REPORT OF THE ERICKSON COMMISSION
SEPTEMBER 1997

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INTRODUCTION

On June 26, 1996, Denver District Attorney Bill Ritter announced the appointment of an advisory commission, the purpose of which would be to review the policies and procedures of the Denver Police Department and the District Attorney for the Second Judicial District for determining whether the use of deadly physical force by police officers should result in criminal charges.[1] More specifically, the commission was asked to focus on incidents in which someone is shot by a Denver police officer.[2] Although the current protocols for handling police shootings have existed in substantially the same form for more than a decade, they had come under increasing criticism, reaching a peak following the decision not to file criminal charges in the shooting death of Jeffrey Truax by two off-duty Denver police officers in March 1996. The commission was charged with looking for ways to improve the

[1] As the report makes clear, *see* **Conclusions And Recommendations: I. Limitations of the Criminal Law**, p. 12, criminal sanctions must be distinquished from civil or administrative consequences for the use of deadly physical force, which may be more appropriate and more effective in certain circumstances but consideration of which is expressly beyond the scope of this report.

[2] The term "deadly physical force" is a legal term of art in the Colorado Criminal Code, *see* §18-1-901(3)(d), 8B C.R.S. (1996 Supp.), which is limited to force that actually produces a death. While this limitation is of significance in defining crimes and defenses in Colorado, the commission considered it artificial and unhelpful for its inquiry to distinguish force that actually results in death from force that is both capable of producing and intended to produce death. Whether or not someone who is shot by a police officer ultimately dies, the criminal investigation of the shooting should involve similar considerations. While internal police regulations require an inquiry every time an officer fires his weapon, incidents that do not result in the wounding or killing of anyone do not present the same issues of criminal liability and therefore were not included within the scope of this inquiry.

fairness and effectiveness of the investigative and charging process and strengthen both police procedures and public confidence in police officers.

The creation of the commission was a joint project involving the City and County of Denver, the political entity with authority over the Denver Police Department, and the District Attorney for the Second Judicial District, the elected state official with the authority to prosecute violations of state criminal statutes committed in Denver. Retired Colorado Supreme Court Justice William H. Erickson was appointed to chair the commission, which was to include seven other members: two appointed by Denver Mayor Wellington Webb, two by the Denver City Council, two by the District Attorney Bill Ritter, and one by the committee chair. A diverse group was ultimately chosen, with backgrounds ranging from law enforcement to business, public administration, and politics, which included elected and former elected officials, business and community leaders, and public servants, whose names and biographies are set forth in Appendix I.

Over the course of more than a year, the commission met in closed sessions 11 times, and conducted two open sessions, one televised in the City Council Chambers to receive input from concerned citizens and one for comment from police officers. With the help of the commission's reporters and a paralegal, it gathered and surveyed the pertinent Colorado statutes and Denver ordinances, as well as national standards on criminal justice and police accreditation, and key literature in the field. The commission had the full cooperation of both

the Denver Police Department and the Denver District Attorney and heard presentations by members of the police department and the district attorney's office. It not only studied local policies and procedures but also those of many other police departments of comparable size and district attorney offices from around the country with varying approaches to the problem of evaluating police shootings. With the assistance of William Pizzi, a professor at the University of Colorado School of Law and a well-recognized scholar in the area of comparative criminal procedure, who acted as consultant to the commission, the commission was able to digest and compare the various features of those other jurisdictions. *See* Appendix II.

