



LEGAL DEFENSE TRUST TRAINING BULLETIN

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HANDLING INITIAL INVESTIGATORY INTERVIEWS

OVERVIEW

This bulletin is designed to guide and assist you in the representation of a police officer who has been ordered by his supervisor or other investigative authority in the police department to submit to an interrogation or interview, either as a witness or an accused.¹ While every situation is unique, there are common rules and guidelines which will assist you in your capacity as an employee representative during the interrogation process. If you believe that you have encountered a situation which is critical to the welfare of the accused officer and feel you are not properly prepared to deal with it, you should contact an experienced legal representative, a member of the Board of Directors of your association, or an association attorney.²

¹This bulletin was originally prepared by Los Angeles Police Protective League General Counsel Michael P. Stone, and Associates General Counsel Patrick J. Thistle, Mary Ann Healy and Enrique "Hank" Hernandez (presently League General Counsel). It has been revised over time, and I use it in a variety of programs including the LAPD In-Service Schools and in P.O.S.T. Internal Affairs Schools. In any event, my heartfelt thanks to Pat, Mary Ann and Hank for all their hard work during my years as General Counsel, and especially on this bulletin.

² In order to obtain the services of an attorney, it is usually necessary to obtain authorization from a member of the Board of

A. PREPARATION

1. Before assuming the responsibility of acting as an employee representative, you should have a working knowledge of the provisions of the applicable Memorandum of Understanding, the Department Manual, the Public Safety Officers Procedural Bill of Rights Act, certain provisions of the Labor Code, and an understanding of basic constitutional protections afforded the officer under investigation. In addition to the contents of this bulletin, your association may assist you in obtaining materials relating to those subject areas.

As a representative, you are called upon in these situations not just to be an observer, but also to be an advocate for the officer who has requested your assistance. The Supreme Court

defined the role of an employee representative in an investigatory interview as follows:

"A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A

Directors; however we welcome the opportunity to be of assistance.

knowledgeable union representative could assist the employee by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Civil Service Association, Local 400 v. City and County of San Francisco* (1978) 22 Cal.3d 22, 567, 150 Cal.Rptr. 129, 138 (quoting *NLRB v. J. Weingarten*, 420 U.S. 251).

The actions you undertake in a representative capacity may well prevent error or injustice occasioned by an investigator's overzealous conduct, good faith mistake, or an unfavorable bias toward the accused.

B. WHAT TO DO BEFORE THE INTERROGATION

1. Make sure you have access to copies of the Department Manual, the Public Safety Officers Procedural Bill of Rights Act, the Memorandum of Understanding, and whatever other reference material you believe will assist you in your role as a representative. Always have access to a tape recorder and enough blank tape to record several hours of interview.

2. Obtain all available information concerning the subject matter of the interrogation. Many times the best source of information regarding the scope of the interview will be the person or persons who wish to conduct the interview. Notwithstanding what you are told by the investigators, carry out as thorough an inquiry as you can before the commencement of the interview. Your focus, at this point, is not to embark on a defense investigation but rather to learn everything you can about the subject matter and scope of the

interview, including existing investigative materials.

3. Meet with and assist the officer to refresh his memory concerning all aspects of the act or omission in which he participated and which is to be the subject of questioning. In the presence of the accused officer, research and review all applicable rules, regulations, policies, practices and departmental orders which may be relevant to the situation. It is important that both you and the accused officer understand the criteria by which the officer's conduct will be judged at some later time.

4. Make determinations regarding possible criminal conduct. Although generally what the officer tells you in your representative capacity is deemed privileged communication, it is likely that you have a duty to disclose evidence of criminal misconduct because of your overriding responsibility as a police officer. Therefore, it is important to comprehend at the earliest possible time whether or not a possibility of criminal misconduct exists. If the accused officer engages in conversation in which it appears that he is about to describe possible criminal misconduct, you should immediately cease your representation and refer the officer to a member of the Board of Directors of the association, who may advise the officer to seek legal representation.

5. Explain your role as a representative to the accused officer. Explain that persons conducting the interrogation are in control of the situation, but that there are a number of rights available to him which you will call to his attention if necessary, and that you will assist in guaranteeing that the interview is conducted in as fair a manner as possible. It is important that the officer understand the rules which govern the interrogation process and your role as his representative.

