

Officer Involved Incidents

303.1 FOREWARD

Investigations of Officer Involved Incidents are frequently more complex and demanding than other incidents which do not involve peace officers or custodial officers. Applicable administrative and criminal statutory and case law is complex and often contradictory. The collection of evidence and its analysis is at issue long after the incident. Questions arise about the propriety of a law enforcement agency conducting an investigation wherein one of its own officers is involved. Public and news media attention is intense. The potential social, civil, administrative and criminal consequences of Officer Involved Incidents are profound and affect many parties. If adequate safeguards are not delineated in advance, the publics' "right to know" may well conflict with the progress of the investigation and the "right to a fair trial". When several agencies are involved, differences in policy, procedure, personnel, resources and interests may conflict and hamper the investigative process. As a result of these factors, these guidelines have been developed to aid individual agencies with investigations of Officer Involved Incidents. The goal of these guidelines is to help assure that such cases are fully and fairly investigated and the proper dispositions of such cases are made based upon all the legally available, relevant evidence. While this document represents the consensus of member agencies as to how such cases are to be investigated, the guidelines permit individual agencies to make modifications in order to meet individual agency regulations, and are not intended to increase the civil or criminal liability of member agencies or their employees and shall not be construed to create any mandatory obligations to, or on behalf of, third parties. Agencies represented should review their related policies and make every effort to modify them to avoid conflict with these guidelines. Each agency's individual policy may be attached to these guidelines.

These guidelines were adopted by the Santa Clara County Police Chief's Association, on July 11, 2002.

303.2 GENERAL POLICY STATEMENT

Investigations of Officer Involved Incidents will be performed to develop all available relevant information about the Incident. They will be performed in a manner that provides for a thorough and creditable investigation that is free of conflicts of interest. Such investigations are designated "Incident Investigations", the goals of which are to determine:

- (a) The identity of the person(s) responsible; and
- (b) The existence or non existence of a crime; if a crime does exist, determine:
 1. The degree of the crime.
 2. Any legal or factual defenses to the crime.
 3. The existence of any factors which would mitigate or aggravate punishment for the criminal conduct.

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The investigations shall be performed in a manner consistent with the rules of admissibility of evidence in a criminal hearing. Any administrative investigation shall be separate and distinctly different from the Incident Investigation.

The investigation of each Incident will commence as promptly as practicable after the occurrence.

303.3 DEFINITIONS

"Officer Involved Incident"

For the purpose of these guidelines, an "Officer-Involved Incident" is any incident in which a peace officer or custodial officer, acting under color of authority, is directly involved where death, the serious likelihood of death, or injury results. Such incidents include but are not limited to:

- (a) Intentional shootings.
- (b) Intentional use of any other deadly or dangerous weapons which proximately causes death of another or injury likely to produce death.
- (c) Intentional act on the part of an officer which proximately causes death of another or injury likely to produce death.
- (d) Death of person while in custody, or under peace officer or custodial officer control.
- (e) Accidental discharge of firearm on part of an officer which proximately causes death or injury of another.

"Peace Officer" and "Custodial Officer"

- (a) Local law enforcement officers defined by Penal Code, § 830.1 et seq. (e.g., Municipal Police, Sheriff, D.A. Investigators, Coroner Investigators, and Probation Officers).
- (b) Custodial Officers defined by Penal Code, § 831.5 (e.g., DOC Correctional Officers).
- (c) State Officers, (e.g., CHP, DOJ, University Police, Parole Officers).
- (d) Federal Agents, (e.g., FBI, ATF, U.S. Marshall, Customs, Border Patrol).

"Primary Agency"

The agency, or agencies, with geographic jurisdiction over the incident.

"Employing Agency"

The agency which employs the involved officer.

"Officer Involved"

- (a) Officer whose act may be a "proximate cause" of the injury to another person; or
- (b) Officer who may intend that his/her act be a "proximate cause" of the injury to another person.

"Proximate Cause"

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A cause which, in a natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

"Incident Investigators"

The persons assigned by the Primary Agency(cies) and the District Attorney's Office to conduct the Incident Investigation.

303.4 INVESTIGATIVE RESPONSIBILITY

The responsibility for investigating "Incidents" rests with the Primary Agency, which has the ultimate responsibility for the preservation and security of the scene(s). This includes collection of evidence at the scene(s), and from the involved officer(s), including their equipment and vehicles.