During the pendency of the study, 11 officer-involved shootings occurred, giving commission members the opportunity to observe the actual use and implementation of the procedures from the initial, on-scene investigation through the final decision of the district attorney, and to consider a number of investigations and clearing letters. On the basis of information already available to the public, the commission also discussed the Truax shooting investigation[3] which played a significant role in initiation of the study, and the

[3] Although the controversy over the decision not to file criminal charges in the shooting death of Jeffrey Truax played a role in the creation of the commission and was the subject of a number of comments at the public hearing, neither it nor any other specific shooting investigation is reviewed in this report. With regard to the Truax shooting in particular, the filing of criminal charges was rejected after investigations by both the Denver District Attorney and the United States Attorney. In addition, the file was examined by Denver's Public Safety Review Commission; no petition pursuant to §16-5-209, 8A C.R.S. (1986), to force prosecution or have a special prosecutor appointed has been filed; and the governor has not chosen to direct the state attorney general to

investigation of the fatal shooting of Benny Atencio in August 1995, questions about which were brought to the commission's attention by a member of Denver's Public Safety Review Commission.

HISTORICAL PERSPECTIVE

The procedures currently being followed by the Denver police and district attorney to investigate and decide whether to file criminal charges in cases of officer-involved shootings have been substantially in place since the early 1980's. They were agreed upon by the two offices in an attempt to create a uniform method of effectively investigating, charging, and making public the details of every incident in which a police officer shoots someone in Denver. While the techniques for conducting an investigation and the standards for filing criminal charges are the same as for other potential crimes, specific protocols have evolved to investigate and review police shootings, which include the involvement of special personnel, procedures, and provisions for making the results of the investigation public.

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investigate and file criminal charges. As it has done with other specific shootings incidents, and because survivors of the victim are currently proceeding with civil litigation in the federal court, the commission declines comment about the investigation or facts of this case.

According to Denver Police Department regulations, any police shooting is immediately reported to the police radio dispatcher, who notifies all persons on the Police Shooting Call-Out List. This includes the Division Chief of Investigations, Captain of the Crimes Against Persons Bureau, Captain of the Crime Lab, On-Call Chief Deputy District Attorney, Homicide Detectives, Crime Lab Technicians, Division Chief of Patrol, District Commander of involved area, and the involved Officer's Division Chief and Commander. The Manager of Safety, Chief of Police, and Public Information Officer are also notified of the shooting. By memorandum of understanding, the on-call Chief Deputy District Attorney in cases of officer-involved shootings is one of three individuals designated by the district attorney -- the Assistant District Attorney, the Chief Deputy District Attorney acting as liaison between the offices, or a back-up Chief Deputy, hand-picked for police-shooting duty. The district attorney is to be personally notified immediately, and at least one, but usually two, of his designated deputies will participate in the on-scene investigation.

The investigation is conducted under the direction of the Division Chief of Investigations with the direct participation of the On-Call Chief Deputy District Attorney at all stages of the investigation. Standard investigative procedures are used at all stages of the investigation, and there are additional specific procedures in the Denver Police Department's Operations Manual for cases involving shootings by peace officers to insure the integrity of the

investigation. Among other things, the procedures call for the immediate separation and sequestration of all key witnesses and all involved officers. This is done in an effort to insure totally independent statements and to avoid even the appearance of collusion. They further require, for example, that the involved officer's weapon be secured and retained until all laboratory testing is completed.

Unless he is for some reason unavailable, the Chief Deputy District Attorney acting as police liaison, who has additional training with firearms, the use of deadly force, and other police procedures, will participate in the investigation at the scene of the shooting, often assisted by the Assistant District Attorney or the other designated police-shooting Chief Deputy. In this capacity the district attorneys are not only available to offer legal advice but also have responsibility for observing the police department investigation and suggesting further investigation where they consider it warranted. In addition to assisting in the investigation and helping preserve evidence through compliance with legal requirements, district attorney participation at this early stage permits first-hand observation of the police investigation and awareness of the extent to which procedures designed to insure the integrity of the investigation are or are not being followed.

Key witnesses and the involved officers are returned as soon as possible to the Crimes Against Persons Bureau for videotaped interviews. The representatives of the district attorney are available for legal advice but are also expected to participate in the actual

questioning of witnesses since they are most knowledgeable about the elements of the statutory crimes and defenses that define the elements of a crime in this jurisdiction. In addition, the opportunity to observe the interviews and the surrounding procedures is considered helpful in evaluating the validity and competence of the interrogation. Those observations can affect the weight to be given any particular statements or, in some circumstances, even suggest the need for follow-up interviews or further investigation.

