

## **A GOOD-PRACTICE APPROACH TO OFFICER-INVOLVED SHOOTING INVESTIGATIONS**

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Officer-involved shooting (OIS) investigations are directed at determining whether the shooter officer's decision to use deadly force was "objectively reasonable under the totality of the circumstances confronting the officer," and thus both lawful and within Department policy.

Two types of investigations, criminal and administrative, are usually conducted, with the involved officer cast in the role of the subject of each. Criminal investigations are intended to determine whether evidence exists which indicates that the involved officer committed any violation of law in the incident. Administrative investigations are aimed at determining whether the officer acted within or without Department policy and/or whether there is any indication of the need for the Department to alter its policies or procedures, or to provide more, better, or different training to its officers. The outcome of an administrative investigation carries with it potential exposure for the involved officer to disciplinary action and/or termination of employment if evidence of misconduct is found. Another important consideration which must be borne in mind is that the reports produced by the OIS investigation will be the foundation upon which the litigation of any civil action, either state or federal, which might arise from the shooting incident, will be built.

The manner in which these two types of investigations are handled varies across jurisdictions, depending on a variety of factors. In some jurisdictions a criminal investigator is the first to seek an interview with the involved officer. In some of those jurisdictions, the interviews may begin with the involved officers being advised of their *Miranda* rights. In those situations the officers may then be advised by their legal counsel to invoke the Fifth Amendment right to remain silent, which invocation terminates any criminal interview.

Regardless of whether there is an effort to conduct a criminal interview, and whether that interview is preceded by a *Miranda* warning, virtually every jurisdiction will conduct an administrative interview of the involved officer. That interview may start with the giving of a *Garrity*<sup>1</sup> admonition, in which the officer is ordered, under pain of separate disciplinary action for insubordination up to and including termination of employment, to provide truthful answers to the administrative questioning which is to follow. Such an admonition protects the officer from the subsequent use of his statement against him in any criminal prosecution arising from the incident under investigation.

It is not unusual for peace officers to approach OIS investigations with a degree of trepidation, given the nature and extent of legal risk the investigations present to them. Depending upon local circumstances, the officers may also tend to view OIS investigators with a degree of suspicion and distrust. Where those perceptions are coupled with the adversarial atmosphere which can be created by *Miranda* and/or *Garrity/Lybarger* warnings, a toxic atmosphere for any sort of rapport with the interviewer can potentially be created.

### ***Officers Merit Special Status***

Handling officers in the same manner as criminal suspects during these investigations is counterproductive and is not a factually accurate representation of their true status.

It is important to remember that officers involved in shootings are simultaneously 1) subjects who could potentially face criminal indictment, 2) employees who were just doing their jobs but will now be subjected to internal investigations that can put their jobs on the line, 3) witnesses to crimes committed by suspects who attempted to harm the officers and/or citizens, and 4) victims of violent crimes committed by the suspects.

The involved officers therefore play a unique role in the criminal justice system and it is justified to develop specialized procedures in dealing with them to ensure that they are provided with fair, neutral, and objective investigations. The fact that officers and agencies are at risk for becoming embroiled in political controversy as a result of a shooting, no matter how justified the use of force, is another factor calling for specialized procedures that maximize the accuracy, thoroughness, and timeliness of the investigations and any statements provided by the officers.

An adversarial relationship between the investigator and the involved officer can be created or exacerbated by any tendency by the investigator to handle the interview of a “subject” officer more from the perspective of one conducting a suspect interrogation than one conducting a witness interview. In that regard, it is crucially important that use-of-force investigators be trained to recognize that officers who have been involved in an OIS are not suspects in any wrongdoing (unless and until evidence of wrongdoing has been developed), but rather are professionals who have been trained, equipped, and sent out onto the street to deal with “critical incidents” on society’s behalf, and who have just personally witnessed and experienced such an incident.

### ***The Goal: Complete & Accurate Information***

In any OIS investigation, the accurate determination of the question at hand turns upon the collection of all available data on exactly what constituted the “totality of the circumstances confronting the officer” at the time the decision to use deadly force was made. As a result, the goal of the OIS investigator should be to obtain as complete and accurate an understanding of the involved officer’s perception of those circumstances as is possible.

To do that, the investigator must be skilled in effectively mining the memory of the involved officer, and must interview him or her in such a way as to maximize the “take” from the interview. The protocols which are used in some jurisdictions for the conduct of OIS investigations can create circumstances which are less than ideal for the achievement of that goal.

An interviewing technique, known as Cognitive Interviewing (CI) and pioneered by Dr. R. Edward Geiselman of U.C.L.A. and Dr. Ronald Fisher of Florida International University, offers OIS investigators the opportunity to achieve the goal of maximizing the “take” from the

interview of an officer who has been involved in a critical incident.

### ***“Good Practice” Approach to Interviewing***

For several years The CI approach has been implemented as standard practice for interviewing civilian witnesses and crime victims at many federal, state, and local policing agencies nationwide. Elements of the CI were included in the DOJ Federal Guidelines on handling and preserving eyewitness evidence in 1999 (*Eyewitness Evidence: A Guide for Law Enforcement*; National Institute of Justice, NCJ 178240, Washington, DC). Drs. Fisher and Geiselman first published a manual for conducting the full CI in 1992 (*Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*. Charles Thomas Publishers: Springfield, Illinois).

