaster or its agencies, police department, district attorney's office concerning standards in effect in April 1976. All such materials used in the police academy in the training of police officers. Course outlines, film strips, tape recordings and other audio visual materials both when Officer Randall was there and at present. (We are talking about an eight year difference.) All such materials issued anytime to active duty police officers. Orders, memoranda, brochures, etc. since his graduation. All materials--particularly the use of deadly force against juveniles. Any or all materials provided to police officers in the academy now.

So you see what they are setting up. What he was given in in-service training over the course of the eight years and what is in the academy now. That's two out of 14 different paragraphs of what they can ask for. You're talking about a response time of 30 days and you're talking about a couple of man-weeks of time. Four or 5 man-weeks. It's all laid out for you here. They say they're not interested in the money, they're interested in changing the system. We believe them. We believe them.

They have some other supplementary publications that come out that certainly would not have us disbelieve that statement. They are not interested in the money. But the next publication that came out is entitled: Money Damages in Police Misconduct Cases. Can you believe that? They're not interested in the money. They lay out for you a number cases where there are some nice rewards. Remember they're talking about 40 percent of $1 million against City of Detroit, City of Honolulu $500,000, $8 million vs. the City of Detroit. Do you know what 40 percent of $8 million is? That's a nice award. You could live a couple of days, even as an attorney, you could live for a couple of days on that.

Because that is going so well, they now have a bimonthly newsletter, "Police Misconduct and Civil Rights Law Report" where every two months

you get cases and awards and everything else as to how to sue your local police. And that's going to continue and it's certainly going to get worse.

The National Lawyers Guild is made up of lawyers who do one thing. They go and look at a precedent and they read and they study. That type of material is making it very easy for lawyers to file suits. That's exactly what they're doing. And when they get to Virginia, and then to Richmond, and they start looking at this more and more and will start filing those suits, we'll be the people who have to deal with them.

What we're going to try to do now is to try to concentrate on two points where we can improve the system; where we can better manage the problem of liability. One approach will be how can we manage it from the point of view of the people we put into the system. If we put better people in, we should be able to control their conduct and future negligence, because part of the problem might be the quality of personnel we have right now. The other approach will be to say what can you do next Monday to start managing liability.

There's a professor at Indiana University who feels very strongly that the courts will, in the future, mandate training. They will say, this officer was not trained properly in that particular area, and we are going to require 40 hours of training for all your officers. You bring a lesson plan, you bring a program and the courts will approve it and we'll give you six months to have all of your officers' training on that topic upgraded.

Now if you want to know a trend, I'm throwing that out as a trend. Why? Because the courts have historically given us credit for a higher level of training than we actually have. They have seen negligent training as an exception. I think in the near future the courts are going to see it as a problem that is systemic. That is one trend I see.

The second trend is the good people who wrote the National Lawyers Guild book on Police Misconduct in the future will be better able to deal with training. What do I mean by that? They are going to be able to better understand what the state of the art in training is. They are going to bring in more expert witnesses. Not the George Kirkhams, but the people who are experts in training. The people who can testify as to what type of training methodology should be used to guarantee that the person has competence in a particular area.

Example: In the State of Florida we certified people in the use of a firearm. You had to get a 70 on the firearm qualification. Now, at a certain point, the rule established by the commission said you had to qualify once with a 70. Somebody said, "Do you mean to tell me that that person can stand on the range until he's hip deep in brass. You know, firing away to qualify." "Yes." Suppose we qualified our friendly pilot the same way. He's crashed 9 times but we're going to let him try to land the plane until he successfully lands it once and then say he's a pilot. We were doing that with 25,000 police officers in Florida. That was changed to raise the score from 70 to 75 because all of the other scores were 75. I said to the Commission there's no way we can defend 70 or 75. At least make them all the same. And secondly, the rule now states you can only make 6 attempts and you have

to qualify 3 out of 6 or 2 in a row. That makes a little more sense. So we've learned something. Secondly, I said to the Commission the qualification now is based upon a skill where you put a bullet into a target. I said to properly qualify a person to use the firearm is not only a skill but is a use of discretion. So a number of months ago, Florida required a discretionary score to accompany the skill score. That makes sense. We have people who could shoot 99 on the range. You take them to the "shoot--don't shoot" course and they shoot perfectly. The skill was perfected to the point where everybody on the "shoot--don't shoot" course was shot--the little old lady--right through the heart, the woman with the child, right through the heart, the little old man right through the forehead. The skill was perfected. We had a problem with discretion.

My point is that attorneys will realize that it's a flaw in the system if you don't have a discretionary part in your qualifications. You can't defend it. We realized the same point with our shotguns. If you could qualify to become a correctional officer now as of July 1981, you could qualify to become a police officer. A correctional officer was anybody who had custody of prisoners whether it was at the county level or the state level. No distinction between state department of corrections and the sheriff's personnel was made. They get all the benefits, salary incentives and everything else. But we had to qualify 9,000 of them in about 6 months. We ran them through the same program and it took us 2 years to realize that we had them all qualified with handguns and correctional officers seldom, if ever, use handguns. They're up in the tower and use a rifle or shotgun. I say that because

that was a flaw in our system. We kind of fell flat on our face. We never qualified them until 2 years later with the weapons they were going to use, which were the job related ones.

So, in all this, I think attorneys are going to make tremendous progress and they are going to bring expert witnesses on training. Training will now require tremendous use of role playing, tremendous use of simulations, better substantive content, more validity in testing.

In one training academy when they had the test on defensive tactics, they had 15 different scenarios that they tell these students they're going to have to handle. The students are brought in one by one into a room. There are mats on the floor. There are 3 judges. They are told they're going face these particular scenarios: taking an unwilling person out of a car; disarming somebody with a weapon; etc. They're told to go through with it. You almost expect somebody to bring up a card, you know, "degree of difficulty 3.5," or something like that. They're scored and they are videotaped for two reasons. The videotape will be able to tell the student the mistakes he or she is making and the video tape is a record. That's part of their record keeping system, to show that they did train the person in the proper use of defensive tactics, or handcuffing techniques. You say that's going to an extreme. Well, if it's the insurance they need to protect themselves, I say more power to them. It's a good training technique and all they are doing is storing the tape as a record. We're going to see a lot more of that.

We're going to have to build our curricula on job-task analyses which in turn becomes the curriculum. We're then going to have instructors' guides and student manuals and we're going to have performance-based

training. (I hear this state is using performance-based training. Congratulations on it.) We need a type of bar exam for police officers to be able to say that they all know a certain minimum amount. And those are things attorneys are going to try to peck away at. The attorneys will realize that after a while, and we are vulnerable.

I heard something new the other day and want to share it you. You've heard of "TAC" teams and "SWAT" teams. Somebody has come up with something new, it's called a SPLAT team: Special Platoon Lacking Any Training. You can probably pick such a group in your department. I want to share with you a letter received by the Commission on Standards and Training. It is addressed to "He/She." This letter is an actual letter we received from a gentleman who wanted to become a police officer. This letter is to find out, and I'll read phonetically since he has very creative spelling, "this letter is to find out if I can become a policeman with this record. Please send this record back to me. Joseph R. Kelly. I'm going to Plam Beach Jr. College. My major is criminal justice. I don't want to prepare myself to get into the FBI," (You can just picture Judge Webster breathing a sigh of relief), "I can't get the job because I've got this record. I'm now applying for a job as a policeman in the City of South Bay." Now, with all the LEAA studies you think they would have come up with the one perfect means of identifying future police officers or people to work in the criminal justice system. They never did it. For all the millions they've spent, Joseph R. Kelly came along and gave us the key to the identification of the proper people who should be criminal justice employees. And here it is. "I'm a Libra born under the scales of justice." (If only we just recruited Libras.) "I love law enforcement. I'm 26 years old. I have

an horneable (sic) discharge from the US Army." "Joseph R. Kelly" And to it he attached his record. An actual letter. And to show his honesty he comments on each conviction whether it was a lie or whether it was true. True, lies, true, true, lie, lie, true, true, true, true, lie, true, lie, lie, lie, etc. And he says, "I'm going to become a policeman, I'm a Libra" (so we don't know where Joe Kelly is). He says, "I'm going to stay in some type of law in college."

Let's look at the way we put people into the system. The old way was no structure, no rationale; we concentrated on OJT. Here are the keys to the car, take off, you're a police officer. And that was it. We didn't really do relevant training. We did training maybe, but it wasn't that relevant. When I was Director of Public Safety for South Bend I asked one of the captains in charge of juvenile services, about his recent training. He replied, "Really good training, it was in aircraft hijacking." That would have been good if we had an airport. He was in charge of juveniles. Maybe we were expecting a rash of hijacking by juveniles. That would justify this, but it was just a gimmick. Hank wanted a vacation. The Chief said, "Here's free training from the government (this was in 1973 or 74). We'll send him off to an aircraft hijacking class." No degree of relevance to the job he was doing.

We're going to talk about what I call a <u>systemic approach</u> to selection and training. I'm going to say that if you want to make the best decision about a person, you have to take a systemic approach. You have to put together a system. There's nothing new with this system; all I can offer you is the encouragement to treat it as a system, because we're doing much of it already--if not all of it.

First, you select by the way you recruit, you select by where you recruit, you select by who does your recruiting. If you don't recruit in minority areas, if you don't recruit on college campuses, or if the people who do your recruiting want a mediocre police department, you are then in reality, de-selecting. Okay, so the first step is to examine your recruiting approach.

The second thing in your initial selection is, as Emory mentioned, background investigations. To get the best people into the system, do a thorough background investigation.

Thirdly, spend a little more time on psychological screening. Not every agency does it. But in the case of Hild vs. Bruner, an award was given against a New Jersey city because of a failure to give psychological tests to prospective officers. The plaintiff's expert witnesses testified that such tests should have been given since they have been used widely since 1975. If you're going to use a psychological evaluation, don't just give the test and send it away to some company to have a computer score it, because it's very difficult to get the computer into court to testify as to why they made certain recommendations. If you're going to get a psychologist to give the test make sure that he or she has a face-to-face interview with the applicant. If you're going to get a psychologist, get one with a little bit of backbone. If a psychologist says I just interviewed 100 applicants for your department and they're all "fantastic" or they all "pass," then he or she is not helping you. Get a psychologist who will go into court and defend the selection made.