After the police investigation is concluded, the entire case file is presented to the district attorney to determine whether any criminal charges should be filed. In addition to the portions of the investigation in which the district attorney's office already participated, the completed investigation may include follow-up interviews, the testing of physical evidence such as firearms, gun shot patterns, and blood by the crime lab and, in the case of a homicide, the autopsy report, including lab work and specialized toxicology testing. While the district attorney's office is dependent to a large extent on the investigation of the Denver Police Department, Coroner's Office, and Crime Laboratory for the materials upon which it must base its charging decision, this procedure permits district attorney representatives to observe and participate in much of the investigation. If the district attorney's office considers it helpful, it has the capacity to pursue additional evidence on its own. Ultimately, the district attorney must evaluate the available evidence and decide whether there is sufficient evidence to prove the commission of a crime.

While the use of the grand jury is not mandated by policies of the district attorney, it remains a viable investigative option, which the district attorney has used on occasion. When the district attorney decides not to present the case to a grand jury, he makes a determination whether to initiate criminal proceedings by filing a direct information. In making that decision the Denver District Attorney indicates that he follows the standards and guidelines approved by the American Bar Association and the National District Attorney's Association. He considers the evidence that would be admissible in a criminal trial and the applicable crimes as defined by Colorado statutes and files only if he believes that there is a reasonable likelihood that he can prove all of the elements of the crime charged, without any justifiable lawful defense or excuse, to a jury of twelve, beyond a reasonable doubt. This is the same case filing standard that the district attorney's office applies to all charging decisions. With regard to officer-involved shootings, the elected district attorney always makes the filing decision personally.

In assessing the sufficiency of admissible evidence to support a conviction and the probability of actually getting a conviction, the district attorney must consider the potential defenses to those crimes. It is, of course, a defense to a crime that the accused person did not commit the elements of the crime at all. However, the Colorado Criminal Code also contains defenses, called "affirmative defenses," which set out particular conditions or circumstances in which one is considered to be excused or justified for comitting the act that would

otherwise be a crime. In order to support a conviction, there must not only be sufficient evidence to prove beyond a reasonable doubt that the defendant committed all of the elements of the crime but also that he did *not* do so under circumstances that excuse or justify his behavior. Generally, a person is justified in using varying degrees of physical force against another if he reasonably believes it to be necessary to protect himself or a third person from injury. Peace officers are additionally justified in using varying degrees of physical force to effect arrests or prevent escapes. Very often in cases involving police shootings, the charging decision turns on an assessment of the reasonableness of the officer's decision to shoot.

If criminal charges are not filed, the district attorney will communicate that fact along with an explanation of his rationale for not filing by letter to the Chief of Police and other appropriate officials. This letter is intended to make clear the district attorney's assessment of the evidence in terms of the applicable filing standard and to explain why he considers the filing of criminal charges inappropriate. It does not, however, exonerate the officer or have any effect on further departmental review or other legal or administrative action. The district attorney's letter explaining his filing decision is at the same time made public, and the entire case file, including video and audio tapes of witness interviews, are made available for inspection by the public at the district attorney's office, unless a criminal case is pending against the party who was shot. In that event, in order to protect that party's ability to receive

a fair trial, Colorado statutes and rules permit some portions of the file to be opened to the public only upon conclusion of the criminal prosecution.

METHODOLOGY AND OVERVIEW

The commission has maintained an analytic point of view throughout. In addition to studying the approaches of other jurisdictions, it has taken note of comments and criticisms from the media, the public, victims and survivors of victims of past police-shooting incidents, and from police officers. Rather than attempt to judge the validity of complaints about past specific incidents, however, the commission has considered the criticisms themselves as important data. Rather than deal with personalities or the acts of particular individuals, the commission has attempted to analyze systematically the existing practice in Denver and to identify those of its features that have been the source of criticism. While criticism does not by itself mean that the existing practice and procedures are flawed and must be changed, the mere fact of the criticism is something to be addressed.