6. *Explain to the accused officer that any statements he makes during the interview will be closely scrutinized in light of all evidence which has been or will be developed by the investigators, and that additional charges may result if it is shown that statements he makes during the interview are false or misleading. **Always** remember to warn the officer that he may be required to testify under oath about these things. The **truth** during all stages of the proceedings, is his **obligation**. Your duty as a representative, does **not** encompass the facilitation of deception or perjury. Today, untruthful responses will almost certainly result in the administrative death penalty: removal.³*

7. Contact the investigating authority and arrange a convenient date and time for the interview. Try to make arrangements which allow you ample opportunity to develop as much information about the case as possible. If the investigator insists on an immediate interview over your protests, contact an association board member who will either assist with the problem or contact an association attorney.

8. Obtain all available reports, tapes, photos, notes and other materials as far in advance of the interview as possible.

C. PRELIMINARY MATTERS AT THE TIME OF THE INTERVIEW

1. Record the interview in its entirety. Immediately upon contact with the investigator, inform him of your intention to record the proceedings and commence the operation of the recorder at the earliest possible time during the process of communications among the involved parties. *Keep your recorder plainly visible*, and beware of Penal Code §632. *See: Rattray v. City of National City*, 36 F.3d 1480 (9th Cir. 1994)—holding covert recording in non-criminal matters violates §632.

2. Make inquiry regarding the nature of the investigation. Ask the investigator for specifics and obtain from him whatever information he is willing to divulge concerning the investigation and allegations against the accused officer. Do not hesitate to ask questions in order to obtain as complete an understanding as possible about the nature of the investigation and the possible charges which might result.

3. If appropriate, make objections to the nature of the investigation. When it appears that an investigation involves strictly off-duty conduct which is not related in any way to work performance, make an objection to the conduct of the interview. If the investigator insists on conducting the interview beyond that point, make it clear that the accused officer will respond to questioning only because he is threatened with discipline if he does not cooperate.

4. State for the record any factors which may mitigate against conducting the interrogation at that particular time and/or place. For example, if the accused officer appears mentally distraught or has been drinking or taking medication, these matters

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The implications of the so-called *Brady* doctrine are discussed in two previous training bulletins. *See*: Vol. II, Issues 10 and 10b, The "New" Threat to Police Careers: Revisiting *Brady v. Maryland*; "More on the *Brady* Issue: Attorney General Takes an Unexpected Position". *See also*: "Truth or Consequences? The Path to Career Destruction", Vol. II, Issue 6, regarding the probable results of deception.

should be stated on the record along with your objection and request for relief from the obligation to submit to the interrogation at that time.

5. Establish on the record that the officer under investigation is compelled under threat of discipline to answer questions put to him by the investigator, even though it is apparent from the circumstances. (See No. 10. below)

6. Request production of all materials, documents, photos, tapes and other things which relate to the matter under investigation and about which the accused officer is to be questioned. Current relevant case law permits production of these items unless they are deemed confidential for some articulable reason. If deemed confidential, the documents or other items withheld may not be entered into the accused officer's personnel file, and may not be used against the officer at the time of later proceedings.

7. Make a demand that all items deemed confidential be described in detail sufficient for later identification. After obtaining a description of each withheld item ask for the specific reason that the item has been deemed to be confidential.

8. For the record, make objections to the characterization of confidentiality of the items withheld. This is important to protect the rights of the officer regarding any further proceedings which may be conducted.

9. If records and/or other items are produced, request copies for review before the commencement of the interrogation. When copies are turned over to you, take all the time necessary to go over the content with the accused officer so as to allow him to refresh his recollection of the matter under investigation before the start of the

interview. If the Department refuses to produce copies for you, do not hesitate to request a review of the investigator's copy each and every time a question is asked which requires the officer to refresh his recollection from yet another review of the material.

10. If the accused officer is given a *Miranda* warning, advise the officer not to waive his rights after the admonition. Once the officer refuses to waive his *Miranda* rights, it is likely that the investigator will issue a "*Lybarger* warning" which means that the accused officer will be ordered to answer questions under threat of discipline, and will be told that the statements made subsequent to the *Lybarger* warning cannot be used against him in any subsequent criminal proceeding.⁴

11. Determine the anticipated length of the interview. If the time poses any problems to you or the accused officer, notify the investigator of those problems. Schedules which should or must be met such as social obligations, childcare schedules, class assignments, work schedules and the like should be articulated on the record.