- (a) Initial officers at the scene will make all reasonable efforts to preserve and secure the scene, pending the arrival of the Incident Investigators.
- (b) The Primary Agency usually will conduct its own investigation. However, it may seek investigative assistance from the District Attorney, or from other agencies.
- (c) If investigative assistance is obtained from another agency, the Primary Agency may maintain control of the investigation itself, or it may relinquish the primary responsibility for the investigation to the agency from which it obtained the assistance.
- (d) The DA Crime Lab or the crime scene unit of another jurisdiction may be called upon for assistance at the discretion of the Primary Agency.
- (e) In Incidents where a vehicular collision or other vehicular movement is involved the California Highway Patrol may be called upon for investigation assistance in that phase of the Incident Investigation.

Until agreement is reached between the various Involved Agencies in a specific case, immediate investigative responsibility is determined in this order:

- (a) The Primary Agency.
- (b) The agency whose on duty employee, acting apparently for a law enforcement purpose, was involved as the officer involved.
- (c) The agency within whose jurisdiction the victim's body was first discovered after infliction of the injury.

If an on duty peace officer is involved in an Incident within the geographical jurisdiction of another agency, but was acting in the performance of his/her duties in connection with a criminal matter originating in his/her own jurisdiction, the Primary Agency may defer its investigative authority to the officer's own agency, which will then investigate the Incident as if it were the Primary Agency.

303.5 SHERIFF DEPARTMENT'S RESPONSIBILITIES

The Sheriff maintains primary responsibility for the investigation of Incidents that occur or emanate:

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- (a) Within the buildings or secured grounds of Detention or correctional facilities, including:
 1. AIB, 875 North San Pedro Street, San Jose
 2. Elmwood Correctional Center (including grounds), 701 South Abel Street, Milpitas
 3. Juvenile Hall, 840 Guadalupe Parkway, San Jose
 4. Main Jail, 180 West Hedding Street, San Jose
 5. Sobering Station, 885 North San Pedro Street, San Jose
 6. Work Furlough Program, 590 East Middlefield Road, Mountain View
- (b) Within the buildings or secured grounds of Superior Court Facilities, including:
 1. Family Court, 170 Park Center Plaza, San Jose
 2. Hall of Justice (East and West), 190 West Hedding Street, San Jose
 3. Juvenile Delinquency, 840 Guadalupe Parkway, San Jose
 4. Criminal Court Annex, 115 Terraine Street, San Jose
 5. Los Gatos Facility, 14205 Capri Drive, Los Gatos
 6. Main Courthouse, 191 North First Street, San Jose
 7. Notre Dame Facility, 99 Notre Dame, San Jose
 8. Old Courthouse, 161 North First Street, San Jose
 9. Palo Alto Facility, 270 Grant Avenue, Palo Alto
 10. Santa Clara Facility, 1095 Homestead Road, Santa Clara
 11. Sunnyvale Facility, 605 West El Camino Real, Sunnyvale
 12. Traffic Facility, 935 Ruff Drive, San Jose
- (c) On Santa Clara Valley Transportation Authority (VTA) equipment and property, including:
 1. VTA light-rail trains;
 2. VTA busses;
 3. VTA light rail stations; and
 4. d. VTA parking lots.

303.6 ROLE OF THE DISTRICT ATTORNEY

The District Attorney has the following roles in an Incident Investigation:

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- (a) Assist and advise the Incident Investigators on the various legal issues that may arise, including search and seizure, Miranda, identification procedures, arrests, element(s) of crimes, immunity, and voluntariness.
- (b) Monitor the police investigation.
- (c) When deemed necessary, perform an independent investigation, separate from that of the police investigation. The District Attorney will notify the Primary Agency if an independent investigation is being conducted, except if such notification would compromise the integrity of the independent investigation.
 - 1. A District Attorney Investigator assigned to participate as an Incident Investigator assisting or teamed with a Primary Agency Incident Investigator will not be a member or participant of an independent District Attorney investigation unless the Primary Agency is notified of such a dual role.
- (d) Determine if criminal liability exists. If so, prosecute as appropriate.

303.7 NOTIFICATIONS

Upon identifying an occurrence as being an "Officer Involved Incident", the Employing Agency shall make the following notifications as promptly as possible:

- (a) Intra department, as required by that agency's procedures;
- (b) Primary Agency (If different from the Employing Agency); and
- (c) District Attorney's on call investigator (via County Communications).