Probably one of the best people doing psychological evaluations is Mike Roberts out of San Jose. Mike has 14 years of experience, 14 years of data. Other psychologists who work for San Jose have done a longitudinal study comparing Mike Roberts' psychological evaluation of applicants with their academy, the field training officer program, with their probationary period, with their job performance and with citizen complaints. Mike's recommendations are grades, an A, B, C or D. He doesn't give the packet back. If he gives you the packet you in turn can be asked, "Well, you had all the information, why did you interpret it that way?" If you rely completely on Mike it says two things, a) you have to hire him to come back to defend you, and b) you've got the best hired gun around to defend you. He has to come in and explain it, and he's done it in courts and he has a tremendous record. So, psychological evaluation and psychological services are things that have been accepted to the degree that they are almost impossible to omit. You would not think of not having firearm qualifications; you wouldn't think now of not having basic training; we're at the point where you should not think of not having psychological evaluations. That's the point we've reached. And that's going to go for corrections, probation, and parole.

I'm on the Board of Governors of a group that is starting to certify child protection service workers. With all the concern about child sexual abuse at day care centers, they're starting to certify the staff people. They're starting to require background checks and they're starting to require psychological evaluations. Who would be more fitting than people who work with children, given the extent of the problem, to have some psychological evaluations? And it's the same for police and corrections.

There was an award against the city in Bonsignore vs. the City of New York. An officer had some problems, and was placed on their "rubber gun" squad or the "bow and arrow" squad. They took the gun away from the officer because he had some problems--could be drinking, could be drugs, could be depression or something. They sent him to see the "shrink." It's kind of interesting that, at the same time, they had a policy requiring off duty officers to carry guns. They took away his service revolver and they never thought about the off duty weapon with which he shot his wife and then killed himself.

The wife survived and sued. She won on the fact that they had psychological services but they were treated negatively by the department. So the two cases indicate that the courts are encouraging psychological testing. Remember, a psychological evaluation gives you an idea at a point in time (let's say in July 1985) as to whether a person is suited for law enforcement at that time. There is no predictive factor which says that the person who is perfectly qualified psychologically will be qualified five years from now.

After three shootings, being beaten up once, having a marriage end in divorce, and additional financial problems, now, five years later, you can't defend yourself by saying, "Mike Roberts said he was an A, you know, best qualified." You have to have the accompanying psychological services. They almost go hand in hand. And that's expensive. But you can afford it. "If you think training is expensive, try ignorance."

Fourth step: The academy. The academy is a selection factor. There used to be a time when, if you got into the academy, you started

counting the months until your retirement. There was that attitude. There was a six month academy and when you finished the academy, in 19 1/2 years you could retire, because some agencies use to swear people in when they went into the academy.

What we have to do is to try to create some hurdles; to create a "rite of passage"; to have different screening factors to keep giving us indications as to the people who should be screened out, or the people we want to keep, if you want to look at it in a positive sense. The quality of training in the academy is of prime importance; I know from my experience since I had 46 training centers around the state of Florida, with 1,300 instructors certified in different areas. There was a tremendous range, from the Southeast Florida Criminal Justice Institute, which I think is certainly one of the best around, to a "mom-and-pop" operation that I didn't even want to talk about. A wide variety of quality. But the training has to be seen as a selection factor and we have to tremendously increase the emphasis on the quality of training. We will not get away with any less in the future.

The fifth step is the Field Training Officer Program. Now, in the academy you have a student--trainer ratio of 30:1 let's say; in the FTO period you have 1:1. I think that's important. In the academy, when you grade people you end up in many cases with a pen and paper type of score, although hopefully there are some role playing or simulations where a person is graded on proficiency. But in the FTO program, remember that 100 percent of it is job related. A person is being evaluated on "x" number of characteristics daily.

We used to assign a young rookie to a veteran. The veteran would say two things to the young rookie as soon as he sat in the car for the first time, "You drive" and "Forget everything you learned in the academy; I'll teach you what it means to be a cop." I think the attitude of the FTO has to be not, "forget everything you learned in the academy," but, "I'm going to teach you how to use everything you learned in the academy in order to become a good police officer." The FTO is a trainer--a Field Training Officer.

The sixth step is the proper use of the probationary period. Now the supervisor has to see his responsibility as trainer. That supervisor just doesn't sit there and take notes. That supervisor has a responsibility to say, "I backed you up on this call. I think you did an excellent job, but I would just suggest that you do this a little bit differently or you say this or you try that approach." That supervisor is now in a training mode in a ratio of 1:8 or 1:9 or 1:5. My point is that training is continuous.

There are different forms of training: the academy, the FTO and the proper use of the probationary period. There are the academy instructors, the FTO and the supervisors. The really final recruit selection decision is made at the end of the probationary period. That is where you take the information given you from the six different steps, the evaluations, the records and everything else and you then make the major decision as to whether that person should become a police officer or correctional officer. Although the FTO is not part of that decision, to my knowledge, I think he certainly should be.

I'll say this also, if you have a good FTO program and if you feel that one of the problems you have is with supervisors, realize that if you have a good FTO that person is good at supervising one person. It's a one to one ratio. A good FTO may be an ideal candidate for supervisor.

Why not try this: If you can identify a good supervisor, start an FTO program for sergeants in which new sergeants are paired with experienced, qualified, well-trained (if they exist) sergeants. Have them evaluated over a two or three week period. Now if you go to court you can say you had some training, job related and better than what we have now, little or no pre-promotional or post-promotional training.

It would be embarrassing to ask how many have had pre-promotional training as supervisors or how many have had post-promotional training as supervisors. It's almost nonexistent. Yet if you ask chiefs of police to identify the major problem, it is supervisors. When we talk about vicarious liability, we talk about the chain of evidence leading to your office. Do you realize that if the supervisor were doing his or her job in most cases the liability would not get past that person. If you had perfect supervisors how many lawsuits could reach your office?

We've identified the problem as a problem of supervision--but we've done that for years. I was able, through the Police Executive Institute, to talk with hundreds of law enforcement executives around the country. They easily identified supervision as their biggest problem. So, what have we done about this problem? Nothing! Basically nothing! And we still complain about the problem. And we still promote new people to be sergeants and we still don't have pre-promotional training and we have

very little, if any, post-promotional training. Think of it this way, the only training that those new sergeants get is based upon their perception of the sergeants who were over them, and how they acted. We admit that they're inadequate for the most part and yet we continue to allow our supervisors to be trained inadequately, negligently, by people who were never trained themselves. It's just illogical!

I would say very strongly, if you were to determine an approach, if you were to go back to your agency next week, I would say do everything possible to decide that 1985 is going to be the year, and possibly for the first time in the history of your agency or American law enforcement, or corrections, you are going to put all your energy in to trying to train your supervisors properly. For one year just concentrate on the training of your supervisors. Then you'll be tackling the problem. Then you'll be making some progress.

I've had the opportunity to present workshops and courses to supervisors. When you really lay out what supervisory negligence means, you start to wake up some people, surprise them. I've had chiefs say, "I've got this sergeant saying I'm not going to work with this drunk. This guy is a drunk." Well, he didn't become an alcoholic in the past week. He became an alcoholic over a period of time. It was something that the sergeant knew about. Now, when he learns how he's responsible, "knew or should have known," he reacts accordingly. Now the chief has been told or, the chain of command has been told this guy has a problem with drinking. "I don't want him on my shift because I could get into trouble." When they start to see that, you'd be surprised what dynamos you may have as supervisors. So if there was one thing you could make an investment in, it would be supervisory training.

There is a step I would add on to the end of that, maybe in conjunction with it. I think that the profession at some point may have to say that the first two years of a law enforcement career may be based on a temporary certification. That may sound revolutionary, but we're talking about taking a person into a profession where that person has power of life or death over somebody else. I would think that for the first two years, even though there is a probationary period, the profession needs to have a temporary certification, to have one more hurdle to keep the person working at a different level, to make them more conscious of putting out over a longer period of time. The problem in the past was that we didn't challenge people. I think this may be one way of doing it.

Finally, in the time remaining I would like to talk about what I call a "quality circle." I would define a quality circle as a combination of policies, training, and discipline so integrated that each follows, supports, improves the other while indicating changes necessary to improve the overall process. Now, what do I mean by that? Remember, how we spelled "relief," when I said policy, training, supervision, discipline, and evaluation. The first step, direction, requires leadership from the top. The impetus starts with the executives, the impetus starts with policy. You have to have policy, and you have to have executive support, standards, goals, policy, leadership, and what I call executive development to perpetuate this attitude in your agency. The first step is the formation of policy, but it doesn't stop there. They did a study of the New York City Police Department one year and it asked how many pieces of paper are issued to every officer a year. In one year, in one precinct that they studied, it was 1,600 pages of

memos, policies, and procedures, from "Manhattan North," the "Commissioner's Office," and the personnel office; there were 1,600 pages put into an officer's mail box, including a new policy and procedures manual. If you worked that into roll call training, you would give out and comment on eight pages a day. There's no way they could cover eight pages a day. The New York City Police Department and their brass may have felt good about saying, "Well, we took care of that, we have all of these policy and procedures out." They only took one step.

The next step, the active phase, is the maintenance of the quality circle. That requires supervision, training, and management and supervisory training, monitoring of the courses, data collection, and record keeping. The name of the game now is record keeping. You cover yourself in paper but it has to be specific.