D. WHAT TO DO DURING THE INTERROGATION PROCESS

1. Be constantly aware of the overall perspective of your responsibilities to the accused officer. Your duty as a representative during the

⁴ There is no guarantee, however, that the statements made after a *Lybarger* warning will not be reviewed by a prosecuting authority. The implications of the prosecutor's decision to review the compelled statement may be catastrophic. *See*: "Taking the Fifth", Parts I, II and III, Michael P. Stone, P.C., Training Bulletins, Vol. I, Issues 1, 2 and 3.

interrogation process is to assure that the officer being questioned is not bullied or intimidated, does not become confused, is not subjected to threats or foul language, is not required to answer improper questions, and is given a full and complete opportunity to articulate his version of the matter under investigation. Some interviews are conducted without much necessity for active participation by the employee representative, since his presence will tend to assure fairness in the process. Others may involve active participation by the employee representative.

2. Maintain a professional and business-like manner. As in the case of an overzealous investigator, the demeanor of an employee representative may negatively impact the accused officer's welfare. While it may be better to err on the side of advocacy, you should strive to solve problems without becoming one yourself. Just as you are not a professional advocate or attorney, neither is it likely that the investigator has honed his skills to the point that he makes no mistakes. Your objections to questions or conduct may be helpful to the process if the parties each respect the other's position when an objection or dispute arises. You will command that respect if your representation is accomplished in a professional and business-like manner, unless the investigator enters the process without an understanding of the rights and dignity of the accused officer.

3. Make a record which, upon review, will reveal any illegal or unconscionable conduct about which you are objecting or commenting on the record. Only as a last resort should you display anger or advise the accused officer not to participate in the interrogation process (this is rarely appropriate). The tenor of the questioning will become evident as the interview progresses and providing you are reasonably familiar with the facts of the case and attentive to the questioning,

you should be able to pick up on negative attitudes and biases of the investigator.

4. Be alert for questions which are inappropriate. When such questions are asked and before the accused officer answers, you should call your observations to the attention of the investigator by stating that you believe the question is not a fair one, and giving the reason for your belief. Some of the reasons that a question or statement is unfair are as follows:

- a. The question is compound or confusing; ask the interrogator to break it up into a series of simple questions, simplify or clarify it.
- b. Questions which may constitute an unwarranted intrusion into the accused officer's right of privacy such as medical records and tax returns, etc.
- c. Questions which do not pertain directly, or sometimes even indirectly, to the allegations which are the subject of the interrogation. If the questions do not appear related to the charges, request to know if there are allegations or charges about which you have not been informed prior to the start of the interview. If other allegations come to light, insist that the investigator inform the officer specifically of the nature of such allegations. If there are no such additional allegations, inquire as to the purpose of the questions.
- d. Questions which intrude into privileged areas such as

conversations the accused officer may have had with his counselor, wife, clergyman, attorney, therapist, or you, or some other employee representative.

- e. Questions which would tend to mislead the officer by misrepresenting prior facts or circumstances, or statements of other persons or prior statements of the officer himself.
 - f. Where questions concern a prior statement by the accused officer, insist that the prior record be used for reference rather than allowing inquiry into the officer's recollection of his prior statement.
 - g. Questions which are argumentative.
 - h. Questions which call for guesswork, surmise or conjecture on the part of the accused officer. This is particularly true if the questions focus on areas involving the state of mind of some other person, such as asking for the reasons why someone else acted in some way or made a particular statement. You should also object to questions which request the officer to give an opinion for which he is not absolutely qualified.
5. During the interview, if it appears that the officer is deviating from what he told you prior to the interview, or you have some other concerns

regarding the nature of his responses, you are within your rights to request a break, during which you should consult with the officer privately to determine the reasons for your concerns and confusion.

6. During the questioning, you may interject to assist the accused officer by asking him questions yourself in order to clear up some confusion which may have resulted from his responses. There are occasions where the investigator and the accused officer are actually conversing about two different subject areas without their knowledge. You may also want to assist the officer in correcting some prior statement made as a result of misunderstanding or confusion. During the interview, it is appropriate for you to comment on the record regarding certain observations you may make at the time. For example, if the investigator is reading from a document, looking at a picture, or making signs or signals of some unusual nature, you should make audible comments into the record to preserve your later recollection of the event.

7. At the conclusion of the interview, make a demand that the investigator's notes and tapes from the interview be preserved until the case is concluded.

8. The investigators may order the officer not to discuss the case with anyone under the threat of discipline. Depending on the circumstances, a blanket order of this type may not be reasonable. For example, unless exigent circumstances exist, the accused officer should have the right to discuss certain aspects of the case with his or her spouse, clergyman, therapist, etc.

9. Do not suggest that the officer take a polygraph examination, and if the subject comes up through the accused officer or the investigators,

advise the officer to consult with an attorney before discussing this matter further. The accused officer is not required to take a polygraph examination, nor can his refusal to do so be mentioned in any investigative report.