The Primary Agency shall make the following confirmations and notifications as promptly as possible:

- (a) Confirm that the District Attorney's on call investigator has been notified.
- (b) Upon confirmation of a fatality, the Coroner's Office.

303.8 SCENE PROCEDURES AND SECURITY PENDING ARRIVAL OF INVESTIGATORS

Emergency life saving measures have the first priority. If a person is transported to a medical facility with injuries, an officer should accompany that person in the same vehicle for the following purposes:

- (a) Preserve, safeguard and maintain the chain of evidence.
- (b) Obtain a dying declaration if appropriate, witness and document any spontaneous statements made to medical staff.
- (c) Maintain custody if the person is under arrest, ensuring the preservation of his/her clothing and possessions.
- (d) Provide information to and from the medical personnel. (If airlifted, immediate response to hospital is required.)

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Pending arrival of the primary agency and incident investigators, the scene(s) should be secured immediately, with a perimeter established for each scene a sufficient distance away to safeguard evidence.

- (a) Access should be limited to only those who must enter for official reasons.
- (b) When not needed for life saving efforts, entry by fire and ambulance crewmembers should also be limited to those whose presence is necessary.
- (c) A log, started as soon as possible, should be kept of the identities of all persons entering the scene, the time of their entry and exit, and the reason for the entry of each.

Whenever possible all witnesses and involved officers should be separated as soon as practical after the incident to ensure that statements and recollections of events are independent.

In cases of a death in a jail or detention facility, all persons, including prisoners, who may have witnessed events leading up to the death shall be identified and separated pending interviews by investigators.

Ultimately, the Primary Agency has the responsibility for securing and processing the crime scene, including the involved officers.

- (a) Evidence collection, witness coordination and general crime scene processing will be under the authority and follow the procedures of the Primary Agency. The Primary Agency may defer its investigative authority to the Employing Agency.
- (b) Physical evidence at the scene which is in danger of being contaminated, destroyed or removed must be promptly and effectively observed, recorded and then protected for subsequent collection.

303.9 INCIDENT INVESTIGATION VS. ADMINISTRATIVE INVESTIGATION

This protocol is intended as an interagency guideline concerning the Incident Investigation (as defined on page 1 as a criminal investigation) of officer involved incidents. This protocol is not intended to address issues concerning the administrative investigation of the incident.

- (a) The administrative investigation is the function of the agency employing the involved officer and will include administrative and non-criminal matters that are not within the scope of the Incident Investigation.
- (b) At the onset of the investigation of an incident, there must be an immediate and clearly defined distinction between the Incident Investigation and the Administrative Investigation.

The agency employing the involved officer, whether it is the Primary Agency or not, has an interest in the outcome of the Incident Investigation and may utilize the results of that investigation for its own non criminal purposes (e.g., determination of possible violations of departmental regulations; establishing suitability for duty; training; for use in civil suits or administrative claims brought by or against the agency, etc.).

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303.10 INTERVIEWS WITH PEACE OFFICER AND CUSTODIAL OFFICER EMPLOYEES

Interviews with peace officer and custodial officer employees should be conducted by the investigator(s) from the Primary Agency. The Primary Agency will determine who will participate in the interview of any involved officer(s) or witnesses and where the interview(s) will take place.

- (a) Interviews of the officer(s) involved or witnesses to an Incident should be tape-recorded.
- (b) The assigned District Attorney investigator and Employing Agency representative, if not physically present during the interview, will be permitted to monitor the interview or have immediate access to any tape recording made of the interview.

If, prior to or during the interview, it is deemed that the involved Officer may be charged with a criminal offense, and the interview becomes custodial, the officer shall be immediately informed of his/her constitutional rights pursuant to the Miranda Decision.

To ensure the voluntariness of an interview with an involved officer, that has not reached the level of a custodial interrogation, the Incident Investigator may wish to advise him/her as follows:

- (a) The involved officer is not in custody and is free to leave the interview.
- (b) The involved officer is not obligated to answer incriminating questions, and answers that are given may be used against him/her in court.

The involved officer may consult with a representative prior to being questioned by the Incident Investigators. Some or all of these considerations may be applicable:

- (a) The consultation should not be allowed to materially impede the investigation.
- (b) The representative should be permitted to consult with only one involved officer at a time.
- (c) To ensure the integrity of each interview, it is important that recollections and other comments about the Incident not be relayed through such representatives among the interviewees, officers involved, any witness officers, and civilian witnesses.