Finally, reactively, after you've done the training, is the question of evaluation, accreditation, certification, job analysis and re-analysis, and discipline. If you go into court and say, "We have a policy against the use of saps or blackjacks," or "We have a policy on the use of flash lights, we do issue a kelight to our officers, we do have records here, that every officer in the department who is issued one has been trained for eight hours by John Peters from National Defense Institute and here is the book we used, published by the National Defense Institute; here's the book and here's the lesson plan." Then they say, "Well, in the five years that you've had this training, how many officers have been disciplined for improper use. You may say, "Ten of them have had complaints filed against them but they have all been unfounded or they

haven't gone any further." The fact that you don't have a disciplinary record that is somewhat consistent with your training and policy may negate the good of the first two. Your discipline has to be consistent with your policy and training. If they find out that the informal policy in the department is to wink at this even though you have this training and this policy, you're going to be liable.

For example, there was a study on the use of deadly force done by LEAA in its waning years. When they looked at the policies on deadly force, they found out that, in agencies across the country, the people who determined the effective policy in the departments were Sergeants! When they looked to the officers to find out what the policy was, it was what the sergeants said or didn't say. If the sergeants said, "Another stupid policy from up above" and they read it to the officers in ways which indicated that wasn't the way to do business on the streets, the effective policy was what the sergeants said and not what the formal policy is. Obviously in Richmond, California, those officers' supervisors somehow indicated certain policies were not going to interfere with the actions of the "Cowboys."

Last year in Chicago an officer by the name of Durell Brandon, 35 years old, was accidentally shot by her partner as she grappled with a drug suspect while trying to make an arrest. Her backup officer could not get into the apartment because there was a burglary gate there, so he shot through the gate and accidentally killed her. Five or six days later, Officer Fred Eckels was shot by a suspect in a raid. The Chicago Tribune interviewed members of this unit and asked, "What do you blame the deaths on?" Answer: "Inadequate training. The department has told

us that in these particular assignments it is nine times more likely that we will be shot at, and we haven't had any special training." That's what the officers said to the Chicago Tribune.

When they interviewed the supervisor, Lieutenant Williams, he said training is important, but "officers get expertise strictly by conducting raids. I've made about 100 raids and when I started, no one told me how to do it. In my opinion you learn the techniques by doing, and then you're still prone to make mistakes."

When the chief heard this, what did he do? Well, he said, "You can't stick to guidelines, if you did you'd be lost. You have to play it by ear." Now, there is the policymaker for the department saying, "You can't stick to guidelines, and by the way folks, I'm the person who makes the guidelines. You can't stick to the guidelines I make, you have to play it by ear." Now, I point out to you that you'd better believe that there are going to be lawsuits coming from the surviving family members against the department for negligent training.

To make it even easier, since then, the department has required two weeks of training for all their narcotics officers. Why? Because it's so dangerous. It's a special activity and these people have to be trained. The department's action almost makes the case for the lawsuits. And that's a question of doing it at the right time. You might not have had a lawsuit for a long period of time. But you never know when the action of some officer under you is going to generate a series of events that will end up in a law suit and will end up with your job being in jeopardy because of something you <u>knew</u> or <u>should have</u>

known, training you should have given, some faulty direction or some failure to direct. Failure to direct, that is the direction and policy phase. Failure to train and failure to supervise is the maintenance stage. Failure to discipline is the assessment stage. That's the Quality Circle.

Let's talk about a program that you can start next Monday. What steps would you take if you wanted to protect yourself better from liability? The first thing is be knowledgeable, stay informed, keep abreast of the literature. If you don't read the professional journals, Police Chief magazine, Law Enforcement News, Training Aids Digest, Crime Control Digest; if you don't pump information into your data center, you're not going to be able to keep up with all the things that are going on. The very fact that you are here for two days means you're trying to become more knowledgeable or let settle the knowledge that you have, or confirm or reaffirm. The first step is to be knowledgeable and keep up with what's going on.

Secondly, identify the area of greatest concern for liability. What is it your people do that is going to offer the greatest concern, the greatest problem, the greatest potential for liability. They carry guns that can kill people, they administer first aid (that's another problem), they take people into custody, they transport people, they work as police officers off-duty, they supervise people and, another big potential area for lawsuits, they drive a car.

A word on that. We train people in the use of firearms because they are dangerous and lethal weapons. There are more officers killed and injured every year, and there are more citizens killed and injured every

year by the use of a lethal weapon called a car than there are by a handgun. We do not certify people in the use of the car. We take a person out of the academy, we give them something we call defensive driving and the first day on the street (and that's if the person has gone through the academy by the way before he hits the street--if the person is in his first year before he goes into the academy) we may now require him on that first day to answer a call, code 3, to go in a high speed chase or pursuit without any training whatsoever. The car is the lethal weapon and I don't think we've really have taken into consideration the impact of that statement.

In England where they don't have firearm training or driver training in the academy, after three years of being a bobby, of walking around, you can apply for basic driving. Basic driving is a five-week course. After two years of driving you can then apply for intermediate driving which is two weeks, and eventually work your way up to advanced driving which is three weeks. A total of ten weeks to show somebody how to drive their way. And, by the way, there is only one way. They all paint out of the same bucket, they all study out of the same book.

The law enforcement profession publishes a book on how to drive a car and how to drive a motorcycle. You can go from one agency to another and they all drive the same way. Ninety-nine percent of their cars are standard transmission. They drive them beautifully. They are well trained. And the expense that they put into it! We are never going to get that far but I'm just saying that there's an example of the investment other countries may make in a particular highly critical area.

So we've identified the areas of liability. The next step is to take our policies and compare them with these critical areas and say: Do these policies protect us? Do they say what I want them to say as far as the conduct and the standard of care that I want our officers to exercise? If your policy at this point says you can still shoot a fleeing felon and you're looking at the liability that is developing as a result of officers shooting at fleeing felons, or people they think are fleeing felons, I would think you would take the step of changing that policy. Review the standards of care. How do you find out the standards of care? Remember a tort is a duty owed, according to the standards of care, injury or loss resulting from your failure to meet that standard of care. So look at the standards of care. They are recognized, approved performance levels.

Unfortunately, we have to look mostly to lawsuits and judgments to find out what the standards of care are. We can review the literature, the training books, and the publications to get a pretty good idea of the standards of care. We can also look at our state statutes.

At this point, I would like to distinguish between an emergency standard of care and an ordinary standard of care. In an emergency you are not going to be held to a lower standard of care, but they'll give you more credit and they'll be more understanding of what you do in an emergency situation you can control. If you have to respond to a barricaded subject, it's different than if you are going to organize a stakeout. In a stakeout you can determine that, "we're going to do it tonight, at this place, with these people, and have this number of hours to try to do this." With a barricaded subject, it is more of an emergency that is

beyond your control; therefore, they will let you get by with a little bit less planning because you have to react to an emergency. When you control everything, your liability goes up a lot faster because the responsibility is on you to control those factors, to plan appropriately to have your people in some type of vest, to have the proper weapons, to have proper communications. You control it.

The fifth step, now that you've identified the standards of care, is to obtain the services of a dependable legal counsel--one that you can trust. Make sure you have legal input. Many of you may be hamstrung by the fact that your legal input could be a city attorney who was working on zoning yesterday and has problems with curb cuts tomorrow and negotiating a contract with the people who pick up trash and garbage. I would even suggest hiring somebody as a consultant to review your policies, somebody who is familiar with the way they should be written, who is an expert on police policy or correctional policy. I would prefer to have Emory Plitt look over my policies if I could as opposed to a city attorney who only functions as a advisor to the police department four hours a week or ten hours a week. So get the input of appropriate counsel.

Once you've done that, train your people accordingly. You have new policies, you've written them, you've issued them; now train your people. You've moved from the proactive stage to the active stage. We're talking about training your personnel, so be very careful. There is a case in your handouts, Sanger vs. Woodlake Park, which revolves around an officer who captured a prisoner, a burglar, spread-eagled him on the ground, and put a shot gun to his neck while he tried to handcuff

him. While the man lay there, the shotgun went off and he was killed. His survivors sued the city. Woodland said, "We didn't train this officer, he was trained at the regional academy." So they went to the regional academy: "Do you train your officers to use a shotgun?" "Nope. Not at all." Back to the officer: "Did you learn this at the academy?" "Yeah, they showed a film." Back to the academy: "Well, the state doesn't require us to certify people to use a shotgun so we don't. We had a film on crime prevention. In it the officer arrested a burglar and he had him spread-eagled on the ground. And guess what? He put the shotgun to his head and he handcuffed him and led him away."

So this officer had learned improper procedure from a film on crime prevention which may end up making that academy liable for negligent training because they didn't say: "Don't do this!" I'm really happy to see how the Tampa, Florida, Police Department which, makes its own video tapes, handles these situations. Anytime there are improper procedures shown there are graphics running along the bottom of the TV screen saying, "this is not a proper procedure, do not use it." It protects the department. Anytime there is any improper procedure shown on any type of audiovisual, the courts are saying you'd better bring out the fact that they are improper.

Document the qualifications of your instructors. Don't allow someone to train because he is available. I'll give you an example where a person applied for certification as a defensive tactics instructor and firearms instructor. We certified him for firearms and not defensive tactics. In the Daytona Beach Jr. College they were short one instructor and since this person had a great interest in teaching defensive tactics,

they let him teach defensive tactics. While showing some different holds, somebody was thrown the wrong way and partially paralyzed. Now there is a multimillion dollar law suit underway. When they came to us at the P.O.S.T. Commission and said, "What was your decision?" We said we reviewed his application and we said he was not qualified.

Be very careful on the qualifications of your instructors. Make sure they are updated. Make sure they get some type of ongoing training so they don't go stale. We decided to have an annual workshop in all the critical areas, an annual workshop in driver training, defensive tactics, first aid or first responder, and firearms. That way we could say all of our instructors had the opportunity to attend a two-and-a-half day workshop on the specific areas they were involved in.

Be critical of your training methods; require a lesson plan which should be followed. We were the repository for all records, employment and training records, for every police officer and every correctional officer in the State of Florida. Our records were being subpoenaed--attendance records and classes and courses. We could testify that the person was there for 36 out of 40 hours. Plantiff's attorneys would ask, "What were the four hours he missed?" The implication is the subject matter we needed for this lawsuit was taught during the four hours when this person was absent.

