

LEGAL ADMINISTRATOR'S COLUMN

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WHAT TO EXPECT FOLLOWING A CRITICAL INCIDENT

An officer, paraphrasing a quote from a World War I memoir, once told me that patrol is “hours of boredom punctuated by moments of intense excitement.”

A critical incident is certainly one of these intense moments, following which I have my first opportunity to meet many of you. Some of you know the procedure, some of you do not, but all involved in a critical incident experience something that will be with them, likely, for the rest of their lives. In moments such as these, with the intensity, the uncertainty, the emotion, and the adrenaline, a plan—knowing what to expect—provides a soothing sense of control. In light of that, I thought I would use this column as opportunity to discuss the basics of critical incidents.¹

A natural starting point would be the definition of “critical incident” under the LDF Plan Document. But first, if you take nothing else from this article, take this: the first rule in a critical incident is “Keep Calm & Shut Your Pie Hole.”²

The second rule of a critical incident is “Keep Calm and Shut your Pie Hole.”³

After a critical incident you are a Buddhist monk, vowed to silence regarding the incident, until you speak with an LDF attorney. The first, and best, thing you can do when involved in a critical incident is to simply shut up.

Now, with that stated, under the LDF Plan Document, a critical incident is:

[A]n action which arises from any act or omission within the scope of employment in which:

- (a) serious injury or death occurs; or
- (b) the discharge of a weapon is involved.

LDF Plan Document Art. I.5. Different departments have differing definitions for what constitutes a critical incident. If your department has a critical incident policy, there will be negotiated procedures that flow from an incident being classified as “critical.” As far as LDF coverage is concerned, however, covered incidents are as described above. As a general rule, when in doubt, we assume the incident is critical and protect the rights of the involved officers accordingly.

¹ The majority of this column and the advice contained herein is based upon a presentation by LDF attorney extraordinaire, and ISPA LDF Consultant, Fred Bruno, and appropriated (stolen) for my own use. This column is a watered-down version of the presentation, avoiding specific advice or strategy where I could. If anyone reading this would like to set up a training session within a given department, we can set up something specific to that department.

² Trademarked by Bruno Law, PLLC (seriously).

³ Again, there's really a trademark.

There are three typical classes of officer in a critical incident: (1) the shooter(s); (2) involved officer(s); and (3) witness officer(s). A “shooter” is self-explanatory. An “involved officer” can mean a number of things, but typically, an involved officer is one who went “hands-on” with a suspect.⁴ “Witness officers” are just that—witnesses. Witness officers did not fire their weapon or go hands-on with a suspect. From a coverage standpoint, LDF generally provides attorneys for shooters and involved officers.⁵ Witness officers are not generally provided LDF attorneys. Witness officers may, however, have representation provided by his or her individual union.

Following a critical incident, all involved officers should be separated from each other and witness officers should be separated from involved officers. A good rule of thumb is to have separate squad cars for each officer. All officers, involved or not, should be aware that the investigating agency will certainly ask each interviewed officer, “Have you spoken about this incident with anyone else?” and behave accordingly.

At some point shortly after the incident, a supervisor or the incident commander will ask for what is called a “public safety statement.” These statements focus the investigation—they identify suspects, victims, evidence, witnesses, the number of rounds fired, the direction the rounds were fired, custody status of the suspect, etc.—and while they can be as informal as “What happened?”, these statements may be *Garrity* protected if the officer is directed to give such a statement, and officers should provide this information, but be careful, because whether the statement is protected by *Garrity* is a matter of interpretation for a judge later. Give the information needed to hand the scene to newly responding officers and nothing more (remember the first two rules).

Involved officers should then contact his or her union representative. Bearing in mind rules numbered 1 and 2, above, the officer should inform the representative that he or she was involved in a critical incident. These union reps have invaluable institutional knowledge and the union rep will be able to guide the officer(s) through the critical incident process. The union rep’s primary role is to protect the rights of the shooter and the involved officers. They also help arrange legal counsel through LDF, help separate officers, and generally act as LDF’s boots on the ground until the LDF attorney arrives. All officers should know their union representative’s phone number.