303.11 INTOXICANT TESTING

If the incident Investigators determine that a peace officer's state of sobriety is relevant to the Incident Investigation, they shall proceed as they would with any civilian person in a similar situation. Their options are to:

- (a) Obtain a blood sample for alcohol testing, and/or urine sample for drug testing, by obtaining the officer's valid consent;
- (b) Obtain the blood sample for alcohol testing and/or urine sample for drug testing incidental to the arrest of that person for a crime; or
- (c) Obtain the blood sample for alcohol testing and/or urine sample for drug testing pursuant to a search warrant.

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In the event appropriate physiological samples are not obtained from a peace officer as part of the Incident Investigation, the Employing Agency (whether or not it is also the Primary Agency) may wish to obtain such sample(s) for administrative employment related purposes. The options are to:

- (a) Obtain the sample(s) with the employee officer's valid consent; or
- (b) Obtain the sample(s) by ordering the employee officer to provide such sample(s) based upon the employer employee relationship.

Departments may establish administrative policies regarding intoxicant testing of any employee involved in an incident.

- (a) If the Employing Agency asks for a physiological fluid sample for administrative purposes after the Incident Investigators have either been unable to obtain a sample or have decided against obtaining one, the Employing Agency will be accommodated as much as possible. The Employing Agency's efforts to obtain a sample should not interfere with the Incident Investigation.

An employee officer may volunteer to provide a physiological fluid sample for intoxicant testing even if the Incident Investigators and Employing Agency have not ordered one. Similarly, a person from whom the Incident Investigators or the Employing Agency has taken a sample, may wish to have a second sample taken for independent testing. Such requests should normally be accommodated, with the understanding that the employee officer will bear any expense for sample collection and testing.

303.12 AUTOPSY

At least one of the primary Incident Investigators shall attend the autopsy. A member of the District Attorney's staff may also be present.

- (a) The Incident Investigators (evidence collection team) have the responsibility for collection and documentation of physical evidence at the autopsy.

The pathologist should receive a full and complete briefing prior to the post mortem examination. The briefing should include all information known at that time which may be relevant to the establishment of the cause, manner and means of decedent's death. The Incident Investigator(s) and a member of the evidence collection team should be present at the briefing.

303.13 NEWS MEDIA RELATIONS

A representative of the Primary Agency is in the best position to comment about the facts of the case and the progress of the investigation. When multiple agencies are involved or have knowledge of an Incident, the following information release guidelines should be followed:

- (a) The Primary Agency will assign a particular individual to be the sole contact with the news media to manage the release of information and to minimize interruptions to incident investigators. If this is not feasible, a particular job assignment (e.g., Watch Commander) should be designated.

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- (b) If Incident Investigators determine that the release of a specific piece of information would materially jeopardize the investigation, they shall notify those agencies possessing that knowledge of the hazards of releasing it.
- (c) Agencies and individuals that are not well informed and intimately involved with the investigation's results and progress should not make statements to the press. As in all other instances, care must be taken to insure that intentionally misleading, erroneous or false statements are not made.
- (d) The interest of the public's right to know what occurred must be balanced with the requirements of the investigation and with the right of a defendant to receive a fair trial.

Other agencies may also be contacted by the news media for information about the Incident, including:

- (a) The employer employee relationship.
- (b) Information which has been cleared for release by the Primary Agency.

The District Attorney

- (a) The District Attorney will not disseminate the following:
 1. An uncharged individual is "under investigation";
 2. A suspect's statement, confession or refusal to interview;
 3. The subject of any gag order;
 4. The prior criminal history of the suspect or defendant unless it is part of the criminal pleading or crime under investigation;
 5. Result of examinations;
 6. Pending a search warrant;
 7. Any statement that has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) In cases presented to the Grand Jury, if no indictment is returned, only the finding "not a true bill" will be revealed in relation to discussion about the closed courtroom session or secret proceeding. If an indictment is returned, the grand jury matters are nonetheless confidential until the defendant is arrested or an arrest warrant is issued and the district attorney discloses the existence of the warrant to assist in the apprehension of the defendant.
- (c) In cases that are filed, the judicial record (grand jury transcript or supporting probable cause document such as a police report) is open to the public. Additionally the District Attorney may disseminate the following:
 1. Name of defendant