At times they were requesting lesson plans, lesson plans could then be reviewed in court. George Kirkham could say, "That isn't the way to teach this." Then we had a situation where an attorney asked whether that lesson plan was taught when they went to the basic academy four or five years ago.

Then they would ask how long were the breaks, how long was the lunch break, and how long were the hourly breaks. Were they 15-20 minutes. Was it a half an hour for lunch? Was it an hour? What's the thought? If the state requires eight hours on this topic they were trying to get the training center to admit that they had only given six hours. They would then say there was negligent training. That's the game you have to start playing.

Attendance records are so important that they should be done each hour and they should be done by the instructor with a seating chart. I couldn't think of a more foolproof system. Maybe there is. We had a celebrated case in Hollywood, Florida, where two officers signed up for a course and didn't take it. They were then given credit for taking an eighty hour supervisors course. They were fired and reinstated and they were indicted and then acquitted. But the captain in Hollywood told the sergeant to sign his name on the sheet that was passed around once a day. The sergeant signed the captain's name. The sergeant couldn't spell too well and the captain wasn't too smart because 20 straight times the sergeant misspelled the captain's name. When they found this out, the Hollywood newspaper hired a handwriting analyst, and with the public record laws they could get the attendance sheets. The handwriting analyst went over the sheets to prove that it wasn't the captain's handwriting. (The fact that it was misspelled helped them a bit.) The lawyers are being more and more creative so make sure that you keep the proper attendance records.

Document! Document! Document! We give out certificates. The certificates say "successful completion" which is based on the fact that you have criteria for "unsuccessful completion." If there is no test

for something the person has attended how would he successfully complete it? You can't use that certificate for anything because there is nothing that a person has passed.

I think there have been some new regulations on retention of records. From my experience with the demands made upon us, since we had been asked for records going back five or six years, we just felt we had to keep everybody's records until they retired because of the requests made upon us. It's a tremendous burden but we didn't see any way around it. I think we would have been hard put at times to meet the demand and not look bad, if we hadn't retained the tons of records. Keep everything current.

Make sure that discipline conforms with policy and training. Keep in contact with your professional groups. Down in Florida a number of the firearms instructors formed their own association and so did instructors in some of the other highly critical areas, because they wanted support from each other. I think that is a good step and maybe something that groups here in this state might want to consider.

Finally, make the next year one of civil liability consciousness raising in your department. You should try to manage liability and make 1985 a year of civil liability consciousness raising. Set goals and objectives for the whole department. Say everybody is going to get two days of training; or, one day of training in liability. Maybe just supervisory liability for your supervisors, but give them some type of training and commit yourself. Give an additional day of training in other high liability areas. Maybe just the uniform division, some type of training in defensive driving, high speed chases or whatever.

I have had occasions where I've talked about policy, while doing a program just for one agency. I said what's the policy on the use of carrying weapons off duty? Do you have a policy? Half the group would say, "No." "Others would say: "Yes, we do." "No, we don't." "Yes, we do." You have 50 people from one agency having an argument over whether the department has a policy.

What does that say about the agency? It developed they were all wrong. When we dug up the policy, it said that the department had no liability if you lost your off-duty weapon. In other words if you got into an argument and somebody took the weapon away from you the department had no liability for that.

Form task forces to examine practices and procedures in the department on an ongoing basis. That task force could continuously write for the policies of other departments around the country, just to make sure you keep seeing what developments and what changes are taking place.

Review, in particular, any incident in the high liability area. If you have a high speed chase and there is a crash, review it. Look at it. Examine it. Learn from it. Brief the people involved. When did the supervisor come on the air? When did the supervisors take control of it? How many cars were in the chase? One department, Huntington Beach, has a liability investigator. Every time they determine there is an incident where there is potential liability this investigator, who is a full-time police officer, starts gathering statements and gathering information. So if down the road a lawsuit is filed they are in a better position to defend against it.

Let me close on an area which I think is getting more and more attention--and should be. High speed chases. This is from an article in the Miami Herald datelined Hollywood, Florida. It shows the asininity--that's the only way you can characterize it--of some of our police activities.

> "A 17-year old boy took off in a yellow school bus, waved good-bye to his mother and sped away on an expressway joyride and banged up 20 police cruisers and injured 3 police officers. The chase lasted 30 minutes and 20 miles. It ended at a Hollywood restaurant seconds after the bus windshield was riddled by police bullets and a tire that was shot flat.
>
> The 17 year-old took his mother's school bus at 10 o'clock one night, waved to her and took off. He headed eastward on the airport expressway and north on the interstate as a fleet of cruisers from the Florida Highway Patrol, Metro Dade, North Miami, Miami Springs, Highland Gardens, and Virginia Gardens Police Departments joined in pursuit. They crashed through a road block made of police cruisers, disabling one. He forced another off the road and finally at the end a trooper fired at least three or four shots at the bus, three windows were shot out, a tire was shot out, and there were bullet holes in the right front door.

I mean it wasn't as if he had stolen a car that was hard to distinguish--it was a yellow school bus, his mother's yellow school bus. It had a number on it and everything else. I mean how many school buses do we run into at 10:00 at night. Eight departments. Twenty some odd police cruisers. This is two years ago, March 30, 1983.

They did a study on high speed chases in the West coast. Let me share this with you because it has some good news and some bad news. Eight different departments--California Highway Patrol, a number of sheriff's departments, a number of municipal police departments of rather large size but not the LAPD or LA Sheriff's. They studied 683 chases. That's our data base and here's the data that they got. Thirty percent ended

in crashes--three out of ten. Eleven percent ended in injuries, one percent in death. Seventy percent of the injuries were the passengers or the drivers. Of the other 30 percent, 15 percent were officers and 15 percent were bystanders. Fifteen percent. Twenty-three percent of the injuries were fatalities. There were shots fired in 21 cases. Three people were shot to death--all passengers of the pursued vehicles. (Not too good at hitting the drivers.) The name of the game, I guess, is to hit the driver. In sixteen cases, police rammed the car; in 52 cases they used forcible methods. They apprehended 97 percent of the drivers. Four percent of the vehicles in this state are motorcycles yet 30 percent of the pursuits were motorcycles. We're getting a picture of who runs. And we'll tell you why. Who does run and why?

The greatest percent of the cases were traffic violations 3 PM to 3 AM. Rush hour as often as not. So we now have high speed chases for traffic violations 50 percent of the time during rush hour. It lasts one mile, two minutes and involves two police cars. The driver is male, average age 20 years old, 39 percent are under the influence of drugs or alcohol. Of those who did flee and were caught, 130 were for drunk driving or drugs; 84, one out of nine I guess it is, were driving stolen cars. Seventy-four were wanted for a serious crime or fear of capture for a serious crime. That's another 10 percent. Forty-six ran because they had faster cars, thirteen percent because they were afraid of police, seven were mentally disturbed, seven liked the thrill of the chase, five didn't like police, and one because he was driving in the nude.

In an accompanying LAPD study the figures were just about the same. They were not a part of the study, but they did one independently. I'm just saying that there is a glaring deficiency or inability to do the type of training and that is what we should recognize. What I've said in the last half hour or 45 minutes that's something you could start working on.

There should be an article in the booklet on the Quality Circle. So you can take those steps and just run through them--add to them too. Those are just some preliminary steps you can take. The selection and training you can do to front-end load better people into the system. I really feel that this is another management challenge. But if you don't run it, it's going to run you. It has run chiefs out of office, and it has run other people into the doctor's office because of stress and everything else. The cost even if there is no judgment is astronomical if you just have to allocate your agency's time and resources in filling out paper and defending yourselves. There are many hidden costs that we really shouldn't have to pay.

Thank you.

Jim Hague

Good morning. In our first hour this morning we're going to have a presentation by Steve W. Bricker who is a well known plaintiff's attorney here in Richmond. Steven W. Bricker is currently with the law firm of Bremner, Baber & Janus. He has been with them about two years. Prior to that he was in private practice since 1978. Prior to that, in fact when I first met Steve in another workshop, he was with the ACLU for four years. His speciality areas have been juvenile rights, prisoner's rights, other complex plaintiff civil litigation, medical malpractice, civil rights and products liability. He currently serves as the chairman of the Richmond Community Services Board which many of you from Richmond know is responsible for Mental Health, Mental Retardation, and Substance Abuse. He holds a JD from the University of Virginia. He has written a number of articles particularly around the area of family law and juvenile rights. He's going to make a presentation and I know he would like to get some questions from you. With no further ado. Steve.

Stephen W. Bricker

I appreciate the invitation to appear before you and I'd like to just preface my comments by saying that I look upon myself in this workshop as really a resource for you. I have worked with folks involved with law enforcement with some frequency, usually not in a cooperative manner--generally in an adversary manner, but in this workshop I wish you would look on me as a resource and perhaps there are lots of

questions you might have. If at any point anybody has a question, don't hesitate to raise your hand or interrupt. Because I'm really not part of your industry, I don't know particularly what questions you want answered and what particular items you want me to focus on. So what I'm going to do is give a relatively short (and hearing that from a lawyer you know when a lawyer says it's a short introduction, stand back and take a seat), but a relatively short introduction and then I would just like to open it up to questions from you.

My topic is a plaintiff's perspective. I'm not a plaintiff so I can't give you that, but I frequently represent plaintiffs and I can give you my perspective which is a very personal one of the plaintiff's perspective in this kind of litigation. I guess my perspective has changed substantially over the years and I'll be very candid with you that I was one of those wild eyed idealists at one point and I still hope you think I have a good deal of idealism left. I think my perspective has matured and changed over the years. My perspective of litigation quite honestly right now is that there is nothing different about suing a law enforcement agency or a correctional agency than there is about suing anybody else. It's a law suit and most frequently it's a law suit where somebody has been injured and my job is essentially two-fold.

Half of this job you never see; sometimes if the job isn't done you may see it. The first job is to screen cases. This is what a substantial part of what somebody who has a practice like mine does. For every case

that I bring there are probably five people who contact me who say that they've got a law suit, a police officer or correctional officer has hit them over the head or they have got hurt in some fashion and want to sue.

