

The Critical Incident

by Don English - General Counsel, Southern States PBA

You have just had to use deadly force to protect yourself or others, had a suspect die in your custody, or have become involved in a serious accident. What should you do next?

After you have paused to give thanks that you will once again go home alive, issued any needed lookouts, and notified your supervisor and/or departmental investigators, your next call should be to your lawyer, hopefully one that is experienced in law enforcement issues. If you are a PBA member, you will have

our 800 number for that purpose, 24/7.

Regardless of how justified your actions may have been, the spotlight and microscope are now on you and could remain for some time, while your department, other agencies, citizen review boards, and even the assorted and strident enemies of law enforcement will analyze and second guess your actions.

You will be faced right away with some very critical decisions you should make only after consulting with your attorney, one of the most important being whether to give a voluntary statement and if so, when. Obviously, if your department orders you to give a statement right away, you will have little choice if you wish to remain employed, and this statement will in all likelihood be protected by the Supreme Court's Garrity decision and its progeny.

However, depending on the facts, it is often better to wait until you have rested, "detoxed" from the adrenaline, and taken the time to review the incident carefully in your mind before giving any interviews. Over the years, I have counseled officers immediately following a critical incident who were so pumped they could barely tell you their names. People have a range of different reactions to this type of trauma. Unfortunately, this is the time many tend to be the most talkative.

When giving any statement, it



is also important to refrain from guessing at things like times, distances or the number of rounds fired - until you are sure. Tomorrow your answer may be different after you have had time to reflect. Several years ago, I met with an officer

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right after a shoot out in which the suspect managed to get away, but the officer was sure that he had winged him in the left shoulder. I suggested that he just say “shoulder” in his narrative for now, but he insisted on saying “left shoulder.” Sure

enough, before he could finish the statement, a hospital called in to report that a “gentleman” had presented at their emergency room with a gunshot to the RIGHT shoulder. Obviously, the officer was not trying to be deceptive but was still suffering from the well known tunnel-vision effect which can occur during a life-or-death encounter. Just beware that at some point, all of your statements will be of public record (depending on your state laws) and fair game for the perpetra-

tor's family and others to use in filing a lawsuit or otherwise attempting to make your life miserable.

After any use of force, the areas of legal exposure facing an officer in their order of importance are generally the following:

1.) Criminal - By far the most important consideration is the possibility of being prosecuted criminally either on the state or federal level, or both. Unfortunately, officers are facing a greater likelihood than ever that their decisions will be the subject of criminal investigations, especially with high profile cases. Sometimes political concerns of the District Attorney or U.S. Attorney can outweigh the reasonable application of the law to a set of facts. It may be a profoundly dismaying thought to realize you could face criminal charges for doing your job, but it is true. For some of the more recent horror stories across the country, check out: www.policedefense.org

One or more of the following agencies (in no particular order) can be involved in the criminal investigatory process, and will of course want a statement from you:

1. Your agency's investigators;
2. Your state's investigative bureau;
3. District Attorney's investigators;



4. FBI;
5. U.S. Attorney; and
6. U.S. Department of Justice, which has a section devoted exclusively to prosecuting law enforcement officers;

Of course, you should not view any of the above as being the bad guys; each agency has an important job to do. But, that job does not include looking out for your interests.

You should never give a voluntary statement which can be potentially used against you criminally without first

discussing the pros and cons with your lawyer, although the pressure to do so can be great.

2.) Certification - Your state certification agency can independently investigate any incident administratively and can take action against your certification, which, of course, you need to maintain your career. Statements given to them are not generally protected from further use, civil or criminal.

3.) Internal Affairs - You can be compelled as a condition of your continued

employment to give a statement to I.A. which generally cannot be used against you criminally (except for perjury). If you are questioned without being read a Garrity warning, you need to “Garrity-ize” yourself before proceeding further. (See our website for more information.) Statements made to I.A. generally are admissible in civil and administrative cases, including your state certification agency. And, most agencies in this part of the country will not permit your lawyer to be present during an internal investigation.

It is extremely rare for an officer in a high crime area to finish out his career without being sued or complained on at some point, most particularly after having to use force during an arrest. Any ill-advised statements you make right after an incident can, even years later, be paraded in front of a jury in the worst possible light. It may be difficult to always think that far down the road, but that is another reason to consult an attorney.

Lastly, please remember that, as vital a role as family, friends, and fellow officers play in helping you get through a critical incident, no conversations you have with them are legally privileged (spouses excepted), and they could be compelled by subpoena to testify to anything you have told them, whereas anything said to your attorney in confidence is off limits, and he or she is legally and ethically bound to keep it confidential.