The CI is a systematic approach to interviewing, the intent of which is to increase the amount of relevant information obtained without compromising the rate of accuracy. It is based on scientifically derived principles of memory and communication theory as well as extensive analyses of law-enforcement interviews. It has been found in scientific studies to produce significantly more information than standard police questioning and it is legally acceptable to the courts. Just as it has been helpful for interviewing lay victims and witnesses, it can be valuable for interviewing officers involved in shootings and other critical incidents as well.

The CI supplies the investigative interviewer with a toolbox of specific techniques designed to elicit a maximum amount of recollected information. Several elements of the CI are directly relevant to a good-practice approach to OIS investigations. First, it relies on the witness to provide the needed information via open-ended questions. This approach is witness-centered rather than interviewer-centered. Second, it encourages the witness to be complete in his/her report and utilizes reliable memory-enhancement techniques to achieve this goal. Third, the communications elements of the CI establish a solid social foundation (rapport) that is conducive to reporting information. Fourth, research has shown that the CI effectively ameliorates psychological stressors like those sometimes found to be present after an OIS incident.

The CI approach differs from a standard police interview in several important ways. Most notably, it utilizes several memory-jogging techniques taken from the field of cognitive psychology that have been demonstrated in experiments and field tests to reliably enhance accurate recall. For example, the narrative account from the interviewee is preceded by a guided mental reinstatement of the physical and emotional context that existed at the time of the incident, and the narrative ultimately is requested a second time but in reverse chronological order to elicit additional details.

The cognitive interviewer develops a plan during the narrative for asking follow-up questions, so as not to interrupt the flow of memory. During follow-up questioning, the interviewer may utilize a toolbox of specific memory-jogging techniques for eliciting specific kinds of information, such as descriptions, names, and numbers. In addition, the interviewer expands upon the rapport development phase of an interview by engaging the subject with interview preparation instructions to clarify the nature and purpose for the interview up front, as well as to clarify the role to be played by the interviewee. These instructions include building

teamwork for the interview, eliciting concentration, and encouraging completeness. This protocol contrasts with some standard police questioning routines where only specific short-answer questions are asked of the subject, with frequent interruptions, and without any memory-jogging initiatives.

OIS investigators should be trained to approach their task as truly objective fact gatherers whose only goal is to collect and report as complete and accurate an account of the shooting as is possible, and to convey that commitment to the involved officer during the “rapport building” stage of the interview. This can help dispel any preconceived negative perceptions held by the interviewee about the OIS investigation process, and to obtain his or her buy-in to the cognitive effort which will be required in order to produce the most complete statement possible during the interview through the use of CI techniques. Only after that foundation has been laid and the interviewee has bought into the concept should the actual interview be commenced and conducted using the Cognitive Interviewing techniques described above.

### ***A Caution about Assumptions & Jargon***

From a communication standpoint, it’s important to remember that in an OIS investigation both the interviewer and the interviewee typically are peace officers. As a result, a dynamic may take place in these interviews whereby many unspoken assumptions as to the involved officer’s background, training, and mind-set going into the incident are made which are not written into the text of the interview, thereby robbing the investigative report of much in the way of background context which would add materially to the creation of a complete account of the “totality of the circumstances” which confronted the officer during the event. That dynamic may also result in the use of jargon not familiar to those reading the report later, and/or in the omission of details regarding police training or procedure.

Therefore, it is advisable for investigators to avoid the use of police jargon in their reports, and to assume ignorance by the reader of police procedures and protocols. Special effort should be made to draw out all details of the event and the factors which went into the making of the interviewee’s use-of-force decisions to assist civilian readers in understanding why the involved officers acted as they did.

### ***Try to avoid “suspicious” supplements***

The involved officers and their employing entities are forced to live with the content of the statements provided to OIS investigators within hours or days of the incident. It can be problematic to later “fill in the blanks” as to any facts which have been left out of the initial investigative report, and subsequent additions and clarifications can be viewed with suspicion. This could become a major issue in civil litigation that may arise from the incident. Therefore it is best to maximize the information obtained in the initial, and perhaps only, interview that the involved officers may provide, and to accurately and completely memorialize it in the investigative report.

With that in mind, there is a need to emphasize to both OIS investigators and their potential future interviewees the full scope of factual information which falls within the

definition of the “totality of the circumstances” which may face an officer at the moment of a use-of-force decision, so as to maximize the likelihood that the full sweep of this information is captured and included in the investigative report.

In addition to the detailed facts of the incident, the state of mind of the involved officer with regard to the threat assessment of the situation which was confronted as it evolved is critical to the assessment of the reasonableness of the use of force decision(s) made in dealing with it. The full and accurate depiction of that evolving state of mind will include more than “just the facts” of the incident.

Depending upon the nature of the incident, it might include such things as detailed information regarding the training and experience of the involved officer which is relevant to the type of incident, any information received by the officer from dispatch and/or witnesses before and during the incident, and the officer’s assessment of emerging threats before and during the incident. The investigator should also probe the involved officer’s memory for all available information regarding the options, if any, that were open to the officer at key junctures in the evolution of the threat, the choice(s) he or she made at each juncture, and the reason(s) why any option was selected and other(s) rejected.

OIS investigators should be trained as to the type of information which should be sought out and preserved in the investigation, and in the techniques for doing so using the CI method. Furthermore, all officers should be well schooled not only in what information is essential in order to provide a complete accounting of the justification for their use-of-force decisions, but also in how it should be retrieved and recounted in order to provide a complete, accurate and cogent account of the evolution of the incident.

The authors are available upon request to act as consultants to assist in that training process.

1. So called after the seminal case entitled *Garrity v. State of New Jersey*, 385 U.S. 493 (1966), and commonly called a Lybarger admonition in California, after the seminal California decision entitled *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.

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