The commission has identified three important elements of an investigation and charging process. Firstly, it must be competent and effective. Nothing will be gained by suggesting changes that detract from the ability to detect what actually occurred, assess liability, and preserve the evidence necessary to prove it. Secondly, it must be fair and objective. Regardless of technical capability, if the process is subject to bias or interest, against or in favor of anyone, an objective evaluation of the incident is still thwarted. Lastly, it must be

apparent to the public (and the police) that the process is fair and effective if they are to have confidence in it.

In seeking solutions the commission has been particularly mindful of balancing these three elements, as well as accounting for other practical limitations. It has tried to avoid sweeping proposals, with unforseeable consequences to the system as a whole that are unlikely ever to be implemented or to have a positive impact. It has also tried to avoid suggestions that can help to solve one problem only by creating others. While there is obviously no single, optimal way to achieve a complex set of goals, the commission has suggested systemic changes designed to improve the process as a whole.

After studying the way in which officer-involved shootings have been handled in Denver, and comparing it with available data and regulations from a number of other jurisdictions, it seems clear that Denver has done much in the last decade and a half to insure that officer-involved shootings are effectively, fairly, and openly investigated and evaluated. While the ultimate charging decisions in several particular cases have been controversial, the commission has seen nothing to seriously question the fairness or effectiveness of the process. Similarly, there is no evidence to suggest that the use of deadly force by the Denver police is on the rise or that the process for evaluating the criminality of police conduct has changed or become less effective.

The commission has, however, identified aspects of current practice that have subjected

it to criticism. The commission's suggested solutions, which appear throughout the discussion of the various stages of the investigative and charging process, revolve primarily around two basic themes: the need for a greater formality and documentation in both the investigation and decision-making process and the need for quicker release of information, which probably requires a more timely filing decision. Ironically, efforts by the police and district attorney since the early 1980's to elevate the handling of police shootings to a special status, involving participation by the most senior personnel and special procedures to make public the results of the investigation and reasons for the charging decision, have also unintentionally had the effect of delaying the final filing decisions and fostering a kind of high-level informality that encourages speculation about special treatment.

CONCLUSIONS AND RECOMMENDATIONS

I. LIMITATIONS OF THE CRIMINAL LAW.

The criminal law, by its very nature, can never be as effective a mechanism for shaping police behavior and limiting the use of deadly force in law enforcement as internal policies, administrative regulations, and training programs that reflect the values and priorities of the community.

The criminal law of every American jurisdiction recognizes a justification in some form or another for the use of force in self-defense and for the use of force by law enforcement officers in the execution of their duties.[4] The precise formula for legitimizing the use of

[4] *See, e.g.,* 2 Paul H. Robinson, *Criminal Law Defenses* §§ 132 and 142 (1984).

deadly force by law enforcement officers has, however, been much debated. Not until 1985 did the United States Supreme Court, in *Tennessee v. Garner*,[5] depart from the common-law rule allowing the use of whatever force was necessary to effect the arrest of a fleeing felon and hold it to be constitutionally unreasonable for an officer to use deadly force to effect an arrest unless the suspect posed a threat of serious physical harm, either to the officer or to others. Even this limitation, however, continues to permit the use of deadly force where, for instance, the suspect has threatened the officer with a weapon or the officer has sufficient reason to believe that the suspect committed a crime involving the infliction or threatened infliction of serious physical harm.

[5] 471 U.S. 1 (1985)

Virtually identical limitations on the use of deadly force were already acknowledged as appropriate by many law enforcement agencies across the country and were in fact required for accreditation by the Commission on Accreditation for Law Enforcement Agencies.[6] Unlike many other states, Colorado narrowed the special justification for the use of deadly force by police officers long before it was required to do so by the United States Supreme Court.[7] In light of the restrictiveness of the Colorado Criminal Code, and the corresponding training and indoctrination of police officers, it is not surprising that the use of deadly force to apprehend non-dangerous criminals has not been a problem in Denver as it has been in some other jurisdictions. To the extent that police shootings in Denver have been controversial at all, the controversy has involved, almost exclusively, the reasonableness of the officer's belief that he had to shoot to defend himself or someone else.