10. It is wise to take a break before the session ends to assure that the officer has an opportunity to consult with you regarding any questions, comments, or concerns he may have about the interview.

11. Before leaving, ask the investigators how long they expect the investigation to take, and how and when the officer will be notified concerning the results.

12. Provide the officer with information concerning how to reach you, the association and legal fund staff. Advise him to call if he receives further contact from investigating authorities regarding the matter under investigation.

E. SPECIAL PROBLEMS

This next section of your bulletin deals with special problems that you may encounter during the initial stages of a preliminary investigation conducted by members of internal affairs. The issues confronted here are substantially more complex than the ordinary conduct of a personnel complaint interview. Only general guidelines are set forth. If any difficulties or questions are encountered in one of these situations, you should seek the advice of a more experienced representative, an association director, or a lawyer, before proceeding.

1. ORDERS TO THE OFFICER TO LEAVE HIS OR HER HOME OR OTHER PLACE, WHILE OFF-DUTY

Sometimes, investigators may seek to remove an off-duty officer from his or her home or other place for the purposes of conducting an interrogation, chemical tests, search, or other investigative procedure at a police facility or another location. Very often, officers who are uninformed of their rights may acquiesce or voluntarily accompany investigators without first seeking representation. In these situations, there is little that you can do. Other times, the officer may call the association, an employee representative, or a director for advice as to what he should do. If this occurs, you should immediately obtain all of the information that the officer has in his possession, in a confidential setting. Investigators should not be allowed to overhear or monitor a conversation between the officer and his representative. Once you have talked to the officer, then ask to speak with the on-site investigator who is in charge of the investigation. When you are able to talk to this investigator, inquire as to the reasons supporting such an exigent and extraordinary procedure. If the circumstances do not appear to justify such an intrusion, attempt to persuade the investigators to continue their investigation to a date and time certain when you can be present and prepared to proceed. If this is not possible, inform the investigators that it is your desire to either be present yourself, or have a competent representative present, before the officer is required to do anything in terms of answering questions or performing any tests, or submitting to any searches. Determine where the officer is to be taken, and confirm the investigators' agreement to await the arrival of a representative, before undertaking any further investigation. Make it clear to the investigators that the officer, if he complies with the demand to accompany the investigators, is doing so as the result of administrative compulsion, and not voluntarily. Request to speak to the officer once again. Make him understand that insisting upon an administrative order to comply is

not construed as a refusal to cooperate. Requiring the issuance of a direct order to comply with the investigators' demands only protects the officer in the event that the order is unjustified at its inception, or in the manner in which it is carried out by the investigators. On the other hand, a voluntary submission to these demands may well result in a waiver of any objection to the irregularity of the procedure. Such a waiver may also result in the admission of all evidence obtained as a result of the procedure, for all purposes. Most often, investigators will attempt to obtain voluntary compliance with a request of this nature. They are, however, fully prepared to issue an administrative order if voluntary consent is not forthcoming. The better practice is to decline voluntary cooperation, and receive the order.

2. DEMANDS BY INVESTIGATORS FOR SUBSTANCE TESTING

In many internal affairs investigations, investigators perceive a need to obtain a sample of an officer's blood, breath or urine for the purpose of substance testing (alcohol or drugs). As an example, in addition to certain constitutional requirements discussed in the Memorandum of Understanding between the Los Angeles Police Protective League and the City of Los Angeles sets forth the requirements for such demands: these provisions are roughly analogous to the constitutional requirements that apply to such searches. *See: Jackson v. Gates, 975 F.2d 648, (9th Cir. 1992)*

An employee shall not be required (unless subject to a random test procedure) to submit to a field sobriety examination, nor to a blood, breath or urine test for the purposes of determining the presence of a narcotic, drug, or alcohol unless:

The employee exhibits objective symptoms of being under the influence of alcohol and/or narcotic or drug;

or

there is a reasonable and articulated suspicion that the employee has ingested or absorbed by the body in any other manner an alcoholic beverage, narcotic or drug.