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2. Area of residence
3. Occupation
4. Physical description
5. Age
6. Sex
7. Time, date and location of arrest
8. Factual circumstances of the crime
9. Amount of bail
10. Location held
11. All charges including warrants
12. Parole or probation holdS
13. Schedule and explanation of the judicial process and
14. Penalty range

The Coroner's Office

Information obtained from the Incident Investigators or from the involved agencies will not be released by the Coroner's Office without prior clearance from those agencies. Release of information will generally be limited to the following:

- (a) Autopsy findings, including the condition of the deceased, the cause of death, and toxicology test results, after the involved agencies have received this information.
- (b) The identity of those present at the autopsy, including the identity and affiliation of the pathologists(s).
- (c) The general nature of further medical testing or medical investigation to be done.
- (d) Information obtained by Coroner's investigators directly from medical sources, the deceased's family members, or witnesses.
- (e) The role of the Coroner's Office in the investigation of death, in general terms.

303.14 ACCESS TO REPORTS AND EVIDENCE

Material created or collected by the Primary Agency's Incident Investigators as well as by any other assisting agencies, will be made available in a timely manner to those agencies which have a "need to know" and which are legally authorized to receive the information. The material may include:

- (a) Reports written and collected.
- (b) Physical evidence obtained.

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- (c) Photographs and diagrams.
- (d) Tape recordings.

The agencies with an interest in the Incident Investigation may include:

- (a) Investigating agencies.
- (b) The employer of any involved peace officer.
- (c) The District Attorney.
- (d) The Crime Laboratory.
- (e) The Coroner's Office.

303.15 GRAND JURY PROCEEDINGS

All deaths apparently caused by a peace officer in the performance of duty are reviewed by the Santa Clara County Criminal Grand Jury in a formal confidential hearing where witnesses are examined under oath.

- (a) In certain rare circumstances the hearing may be conducted in public, pursuant to Penal Code, § 939.1.

All such death investigations should be presented to the District Attorney's designee (generally the assistant district attorney supervising the homicide team) for review. It is not unusual that follow-up investigation is requested before a grand jury hearing is scheduled.

When a grand jury hearing is scheduled, the assistant district attorney will coordinate the preparation of the case for presentation with the case investigators.

- (a) Subpoenas will be issued and delivered to the case investigators for service.

Any witnesses called before the grand jury may arrange for an attorney to be present outside the hearing room to give the witness legal advice. However, such attorney may not be present in the grand jury hearing room.

- (a) If the witness wants legal advice during the course of giving testimony he/she must request the opportunity to consult the attorney outside the hearing room.

During the hearing only the members of the grand jury, the assistant district attorney, the court reporter and the witness being examined are permitted to be present. The grand jurors will be given the opportunity to ask questions of each witness when the assistant district attorney has completed the initial examination. At the conclusion of the presentation of the evidence the assistant district attorney will instruct the grand jury on the applicable law, present a summary of the case and answer any questions the jurors may ask. If a question calls for the presentation of additional evidence, that evidence will be formally presented. When the evidentiary hearing is concluded the assistant district attorney and court reporter will leave the room and the grand jurors will deliberate in private.

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If twelve or more of the nineteen grand jurors vote to find an indictment the foreperson will sign and date the indictment prepared by the district attorney and present it to the court. The court will order the indictment to be filed and a bench warrant to be issued for the officer's arrest. If an indictment is not found the proceedings are terminated.

The court reporter's record of the proceedings may be transcribed only when an indictment is found. If no indictment is found the officer(s) that were the subject of the grand jury hearing may request the issuance of a declaration of no indictment, pursuant to Penal Code, § 939.91. The declaration will state that a specified charge (generally murder or manslaughter) against said officer(s) was investigated and that based on the evidence presented the grand jury could not find an indictment. The court must approve the issuance of such a declaration.

303.16 TRAINING

All affected agencies are strongly encouraged to provide training to their members regarding these guidelines, including:

- (a) The responsibilities of the incident investigators and first responders to the scene of an Officer-Involved Incident;
- (b) The investigative process an involved officer will experience; and
- (c) The psychological implications experienced by the involved and witness officers as the result of an Officer-Involved Incident.
- (d) The employing agencies are encouraged to provide some form of critical incident stress debriefing to their affected employees.