What I do first is sit down with the client, review the case, see what facts the client has, challenge the credibility of the client, see what supports the client's story, and give it a ballpark assessment. After meeting with the client for only 20 minutes, 30 minutes, 40 minutes, I ask myself if this case is one I would want to take further, because just as in your work, I am testing credibility.

Whether I am being lied to or not is a large part of what I have to figure out. Is this a client whose story makes sense? If it looks like the client has got something then I take it further. I talk to other witnesses, perhaps seek record. A lot of cases I handle personally in the law enforcement area deal with medical problems, particularly out of corrections. There are two practical reasons for it.

One, the level of health care in prisons and jails is pretty dismal generally. A lot of people get hurt so a lot of people need me--there is just more work there. It's also better because correctional officers do a worse job than police officers, so in my perspective it's a little bit easier.

After I do an initial screening, I go and get the records and do a further review. If at that point I think the client has a case, that's

when I file suit. But again, only one out of five, one out of ten clients who call me actually get to trial or get to suit. A lot of those cases you never see. This may sound somewhat self-serving to you, but if you have good lawyers representing plaintiffs you are better off because the good lawyers will screen out the dogs, and you will not have to deal with all those harassment suits. I'm sure that if you've been sued personally or worked in this area for your individual agency there's a type of suit that you see with some frequency that's just absurd. There's just no merit to it.

Let me just ask here, how many of the folks in the audience have personally been sued over your professional duties? Have been personally named--I don't mean your spouse suing you--but a good number. How many have never had any professional involvement in a civil law suit? That is you've never been sued by somebody or you've never been assigned to a case that involved some kind of civil aspect. Is there anybody who's never personally had any professional involvement in a civil law suit? Maybe a dozen. From your experiences maybe that's why you're attending.

I've assumed that you've had a good deal of experience dealing with litigation. By the nature of incarceration, prisoners are fairly powerless in terms of their position so you get a very high volume of law suits being filed and a very high volume of essentially frivolous law suits. So the more good plaintiff's lawyers that get involved to some extent makes the whole litigation process more professional, and the cases that deserve to be litigated are the ones in fact that get litigated.

When a case comes in to me, one of the things I've got to do, assuming there is a case just factually that somebody got injured, is to determine that on a factual basis they shouldn't have been injured whether it is because of excessive force or something much more accidental.

The next thing that I've got to find is a way to get recovery legally. One thing you may not be aware of--and let me emphasize this to you--is you have a great deal more protection civilly than just about anybody else who is being sued civilly today. It is much more difficult to sue you than it is to sue a physician. It's much more difficult to sue you legally than it is to sue a driver of an automobile in just a standard auto accident case. There are more legal hurdles for a plaintiff's attorney to get over in your situation than just about any other case. Also, if I get over all those legal hurdles and get to the jury, you enjoy a great deal more credibility with juries than others. When I'm representing an ex-felon or felon who has been injured and my defendant is a clean cut blond police officer, and maybe his supervisor, and maybe the police agency itself, before the first juror is sworn in I've got two or three strikes against me. You enjoy a jury bias in your favor. So, bringing these cases is very difficult from the plaintiff's perspective.

Let me just review some of that briefly. There are two ways you can go. You can sue under state law or you can sue under federal law. There is one big development which is occurring in Virginia under state law which you should be aware of. That is what's called the Tort Claims Act.

Traditionally, state and local employees have enjoyed what is called sovereign immunity which basically means you can't sue the state and you can't sue the employees who work for the state. A couple of years ago the legislature passed what is called the Tort Claims Act which waives the Commonwealth's sovereign immunity and allows suits basically on the same basis as you can sue in an auto accident case against state governmental agencies. At the present time that waiver of sovereign immunity applies only to state agencies and does not apply to local agencies. At this time you can't sue the local police department or the county sheriff's office under state law directly. But either this year, or next year, or the year after that, that is definitely going to change.

There is a definite move and you can see it over the years in the General Assembly, to drop governmental immunity. There is going to be a bill in this year's General Assembly session, and it's got a least a 50/50 chance of passage, to include localities in the Tort Claims Act such that local police agencies or correctional agencies could be subject to suits as well. The Tort Claims Act opens up only the agencies to suit not the individual officers.

I would very strongly suggest to you that's good for me and that's good for you. Because right now what plaintiff's attorneys are forced to do, since we can't sue the state at all except under the new Tort Claims Act and we still can't sue the local police agencies directly under state law, is sue individuals. There is a way to get around sovereign immunity against individuals.

There are three exceptions to the doctrine of sovereign immunity under state law when you can sue an individual. One, is gross negligence. That is, if the act or the acts that are challenged are not just negligence but gross negligence. The best description of that is not just a simple screw up but a real big screw up and that's essentially what the legal doctrine means. You can sue an individual despite sovereign immunity also for what are called ministerial acts and these would be things that would require no discretion. That is if you had a rule that said that every time you arrest a suspect you have to read them their rights, a line police officer has no discretion in terms of whether he reads Miranda rights and that would be a ministerial duty. Obviously, questions of use of force would be discretionary. There are no absolute procedures to follow when you're using force. Also, intentional acts are outside sovereign immunity. That most frequently occurs in cases of alleged use of excessive force.

Right now under state law, plaintiff's attorneys have to go after the individuals. In my mind that is unfair. It hurts me because a jury is going to be much more sympathetic towards an individual defendant, (individual police officer, individual correctional official) than it is going to be sympathetic towards the state; the jury bias that I confront as a plaintiff's attorney is much more difficult. I would suggest it is in your interests to expand immunity or expand the exceptions to the immunity so that I can sue the agency directly, because at a minimum it is a real inconvenience to be named personally as a defendant in one of these cases. I assume that's true even if you have insurance to cover it--if your agency has insurance. I assume it's something that's going to wear on you and going to affect your job.

Most often, most good cases don't deal with just an individual's failure. Usually it's some kind of institutional agency failure that's really involved. So why can't you sue the agency directly?

The same phenomenon of having to sue individuals substantially exists if you sue under federal law, which is the second avenue I have as a plaintiff's attorney. You can sue for violation of federal constitutional rights. This is true both for alleged police abuses as well as for the same in the prison and jail setting. In federal suits you cannot sue the state or any state agency. You can, however, sue a municipal or county agency, but there are a large number of procedural and legal hurdles in actually getting judgment. The chances of actual recovery against a local agency are, in federal court, fairly difficult. So in practical realities, I'm suing individuals again in federal court; namely you and your subordinates and superiors.

Let me say, my initial point to you was that litigation involving you is no different than any other litigation dealing with auto accidents or medical malpractice. Let me give you a practical perspective of this. In law, a whole realm of civil law suits deal with medical malpractice. Dealing with malpractice is called professional negligence. You are professionals. Your profession is developing standards of management and standards of conduct which it is in effect imposing on its members. The trial of a suit against you is virtually identical in many respects to the trial of a suit against a physician for medical malpractice.

In a great majority of prisoner's rights or police misconduct cases that I would try, one of the first things I would do would be to contact a professional in your field or the field that the case involves and get a second opinion. Or I guess in my case a first opinion. Is the conduct involved in this case unprofessional, unwarranted? Most often, if suit is brought, that individual would say yes; otherwise I would not bring suit. And that individual is my expert witness who, when the case is tried, will testify in my behalf. One of the corner stones to having a successful plaintiff's practice is to bring good cases. Hopefully you bring nothing but good cases but you don't always have perfect judgment so there are exceptions.

I was chatting one day with a friend who is an insurance defense attorney, and in fact frequently defends civil suits brought against the Richmond Police Bureau. I think we had just settled a case so we were both in a good mood and talking about our practice; he said, "Plaintiff's practice is the easiest thing in the world. The trick is to just get good cases." That's really true. It's particularly true when we are dealing with a case from law enforcement because of the procedural, legal, and practical hurdles I face in winning. I have got to have a very strong case where the conduct that I'm dealing with clearly violates your own standards.

One of the things I frequently try to do is call as adverse witnesses the officers or employees of the agency that I am in fact suing, and get admissions from them that the conduct at issue, whatever it is, just was clearly unprofessional. This is using the standards of the agency and using overall standards of your profession against you. But the reality is that I am merely enforcing what in fact are your own standards.

I think your situation is probably very similar to say medical malpractice because, as you are aware, physicians for a number of years have been up in arms about the frequency of medical malpractice cases. That engenders a fair degree of hostility from physicians towards lawyers, particularly lawyers who handle plantiff cases.

When at a social event or something like that I happen to encounter a doctor and he says what do you do, and I end up telling him, "Well, I sue guys like you every now and then." I usually get a strong reaction. I say, "Really you've got nothing to fear from me because what I'm all about in bringing medical malpractice cases is good medicine. I'm merely enforcing the standards of your own profession and I'm bring good medicine to the court room."

In bringing a corrections case or bringing a police case, what I'm about are good police practices and good correctional practices. I'm merely enforcing, if I'm doing my job right, what should be done and getting compensation for those who have been injured because acceptable professional practices weren't used.

The commonness of law suits against police and correctional folks is a relatively recent thing. I think right now when somebody is sued very often it is viewed very personally; that is, it's something I did wrong or something alleged that I did wrong; it's upsetting, you know, kind of pointing the finger. But I think over time what will happen is that kind of "personalness" in a law suit dealing in your area will diminish.

For example, if you or your spouse has a fender bender and you get sued civilly, you don't think a whole lot of it. You certainly are worried about it somewhat, nobody likes to get sued, but you don't view it as a personal attack. We all have accidents and that's what we have insurance for and it's viewed as just pretty much like that's the system. My prediction is that a way down the pike, that's what governmental litigation including police and correctional practices is going to be all about.

That leads me to another topic which I wanted to cover briefly--insurance. How many of you in the room have ever checked to see what kind of civil insurance you yourself have or your agency has? Probably a quarter of the group here. Probably the most important thing you can do is check your insurance. That is going to have more impact upon your civil liability than anything we could teach in a three week seminar. Because that is the best protection you have.