This requires investigators to satisfy either prong of the two-part test indicated above, prior to requiring or demanding such test. As a matter of constitutional law, such a request or demand must be based on a reasonable, articulated and individualized suspicion that the testing will produce evidence of the ingestion of alcohol or a contraband drug. The requirement, however, is not to be confused with random testing. As you know, random substance tests of police officers are a matter of much legal argument and debate. It is beyond the scope of this bulletin to discuss random testing. Here again, any objection to the testing procedure on the basis that it was unjustified at its inception or carried out in a manner that is unreasonable, will likely be waived if the officer voluntarily consents to the testing. Again, the proper procedure is to require the investigators to order the officer to submit. This is not a refusal to cooperate. Where the investigators are relying on the second prong mentioned that of a "reasonable and articulated suspicion", they should be required to explain the evidentiary basis and observations upon which they are relying to issue the order. It is clear that such testing is subject to constitutional requirements of "Reasonableness". An order to submit to such testing unaccompanied by any explanation of the basis for the order, forces the employee to gamble his entire career as the price for the exercise of a constitutional right. The representative should make detailed notes about, and record if possible, the investigators' explanation for the basis for the order, or the

explanation of their refusal to divulge information about the basis for the order.

If the officer decides to comply with the order to submit to testing, it should be made clear that the results will be used for *administrative purposes only*. If the investigators are basing the order for a chemical test on the first prong of the test, that is, objective symptoms of ingestion, be sure to carefully monitor and record the existence or absence of such objective symptoms. Try to have a reasonable number of independent persons observe the physical appearance and demeanor of the officer at the time of the proposed chemical test. An employee has a limited right to representation prior to submitting to a substance test. That portion of the League's MOU states in pertinent part:

If any employee requests a representative prior to submitting to a substance test, the employee shall be permitted to consult with a representative telephonically; and the employee shall be permitted to have a representative present, provided that such representative is able to arrive at the scene within two (2) hours. If, while awaiting a representative, the employee must relieve himself or herself, he or she must provide a sample to be held by Department representatives pending the employee's receipt of advice; provided, however, that such sample shall be returned immediately to the employee without analysis in the event that he or she chooses, after advice, to "refuse" a test.

The officer and his representative should always argue for strict compliance with these provisions, where applicable.

3. INVESTIGATORS' DEMANDS TO PERFORM SEARCHES OF THE OFFICER'S PERSON, DWELLING, CAR, EFFECTS, OR LOCKER

Just like any other person, a police officer has a right to be free from unwarranted and unreasonable searches of his person, effects, or other private areas. In administrative investigations, the rights of an officer with respect to such intrusions may be somewhat more limited than that of the average citizen, for a variety of reasons. Nevertheless, the standard against which investigative conduct in this area is measured is always whether or not the search is reasonable at its inception and reasonable in the manner in which it is conducted. Ordinarily, investigators are required to utilize the least intrusive alternative. Obviously, the expectation of privacy and the limitations on the employer's ability to conduct searches vary considerably with the type, place, time, manner and method of the search. The search of an officer's locker or desk at a police facility is substantially less intrusive than a strip search or body cavity search of his person, or a search of his dwelling. Generally, the more intrusive the search, the more compelling must be the employer's interest in conducting the search. As with other types of employee searches, voluntary compliance with a request will likely result in a waiver of any objection to the search at a later time, and may result in the admission of any evidence obtained for all purposes in both administrative and criminal proceedings. As a general rule, prosecutorial authorities will decline to use evidence against an officer which was obtained as the result of administrative compulsion. Therefore, always make sure that the search is being conducted pursuant to a direct

order, upon pain and penalty of insubordination for refusal or lack of cooperation.

Again, rarely will investigators request voluntary submission to a search unless they are prepared to back it up with a direct order if voluntary submission is not forthcoming. While the law in this area is constantly developing, it is clear that body cavity or strip searches must be accompanied by a reasonable and articulated individualized suspicion that the search will turn up the sought evidence. Locker, desk or personal storage areas within the police facility are subject to search pursuant to the provisions of *Government Code §3309*:

No public safety officer shall have his locker, or other space for storage that may be assigned to him searched, except in his presence, or with his consent, or unless a valid search warrant has been obtained, or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

Again, if particular circumstances create doubt in your mind as to the proper procedure, contact an experienced representative, an association director, or a lawyer.

4. REQUESTS FOR POLYGRAPH EXAMINATIONS

During an investigation, it may seem advisable to the investigators to request a polygraph examination of the officer being investigated. While no law prevents investigators from

requesting submission to such testing, they are strictly prohibited from compelling an officer to submit to polygraph examination. Furthermore, investigators may not enter anywhere in the investigation or their notes, any reference to the officer's refusal to participate in such testing. Consent to a polygraph examination always involves a complicated analysis of the case. No decision on this should be made hastily, and certainly not without consultation with a qualified representative or a lawyer.

Stay safe!

- Michael P. Stone

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