Either the union rep or the involved officer will contact LDF at 1-844-ISPALDF (1-844-477-2533). The call goes to our answering service, the caller will speak with a receptionist there, and then the call is patched through to my cell phone. If I am unavailable, another attorney at Bruno Law will take the call and assist the caller. One of my partners or I will discuss the incident with the officer, as well as next steps. When we have this conversation, whatever the officer tells me is confidential and privileged. Provided our conversation is private, this is the first time the officer may disregard rules one and two. I will determine whether it is a covered incident and whether the caller is a covered officer. Again, when in doubt, we assume the incident is critical.

⁴ Another common example is an officer in a vehicle pursuit who used a pit maneuver or was directly involved with a suspect vehicle that crashed, injuring the suspect, innocents, or other officers.

⁵ Disclaimer: this article does not provide any kind of guarantee for coverage, denial, or set any precedent. Each case, and each coverage decision, rises and falls upon its own facts.

If covered, I will contact an LDF attorney, who will call the officer as soon as possible and likely come meet with the officer in person.

Initially, these incidents, with all the adrenaline involved, tend to make everyone feel as though time is of the essence. Everyone speeds up. Investigators may be pushing to move the investigation along, administration may be pushing for information, and the press will certainly want all of the information they can get their hands on, quickly. Within that context, however, we must all remember that the time concerns of the involved officer trumps everything.

One thing (of many things) union reps, LDF, and LDF attorneys do well is slow everything down. It is important the involved officers know and understand that their rights come first: their right to an attorney, their right to union representation, and their right to either give a statement, or not. That statement is called officer's *voluntary* statement for a reason—it is that officer's choice whether, when, and how to give the statement. There is nothing the investigators can do to change that—short of an order from Administration, which will then move the statement within *Garrity's* protections (and would be great).

Once an LDF attorney arrives on scene or at the station, the attorney will discuss the voluntary statement with the involved officer. They will discuss whether, when, and how to give the statement. Many officers want to talk to investigators immediately (“I have nothing to hide”), but as for timelines, it is common, and perhaps a best practice, to wait 48 hours before giving a statement. This time will allow for an adrenaline dump and for the phenomenon known as “tunnel vision” to subside. Officers often remember more about the incident as adrenaline subsides.

If the involved officer decides to give a statement, the statement can be audio recorded, or in writing. However the statement is given, the LDF attorney will prepare the involved officer for the statement and be present with the officer at the time of the statement.

Once the officer either declines a statement or gives a statement, the LDF attorney will continue to communicate with investigators, and prosecutors (if necessary), to advocate on behalf of the officer, and the attorney will inform the officer of any developments and answer the officer's questions.

Throughout the entire process, from the incident to resolution, anything the involved officer says, writes, posts, records, signs, tweets, snaps, or “tiktoks”⁶ regarding the incident could be evidence. Involved officers and union reps must understand privilege, that is, with whom the involved officer can confidentially discuss the incident. Involved officers can discuss the incident with their lawyer, their spouse, clergy, or therapist—that's it. And even when speaking to these individuals, involved officers should avoid putting any discussions in writing, text, email, dm, etc.

We err on the side of caution, always, and keeping this circle of knowledge small is very important. But critical incidents can be isolating. Involved officers will be separated, placed in a room by themselves, given a lawyer, and likely asked to surrender their weapon and uniform. Many are then placed on administrative leave. It is not uncommon for these officers to feel as though they are in custody or on house arrest. It is important for them to know they are not alone,

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and I encourage colleagues to reach out, not to discuss the incident, but to make sure they are okay. You can complain about the Gophers beating the Hawkeyes, discuss philosophy, fishing, or argue about politics. Do not discuss the incident, but be there for them. We support them and appreciate their work, and they should know it.

As always, thank you for the great work you are all doing for your communities, and add LDF's number to your contacts (1-844-477-2533). My personal cell number is 651-246-2103.

Stephen