I do represent a small number of physicians and a small number of folks such as yourself and I tell them to get the best insurance they can and then do the best job they can and don't worry about law suits. That's my advice. If you try to run your life around a law suit that's no way to live; that's no way to run a police agency. What you want to do is get good insurance, do the best job you can using the best information and the best officers you can get and let the insurance company and the lawyers take care of the law suits.

Fortunately in Virginia insurance for all public employees is becoming much more common. If you're a State employee you have $10 million worth

of coverage. Which is probably what you need. A million dollars I would say is the minimum coverage which you should have. If you want to be secure if you're in a rural area, an area where verdicts are low, you may not need more than a million dollars. If you're in Richmond or in a metropolitan area where verdicts are rising you probably need in excess of a million dollars and $10 million would be a comfortable level of coverage.

If you're a local employee, what insurance coverage you have is totally up to the discretion of your city or county. If you're a sheriff's employee, you have the availability of state funds to pay for insurance. That is, for a number of years, going back four or five years, the State Compensation Board has paid 100 percent of insurance premiums for liability coverage for sheriff's departments. It is amazing to me that I occasionally find a sheriff's department that is unaware of that and has never made a claim with the Compensation Board to get insurance coverage to protect them.

Your State Sheriff's Association is also active in getting a fair policy that's on a group basis so that you can buy into coverage fairly quickly and easily. If you work for a police department or a municipal agency what coverage you have is likely to be included in a general liability policy applicable to all county employees.

Somebody should check that coverage because there are types of liability that police officers have that welfare workers or school bus drivers don't have. You ought to get your Commonwealth's Attorney, your city attorney, your county attorney, whoever it is, to review both the limits

of your liability policy as well as the breadth of the coverage. Occasionally, there are exclusions from general liability polices that in fact cover the most frequent incidents where you are going to be sued. For example, some policies exclude law enforcement activities all together and you may be unaware of that. Also, one thing you should always have in a liability insurance policy (which the state's policy does not have) is what is called a defense clause. That is where the insurance company undertakes the expense of hiring an attorney to defend the civil action. I think, and I hope I don't offend anybody on this, but I think you get a much better defense if you have an attorney in private practice who does civil defense work for a living. You're going to have a better defense than if you have your Commonwealth's attorney, or your city attorney representing you.

Just in the same sense that you want to do a professional job, you want somebody to do a professional job on your behalf when you're sued. If you have a heart problem, you don't want to go to a GP you want to go to a cardiologist and by the same token when you're sued civilly you want to go to a lawyer who does that for a living.

My experience is that insurance companies have something that all us plaintiff's attorneys want and that's money. Insurance companies are sitting on a pot of reserves because every time we make a claim they set aside in a special fund, a sufficient amount, to cover whatever we're asking for and they've got it. Money just sitting there, and our jobs as plaintiff's attorneys is to try to get it. Money is something that people don't want to give up, particularly insurance companies. And I can tell you if they hire their defense, they defend those cases as

vigorously as they can. They don't let that defense go second to a murder prosecution or to the demands of the municipal agency. I think you're much better off (I probably shouldn't even be saying this because it's going to make my job harder), but I think you're much better off as I said, having a provision for specialist in civil litigation, which in fact many of the policies now have. In the City of Richmond's policy, that's the case. For a number of years the group policy that the state Sheriff's Association and most of the sheriffs have bought into, has had a defense clause that is like that.

Lastly, let me give you some cases that I've been involved with that highlight some problems that I think law sometimes creates for you. One of the points made in one of the articles that you were given was that a line officer is less likely to be found liable than a supervisor. What the author recommended was that you set up procedures to discipline line officers and make sure you get the line officers to protect themselves. I think, in my experience, that's substantially true and I'll give you an example.

I had a jail rape case that was one of the few jail rape cases that actually went to trial and actually got a substantial favorable verdict on the plaintiff's behalf. It was a young man who was in on a very minor traffic charge, a juvenile, and as everybody who works with juveniles know, including parents, they're obnoxious human beings particularly when you put them in jail. This guy was five foot tall and had an ego of six feet. The guy couldn't keep his mouth shut and all the other juveniles got tired of him, eventually ganged up on him, and raped him and a very vicious rape over a period of time. They

repeatedly raped him and knocked him around. Frequently, one of the things I'm forced to do is end up suing everybody, since we have to sue individuals.

I don't know initially who in fact is responsible so I sue everybody who may have been responsible. In the course of the law suit, if I find out that this guy didn't have anything to do with it, I'll dismiss him. This was one of these where we sued everybody but as we went to trial we essentially ended up with three defendants. One was the administrator of the jail, the deputy administrator of the jail and a line officer. The officer had decided that he was going to do a "Scared Straight" program in the jail and had brought in this one little obnoxious inmate in the juvenile tier and he said, "Boys, here's some fresh meat." He was encouraging, in effect, the other juvenile inmates on the tier to scare this guy and rape him. Just using the words "fresh meat," given prison jargon, was in effect almost saying "rape this guy." This officer admitted that he said that.

What happened is we won. From the plaintiff's perspective, we won and we got a favorable verdict--but the jury let that deputy go. Found for the defendant as to the deputy, but found the jail administrator and the deputy administrator civilly liable. The verdict astounded everybody. I have one rule which is "them that is closest to the fire is more likely to get burnt." The group of people, the ones who are most directly involved in the misconduct, are more likely to be held liable. In this instance, it proved to be wrong. The jury apparently sympathized with this deputy even though he clearly wasn't properly trained and wasn't doing his job. They let him go and held the supervisors liable.

A case I had involving the Highway Department illustrates another problem with having to sue individuals under the State Torts Claim Act. I can get a judgment against the Commonwealth, the state, only up to $25,000. In today's litigation ball park that is nothing. If you have severe injuries or death, that doesn't go anywhere towards giving a fair compensation based on some of the verdicts, and this was a case where a whole family was killed. I sued the State Highway Department and found out that in fact we could only recover $25,000, but the state had provided $10 million of insurance coverage for individuals. What I did was join in individuals to be able to get that additional insurance coverage. Even though it was much more difficult against the individuals, that's where the pocket was because they had all of the insurance coverage so I went against them. I think that's just another example of how insurance coverage effects the outcome of cases and who gets sued.

Let me just close on one point that what I use in evaluating cases, what gets brought and what I think juries react to in ruling on civil cases is what I call the gut factor. I'm sure you see this all the time in your work, maybe not all the time but occasionally--you'll get an incident of misconduct by your subordinates and your gut reaction is why did he do that. What a stupid thing to do. That's my case, that's the one I'm going to bring.

Juries look at cases very practically, particularly in Virginia where we don't have runaway juries. The verdicts in Virginia by national standards are very low. The frequency with which juries return plaintiff's verdicts in law enforcement cases is very small. For

example, in the case that I just mentioned dealing with the jail rape, it was tried in federal court here in Richmond. Federal juries are drawn from an area south of Fredericksburg, out to the bay, down to the Carolina line. It's tough for the plaintiff's attorney to come out and look at this jury because there's all these peanut farmers and hunters and so forth. Those folks like you, they like you a whole lot.

For me to win the case requires that I have to convince those people, who are with you in the beginning, that this guy has had something happen to him that he didn't deserve. It's a gut reaction. That's really what trial work is all about. You have to know the juries, you have to know what will fly with the jury and you have to hit them in the gut. On that note, I'll conclude and just refer to you, to ask me any questions that you might have.

QUESTIONS:

1. The question was: "In both police and correctional areas there are state agencies that have the responsibility to set minimum standards for performance of training; is there a liability arising on the part of the state for failing to set adequate minimum standards."

I think potentially yes, very definitely. There have been cases dealing with that. Years ago there was a suit (I'm sure Sheriff Winston will remember this); the Stenny case dealing with minimum standards in local jails across the state. I believe the case was eventually settled. This was back in the early '70's when the state standards for jails were

in a very informal and primitive stage and the long and short of it was that the state needed to issue much more comprehensive, detailed, and adequate standards.

I think that standards such as that are, for you, a two-edged sword. I'm going to use it against you. If officers don't perform according to those standards, that's going to be the basis of evidence I may use in a civil suit if somebody gets hurt. So it can hurt you; but it's also your protection, because that's how you get performance and that's how you measure performance. In fact, that is the point of the articles in the materials that were handed out. That's how you put the responsibility on the guy who screwed up. "I did my job as a supervisor. I made the standards and told them to abide by them." Then if he screws up it's his responsibility. There are all different ways that standards such as that get brought into litigation.

2. "Let me ask a question about discovery. In a state court in Virginia compared to a Federal court, are there differences in the way discovery is handled? Would you have some examples of the kind of things that might be available or liable to plaintiff's discovery in the federal court that might not be discoverable in the state court. Is there anything that comes to mind?"

Bricker:

"Legally it's not about the same--it is the same. Legally the standards for discovery are virtually identical in the state and federal courts, but practically they are not the same. I think there is a tendency on

the part of federal judges to be more prone to discovery. One thing, particularly true in the state courts of Virginia, there occasionally is a dramatic difference in practice from one locality to another. That is, the Circuit judge in the City of Richmond is just a very different creature and really has his own law as opposed to somebody in Buckingham County. There is a lot of variation on what circuit court judges do from region to region or locality to locality, but as a gross generalization I think state court judges are a little tighter on discovery than federal judges."

3. "It has sometimes been stated as a strategy--the idea that we should keep records, we should keep good records. The other side of that is, of course, those things are discoverable. In your experience do you know of some examples of some sort of records that were kept on information that shouldn't have been kept, that didn't have to be kept, or that might be or may be poorly kept, and therefore actually gave the plaintiff information that might not have otherwise been available?"

Bricker:

"Record keeping is a great advantage if you're doing well and is a great disadvantage if you are not doing your job well. The nature of record keeping is documentation. If you're doing your job well, it's been documented, and if there is a screw up, that's going to be documented as well. I think my experience is that careful record keeping is something that is basically a learned skill. It takes some doing; you have to get use to the routine of documenting activities. I think there is an

increasingly professional attitude towards record keeping and documentation among law enforcement agencies, but generally, in the cases I've been involved in, there's still a long way to go.