Condemnation of behavior by police officers as a crime is a drastic measure. Criminal sanctions include the strongest force that official agencies can bring to bear on individuals for their conduct.[8] For the criminal use of deadly force against another in this and most other states, one can suffer not only the stigma of a felony conviction but also a substantial loss of

[6] *See* Standards for Law Enforcement Agencies 1-2 (Commission on Accreditation of Law Enforcement Agencies, Inc.,1983).

[7] *See* §18-1-707, C.R.S. 1973.

[8] *See* Model Penal Code § 1.02 commentary (American Law Institute, 1985).

liberty. In recognition of the drastic nature of the criminal law, it is therefore reserved for conduct that *unjustifiably and inexcusably* inflicts or threatens substantial harm to individual or public interests.[9] Conduct that would otherwise be criminal is generally considered justifiable if it serves a legitimate purpose, and even if the actor is mistaken, as long as his belief in the necessity of his action is reasonable, his conduct is usually considered at least excusable. The criminality of the use of deadly force against a person, unless clearly unjustified, therefore ultimately turns on the actor's belief in the necessity of his conduct for legitimate purposes and the reasonableness of that belief.

Also because of their drastic nature, criminal or penal sanctions are limited to those cases in which it can be clearly proved that the harm was *unjustifiable and inexcusable.* As a matter of constitutional principle, before one is subjected to criminal sanction, the state must meet the most demanding burden of proof, in a process in which the charged person is entitled to the greatest procedural protections and privileges known to our legal system. Ultimately, the policy choice that is embodied in our constitution limits the use of criminal sanctions to those individuals whose actions are proved beyond a reasonable doubt to the satisfaction of a unanimous jury not only to have been otherwise criminal but also to have

[9] *See, e.g.,* Model Penal Code § 1.02(1)(a).

been both unjustified and inexcusable.

Because criminal sanctions are by their very nature limited to the most clearly provable and most harmful or offensive conduct, the criminal law can virtually never be effective as the primary tool for regulating police-citizen relationships. The criminal law obviously plays an important role in punishing police officers, like other citizens, who commit common crimes. And to the extent that police officers have special status and authority, the criminal law has a special duty to insure that they do not take advantage of their position to commit or prevent the detection of criminal behavior. But when police officers are ostensibly acting in their official capacity to detect and prevent crime, the criminal law will inevitably be limited to providing a sanction against purposeful misconduct or gross deviations from their training and procedures.

Unlike any other segment of our society, law enforcement officers are not only permitted to, but are actually charged with,using force when necessary to enforce the law. Once engaged in a confrontation in which someone has or reasonably appears to have committed a serious crime, or to be capable of and intent upon inflicting serious injury, a police officer's often split-second decision to use deadly force cannot ordinarily be proved beyond a reasonable doubt to have been unreasonable. The criminal law is both inappropriate and inadequate to guide police behavior, except at the very fringes of acceptability. As a general regulatory device, it will inevitably be ineffectual and unable to satisfy the expectations of

the media and the public.

To the extent that they are available at all,[10] nationwide statistics have generally borne out the fact that comparatively few officers are prosecuted for using deadly physical force and fewer still are ever convicted. In their treatise on the use of deadly force by law enforcement officers, Geller and Scott note that out of 477 shootings, 174 of them fatal, by deputies of the approximately 8,000-member Los Angeles County Sheriff's Department from 1979 through September 7, 1991, criminal charges were filed against only one deputy, who falsely reported a disturbance at a home in order to justify a raid, kicked the door down, and shot a 22-year-old, pregnant woman holding an unloaded rifle, wounding her and "killing" her unborn fetus.[11] A 1975 study cited by Geller and Scott found criminal prosecutions in

[10] For a detailed discussion of the need for and difficulties associated with the collection of reliable data concerning the use of force by police, as well as current efforts to collect such data, *see* National Data Collection on Police Use of Force (United States Department of Justice and National Institute of Justice, April 1996).