The most frequent area involves ensuring employee performance; for example, in the jail or prison setting, ensuring that certain things must be done during the shift and requiring the officer, as he makes his 30 minute checks, to sign off on that. Occasionally I have found that those things were not done and I use that as a basis of liability; sometimes we find out. Discovery is really critical to the plaintiff in my perspective because I don't know what happened and you, by nature of being a law enforcement agency, have got just incredible investigatory resources at your fingertips and you can find out what happened while I can't.

If you have a good lawyer, he will tell your people not to talk to me. So if I call on the phone, or whatever, you will not talk to me. So I have to come and find out what happened to prove my case, and I've got to do it through discovery. That's really critical from my perspective and documentation is often the way that you get to know what question to ask.

I'll give you an example of another jail case where a guy got hurt. He was with a locality that I won't name, and that locality was having a whole lot of personnel problems at the time. Salaries were low, competing jurisdictions offered better salaries, the level of quality of the personnel wasn't all that great. This case involved an assault by

one inmate on another during the night shift. We noticed in the logs for that shift that one of the officers on duty left. That was kind of puzzling to us and we brought it up in deposition and found out that one of the officers just walked out of the jail and walked right off the shift. I was taken aback by this and was kind of surprised. I said I don't know what your practice is, but in the military they shoot people for that. There is a responsibility there, and just walking off and leaving other officers in jeopardy? I think I was dealing with a major or somebody responsible, and this guy kind of got a smile on his own face and said, "we felt a little better having him outside the wall rather than in."

4. "What law enforcement records are confidential? What records must be produced during discovery in a civil lawsuit?"

BRICKER:

"There's no hard and fast rule on that. But you should probably assume that nothing cannot eventually be discovered. The way discovery basically works is, where there is a claim of confidentiality, the judge basically weighs how important keeping it confidential is with how important it is to the law suit. So if I'm trying to get some piece of evidence or document which is claimed to be confidential, to get that what I have to do is to show the judge that it is critical to my case. Say for example the incident I just used. This officer walked off his shift and let's say he was responsible for guarding the tier where my client was injured and I'm trying to make a case against the sheriff

that he never should have hired this guy. I'll want to get his personnel file. That's clearly critical to my case against the sheriff. In all likelihood the judge would give me that file. But if I'm just doing a blanket kind of fishing expedition the judge may not. You should assume that everything could eventually be discovered if the plaintiff's attorney makes a sufficient showing of need. One possible exception to that would be certain strictly law enforcement records. The names of confidential informants is the classic example of the kind of thing that is almost never discoverable. Certain strictly criminal records would be excluded. But when you're dealing with operational records you should assume that probably everything could eventually be discovered."

5. "Steve, don't you see a trend occurring where people are getting fed up with criminals running our country and certain organizations suing the police and doing all these things . . . at the expense of the general public. Do you see that trend coming about and changing or not?"

Bricker:

"I definitely think that the public is much more law enforcement oriented. I think you can see that in Virginia, say in Richmond somewhat. But I guess my perspective is a good case."

Audience:

"But your perspective is not motivated by the good of the Commonwealth, and the good of the citizens out here. Most policemen are not policemen because they want big bucks. They're out here because they're doing their jobs and trying to protect what's going on in our country and that's a different motivation."

Bricker:

"I guess my point is that I think what we're dealing with and what we are talking about today will be here ten years from now. The feeling about the public's interest in personal security is not going to change the need to plan for civil liability. It's really not going to change. Civil liability is probably much less affected by notions that police are good guys or bad guys, than it is affected just by the fact that we're in an increasingly law suit oriented society. What's happening to you is the same thing that is happening to physicians. And that's the point that I'm trying to make, that you're being sued more frequently not because you're less liked than you were ten years ago or that the public is less concerned about public safety, it's because people who get injured are suing. The increasing liability that you are facing is really a separate phenomenon entirely from whatever public attitudes there may be about police officers."

6. "How do you feel about criminal justice administrators training their people to file counter suits against your clients and you when they are sued in court? Do you see any movement on the part of anybody to restrict us?"

Bricker:

"In Virginia, in state court, it is a pointless exercise. This is another example of how you and doctors are thinking the same way. The doctors tried that in Virginia three or four years ago and the Virginia Supreme Court ruled that you couldn't do that in a civil suit. In federal court you have a right as a defendant in a civil rights suit if the case is frivolous, meaning it had no merit from the beginning and it's kind of a harassing case, you have the right to ask for your attorney's fees to be awarded against the plaintiff and, in some unusual circumstances, the plaintiff's attorney personally. That doesn't affect a good law suit because you don't have the right to do that in the instance where there is a case with some merit, whether or not it's a winner. In the dog cases, in the harassing cases, you can strike back.

7. "What else can we do to prevent these harassment cases? It costs money to defend against them just as much as it does to defend against legitimate cases."

Bricker:

There are really two different kinds of harassing law suits. If you're in corrections, one is the inmate case, the inmate who is filing on his own and doesn't have a lawyer. Quite frankly, there isn't anything you can do about that, and that's my judgment.

But, if you're dealing with cases filed by lawyers, I think the system will just take care of itself. Any lawyer who brings in a dog case as the plaintiff's attorney, it's a pointless exercise. I get paid on a contingency fee. If I bring a dog case I'm wasting my time. It takes a lot of both time and money to bring a successful suit against the law enforcement agency. Ex-felons or felons are not the most affluent bunch around. I usually have to pay the expenses to hire the expert. I've got to dig in my pocket to advance certain out of pocket costs necessary plus time. Time is money. With certain exceptions, you don't find lawyers doing loosing cases over and over again. Because they will put themselves out of business.

Audience:

"Unless they're members of the ACLU."

Bricker:

"Actually, the ACLU is even more selective than I am. The ACLU may bring cases you disagree with, but they're not frivolous. And the ACLU wins a lot of those cases."

8. You seem pretty professional and somewhat mature--in fact you've admitted that you've seasoned or matured over the years. I have basically two questions which kind of follow here. Are there any standards of conduct in your profession? Because occasionally we have run into lawyers who seemed to have what I call that ambulance chasing .

mentality. You know, they're out to encourage inmates to sue. They're out to just go for it. Those kinds of cases just might not win unless you take a gamble. Again, are there standards of conduct and are there some avenues that we can take if we see that there are some lawyers who seem to be unprofessional and seem to have this type of mentality?"

Bricker:

"Yes, indeed. I'm tempted to defend my profession. My profession, like your profession, has some guys in it that do things that don't speak well for the profession. But one of the good things about lawyers or the organized Bar is that we have a very vigorous ethical complaint system. It is unethical for an attorney to bring a case that he knows has no merit and there is an ethics committee for every congressional district. There are ten separate ethics committees. Their purpose is to screen complaints and every issue of the Bar News, which comes out monthly, has at least three or four lawyers being disbarred, suspended, or disciplined one way or another for unethical misconduct. It is an active, vigorous discipline system. But I'll tell you it's going to be hard because what you've got to show is that the lawyer--it's an intentional standard--you've got to show the lawyer knew he didn't have a good case. That's a very difficult standard to meet."

Audience:

"Can any enforcement be given by the judge himself? Wasn't there a recent case where a district court judge here reprimanded the attorney for bringing a frivolous case?"

Bricker:

"He didn't just reprimand the attorney. He awarded several thousand dollars in attorney's fees against the attorney. That was a younger lawyer who perhaps had more vigor than insight. Who was perhaps kind of like the situation you just made reference to."

"I think, we are in the correcting mode now. Obviously, over the last ten or fifteen years there has been a great growth in the number of law suits filed, and what they're being filed over. The standards are growing, so the law suits have been growing. But, I think we're in a corrective mode somewhat now where the excesses of that are being dealt with. And I think judges are increasingly ready to do something about the frivolous law suit."

9. What bothers me from a police standpoint, is not the fact that the ACLU or attorneys of that nature can have a watch dog effect on police agencies, that doesn't bother me at all because I think police officers should be accountable and should have to pay for their mistakes and compensate the victim. Yesterday, several of the speakers related some legal fees that seemed extremely exorbitant. Seemed like to me that about 60 percent or 80 percent of that money that was awarded was legal fees. Awards of $2 million or $3 million or whatever I doubt very seriously if the victim saw more than 20 percent of that.

My one involvement in a law suit from a victim's standpoint, was when I was involved in an accident about 15 years ago and I received an award

of $15,000 due to the fact that I had some injuries. Out of that $15,000 I received $2,500 of it. My lawyer, for his trouble, wrote three letters and made an hour long appearance in court for $12,500. It doesn't seem like a lot of money now as it was then.

That's the thing that I think bothers me not only from a police standpoint but from the general public. A public opinion poll that was in the newspaper about three or four months ago showed that attorneys in the public opinion poll were on the same level as car salesmen and vacuum cleaner salesmen. I think that is because of these exorbitant awards and the amount of money going to attorneys. The fact that attorneys are profiting from other peoples' misfortune is what bothers police officers, not the fact that they're being watched to make sure we doing our jobs. We want to do our jobs, and we want to weed out the bad apples in our lot but we don't want attorneys to profit from our mistakes and become rich from other peoples misfortune. That's what bothers me.

Bricker:

The public has a love-hate relationship with lawyers that has always kind of tickled me. If you're in trouble and you need a lawyer, the concerns that you've raised don't seem to bother the client. They want to get the best lawyers and love them then. But when you're not in trouble the public is very down on them. I don't doubt that there are instances of excessive fees, but in your area of litigation the reality is that it is the hardest way to make money as a lawyer. Being a lawyer

is obviously one of the professions in our society where you can make a lot of money. It's a lot harder making money suing you guys than it is suing in an auto accident case or anything else, for the reasons I've described. The legal hurdles are greater and the juries give less to the victims in this area.