[11] William A. Geller and Michael Scott, Deadly Force: What We Know -A Practitioner's Desk Reference on Police-Involved Shootings *292-93* (1992).

only one of every 500 cases of fatal shootings by police in the 1970's.[12] Among the reasons offered as possible explanations for these figures, the author of the study noted not only the fact that juries are unlikely to convict law enforcement officers who use force against criminal suspects but also the fact that police shootings only rarely even present close questions because departmental policies typically already impose more stringent standards on the use of force than state criminal law.

[12] *Id.*, at 293

While the commission believes there are important steps that can be taken to enhance public confidence in the administration of the criminal law in cases of officer-involved shootings, which are reflected in its recommendations, it feels strongly that any significant change in the use of deadly physical force by Denver police officers, should a change be desirable, can occur only as the result of changes in internal policies, procedures, and training, and their enforcement through administrative action.[13] The criminal law establishes minimal, threshold conditions, without which the use of deadly force is subject to the most severe penalties the government can impose. It in no way prohibits police departments and the governments which they serve from making more subtle distinctions with regard to the acceptability of the behavior of its officers by policies and administrative regulations. By comparison with the criminal law, internal policies and procedures can more effectively

[13] The devices for regulating and controlling police use of deadly force referred to here, as well as other suggestions of the commission for formalizing police relationships with the district attorney and media and regulating the conduct of the investigation itself, necessarily imply regular and immediate police access to specialized legal advice. For more than a quarter of a century, The International Association of Chiefs of Police has recommended the existence of separate police legal units to function essentially as in-house counsel for metropolitan police departments. *See* 1972 IACP Publication, "Guidelines for a Police Legal Unit." The concept has never been to make the police department independent of the office that provides legal advice to the municipality, but merely to give the police, because of their peculiar needs, direct access to a legal advisor who is part of the municipality's legal office. Especially because the district attorney is (and should be) primarily concerned with the prosecution of criminal cases rather than the operation of the police department, the commission recommends that a separate police legal unit be reestablished for the Denver Police Department as part of the City Attorney's Office to provide it with the immediate and continuous access it needs for legal advice concerning matters other than the conduct of a particular criminal investigation.

regulate the conduct of police officers in particular contexts, like motor vehicle chases, shooting at vehicles, the use of violence against juveniles, and the scope and authority of off-duty officers, and can do so with greater responsiveness to the changing values and concerns of the community.[14] Similarly, various administrative personnel actions can be more effective than the criminal law in dealing with questions of judgment.

It is beyond the limited scope of the commission's mandate and expertise to significantly contribute to the legal and philosophical debate over the limits that should be imposed upon police use of deadly force or to suggest specific policy guidelines regarding its use in this community. However, after critically considering the limits of the criminal law, it is the commission's considered opinion that if a gulf develops between community standards of acceptability and police practices involving the use of deadly force to enforce the law, it cannot be substantially narrowed by criminal prosecution. A problem of this nature, if it occurs, can ultimately be solved only by the creation of a culture within police ranks which reflects the community's choice of an appropriate balance between the value of human life and the need for aggressive law enforcement.[15] Further definition of criminal conduct is

[14] For example, it was recently reported that after Waco and Ruby Ridge, the Federal Bureau of Investigation overhauled its policy in hostage situations, permitting the use of deadly force only if agents or hostages face imminent death or serious physical injury. *See* Nancy Gibbs, *Special Report/The FBI: Under the Microscope*, Time, April 18, 1997, at 28, 35; *see also* John C. Hall, *FBI Training on the New Federal Deadly Force Policy*, Federal Bureau of Investigation Law Enforcement Bulletin, April 17, 1996, at 25.