I think what those guys who spoke yesterday were doing, and apparently they did their job well, was to try to scare you a little bit and get you thinking of what could happen. The reality is that Virginia is a different ball game altogether from what's happening nationally. Virginia has never had any real big, big verdicts against police officers. There was one down in Newport News of $1 million, but that was reversed.

There have never been any big, big verdicts and there really aren't any lawyers getting rich on handling police and prisoner cases. We make money but we're not making the kind of money that you make in other areas. Maybe that doesn't answer your question. Maybe you're just angry about how much lawyers make. But in this area, my job is hard. It takes a whole lot more work and my perspective is that if I can make money handling prisoners' rights cases, Lord knows what I can do when I get a non-felon plaintiff; somebody who looks good, and who the jury may like. It's just a lot easier in other areas of law.

CRIMINAL JUSTICE LIABILITY
MANAGEMENT SEMINAR

TRAINING WORKSHOP

Resource Experts:
James L. Hague, VCU
Frank Mardavich, Esq., D.O.C.
Charles E. Friend, George Mason
Kenneth McCreedy, DCJS

Submitted by:
Lisa Bennett
Kathleen Dodson

In talking about management liability, training is one of the more critical aspects to consider. Lack of or improper training leaves management open to potential civil liability.

After narrowing down the list of questions and problems posed by the group, five major topics seemed to encompass all areas of concern. They were:

A. Training in the use of force

B. Coordinating training with policies

C. Evaluation of training and test validation

D. Improving the quality of trainers and instructors

E. Determining what training records to keep and for how long

A. Training people in the use of force is a task that must be undertaken with great seriousness. Some of the suggestions and recommendations made by the group included:

1. The selection of proper people is essential in building a good force. These people should understand what will be taught and then use that knowledge wisely.

2. Needs assessments and surveys are essential when developing a useful and responsive training program.

3. When teaching people to use force, lessons in discretion must accompany lessons in tactics. A person not only needs to learn how to use force, but also when it is necessary and how much.

4. Lastly, an on-going training program should be maintained. New techniques should be taught and old ones updated. Group training also is a pertinent factor.

5. Through good training practices, management can decrease the chances for civil liability. Some other measures for increasing protection from civil liability are:

   a) Careful selection of participants
   b) Always provide good training
   c) Teach alternatives to the use of force
   d) Include training in discretion
   e) Maintain adequate records and documents

   The above should be common practices in any department.

B. Policies and training procedures are not always going to be compatible with each other, thus the need for coordinating training and policies. There will always be conflicts so, do we change training? There must be a reasonable compromise where the best intentions of both are upheld. The rule, however, is the department policy governs.

C. Evaluation and Test Validation are truly essential. What you are training people for is not any good unless you know what the students get from the lessons. Instructors should not deviate from lesson plans. At the beginning of training, the students should be told what the objectives are; this will keep them aware of what is going on. Afterwards, analyze the exams and criticize the students to see what they got out of training. In-service people can tell what, if anything, was left out of the training. Once training is completed, supervisors need to let their subordinates use what they have learned in training.

There will never be complete immunity from liability; however, if these ideas and practices are made priorities, it can aid in liability protection.

3. Difficulty in training personnel in smaller agencies:

   A block of training time is mandated for each agency in the various criminal justice agencies to use. However, while one individual may require only twenty hours to train, for example, another individual may take forty hours to train. While the training time is mandated, funds are not equally mandated to provide coverage to compensate for the individuals who are in training. One solution to this dilemma is the idea of performance-based training. In this situation, individuals are trained in the amount of time they indicate they need based on their individual performance. Thus, while certain persons may need more time than others, persons who can be trained in less time are not held back. Another solution suggested to this problem is "job task analysis." It is vital to train individuals so that they understand exactly what is required of them. Training must be conducted in such detail that, in a given situation, there is no doubt in the individual's mind as to how to react or respond.

4. Supervisors' resistance to change:

   It was agreed in this workshop that workshops in general do provide a neutral environment for problems to be shared and solutions to be discussed. On the other hand, it is also true that little of this knowledge can be put into action unless management is receptive to new ideas. People are generally resistant to change unless it can be demonstrated that the change can benefit them. Another factor that contributes to resistance is expense. One solution to this is to ask "what changes can I make that do not cost money?" It was agreed by the members of the workshop that implementing certain policy changes does not cost money and suggestions of other supervisors and managers are free but rich in potential.

# CRIMINAL JUSTICE LIABILITY MANAGEMENT SEMINAR

## MANAGEMENT WORKSHOP

Resource Experts:
G. Patrick Gallagher
Sheriff Andrew Winston, Richmond Sheriff
Dr. Jay Malcan, VCU
Mr. James Hooker, VCU

Submitted by:
Connie McHale
Joseph LeCato

In the Criminal Justice Liability Management Seminar, several small group workshops were held. These workshops were developed to help participants discuss resolutions to common problems and perhaps return to their respective agencies with plans to implement these resolutions.

In the Management workshop, the various problems discussed were those commonly shared by police agencies, corrections agencies and the like. Some of the major problems were outlined as follows:

1. A need for greater efficiency in the maintenance of records.
2. A need for standards among policies enforced by management.
3. Difficulty in meeting mandated training requirements in smaller agencies.
4. Supervisors' resistance to change.

The following is a summary of the discussion of the four problems.

1. A need for greater efficiency in the maintenance of records:

   One concern presented in this workshop was directed toward the documentation of activities. Can one "over-document", and, in certain circumstances be held liable because of those details? The general consensus was that is is far better to over-document than to be caught short. It was stressed that every procedure and every activity must be recorded in writing in the event that questions concerning the conduct should arise.

2. A need for standards among policies enforced by management:

   A lack of agreement among supervisors and managers, as to standards, can create an increased risk of liability. If there is not unanimity among supervisors and managers, it will ultimately lead to confusion in the implementation of policies. There was no one solution offered to remedy this problem. However, improved communication and periodic monitering can reduce the potential of the enforcement of conflicting standards.

CRIMINAL JUSTICE LIABILITY
MANAGEMENT SEMINAR

PERSONNEL WORKSHOP

Resource Experts:
Ron Jordan, DCJS
David Nagel; Markham, Meath and Drumheller
Guy Horsley, Assistant Attorney General
Beth Flournoy, Virginia State Police

Submitted by:
Mark P. Bennett
Fernando R. Shaw

The Personnel Workshop began with the participants' listing of personnel problems and issues which potentially could result in civil liability for their various departments. These issues were addressed by the panel of experts in the order in which they arise in the personnel process.

The group first discussed issues pertaining to the selection process. Compliance with affirmative action guidelines was stressed by the agencies represented as a point of confusion since adherence to this policy is desireable of itself, and since Title Seven, legal action can stem from a perceived failure to do so. The agencies were advised to work with one another in establishing their own voluntary affirmative action policies so that past mistakes are avoided and uniformity can result. Obtaining legal advice was recommended so that affirmative action programs can be set up as required before the threat of losing federal assistance appears.

Selection standards for hiring are another personnel issue which federal agencies like the EEOC monitor for compliance. Often, insurance held by criminal justice agencies does not cover federal audits, so strict compliance with legal standards is vitally important. The experts advised the local agencies to establish clear descriptions for all jobs for which they are hiring. In addition, any restrictions which are imposed on the applicants to be considered must be based on Bona Fide Occupational Qualifications: specific, demonstrable abilities which are essential to the performance of the job and which are supported by careful documentation. Private firms exist which can examine employment standards and determine whether they fall within EEOC guidelines. The agencies were advised that they cannot establish a maximum age for applicants, and that there can be no mandatory retirement age without proof of inability to perform the job in question after that age. Physical fitness requirements must be job related and appropraite to actual duties to be legal. Also, the agencies were told not to exclude applicants for failure to meet fitness standards if there also are older officers still employed who are unable to meet them. The workshop also was advised that employees who have been involved in EEOC complaints in the past may be troublemakers and should be avoided.

Improper and inadequate training of criminal justice employees also can result in civil suit. Since suits can center on an untrained officer or a poor quality training program, training involving certified instructors provides a measure of security from liability. Untrained officers should never be allowed to perform training-specific tasks. The experts stressed the need for fair, uniformly applied policies in all stages of the selection process.

Personnel records are another area where criminal justice agencies face liability, since almost anything found in personnel records is subject to discovery. Good files must be maintained and all decisions on applications and promotions must be documented to demonstrate fairness. The panel advised that one unified file be maintained so that each officer does not have his own filing system which could compromise the department. The agencies were told to dispose of records once their usefulness is exhausted, especially unfounded complaints and those of a non-serious nature. But, the experts warned, a file should never be cleaned once suit has been filed.

Employee probationary periods were encouraged as a way to insure against civil action. Employees may be dismissed for cause without due process if it is made clear that there is no expectation of continued employment during this period. Performance appraisal standards must be valid, objective and fairly applied. Reluctance to evaluate an employee negatively must be avoided so discrepancies do not exist between a supervisor's opinion of an employee and the information found in the personnel file. Evaluations should be keyed to specific tasks and uniformity must exist among evaluators so that employees are evaluated fairly. Exploration of new evaluation techniques also was encouraged.

Employee discipline was another concern of the workshop since employee misconduct often leads to suit. In dealing with citizen and inmate complaints, the officials were advised to assume that every word of the complaint is true and determine if a violation of state law or departmental policy is alleged. If a violation is claimed, then the complaint should be recorded and investigated; otherwise, the complaint should not be documented. Classified complaints which prove to be unfounded upon investiigation should then be purged from the file, and all record of them should be trashed. Since testimony given by an employee at an internal affairs hearing usually is inadmissible in court, possible criminal actions should be decided before internal hearings are conducted. Termination procedures must be documented and reasons for termination given. The appearance of fairness must exist in all terminations, and termination of poor employees must not be delayed since civil action for negligent retention may arise from future errors.

Finally, to protect morale and to avoid suits, employees performing the same tasks must be paid equally and receive equal benefits. It is vital that this practice be upheld and that no appearance to the contrary be given, or the department as a whole may be damaged.