[15] In an essay brought to the attention of the commission by a speaker at the public hearing,

solely within the province of the General Assembly and to a limited extent with the City Council.

II. THE INVESTIGATING AGENCY.

The Denver Police Department is the agency best situated to conduct the primary investigation into police-involved shootings, as it does with all other potentially criminal acts of violence in Denver, but by working in concert with

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David Bayley, a professor of The School of Criminal Justice at the State University of New York at Albany, cogently makes the case that excessive use of force by the police cannot be effectively deterred by reacting to the misconduct of individual officers without creating an "occupational atmosphere" that shapes collective and individual attitudes in ways that support (and demand) adherence to high moral and legal standards. Moreover, he asserts that what police have instinctively resisted as "civilian review" in the area of police misconduct is becoming routinely accepted with respect to operational matters where it focuses on policies rather than people. *See* David Bayley, *Getting Serious about Police Brutality* in Accountability for Criminal Justice 98 (Philip C. Stemming, Ed. 1995).

the Denver District Attorney to develop written protocols providing for greater participation and a more defined role for the district attorney's office in the initial investigation, it can enhance public confidence in the objectivity of the investigation.

A concern voiced by speakers at the public hearing, members of the press, and others who have been dissatisfied with decisions not to file criminal charges against police officers has been that in the case of officer-involved shootings, the Denver Police Department finds itself in the position of investigating members of its own organization. Although there is a suggestion or appearance of bias inherent in such a situation, the commission also considered the practical and political realities of any alternative and the need to insure that the effectiveness of the investigation would not unduly suffer for the sake of appearances. After comparing the advantages and disadvantages of having the initial investigation conducted by the Denver Police Department with any feasible alternative, the commission recommends that it continue to be the primary investigative agency in cases of shootings by Denver police officers, but that the investigation involve an increased participation by the district attorney's office and be subject to a distinct review that is separate from the evaluation of the evidence for charging purposes.

The Denver Police Department is the agency charged by law with the duty to enforce the state's criminal law in the city, and it is clearly the agency best situated to conduct a thorough, effective, and timely investigation in Denver. It is not only trained and equipped to conduct serious criminal investigations in this jurisdiction, but is in fact the only police

agency in the jurisdiction, and it is at least arguably the best trained and equipped criminal investigative agency in the state. Because of its unique size in the region, it has the necessary manpower, logistical support, including its own laboratory facilities and expertise, which are unmatched by any other local agency in the state, and perhaps most importantly, the command and control structure necessary to immediately direct and manage a substantial and complicated investigation in this jurisdiction. Moreover it is the only police agency that is directly responsive to the civilian authority of the city, which in turn is directly responsive to the Denver voters.

No other police agency in Colorado has comparable investigative and technical capabilities.[16] Even if another agency could be present and ready to operate in this jurisdiction on a moments notice, as the Denver Police Department is, none would have comparable personnel or resources immediately available to devote to the investigation.[17] Nowhere in the state is there another agency with the collective experience and expertise of

[16] As an example of the importance of a police agency's size in determining the extent and sophistication of the capabilities it can be expected to have, the National Accreditations Standards, which contain 436 separate standards, categorize agencies by size into four levels, and with regard to each standard, specify whether it is mandatory, other-than-mandatory, or not applicable to each level. Standards for Law Enforcement Agencies (Commission on Accreditation for Law Enforcement Agencies, Inc., 3d Ed. April 1994).

[17] During the time the commission was engaged in its work, some officer-involved shootings in Denver received the immediate commitment of 100 or more police officers to handle various aspects of the investigation and crime scene control, depending on the location and circumstances of the shooting.

the Denver Police Homicide Bureau in investigating homicides and serious assaults. Although perhaps not insurmountable, substantial legal, policy, and budgetary problems would have to be overcome in "importing" a law enforcement agency from outside the political jurisdiction of Denver to serve as the primary investigating agency.

Aside from the state patrol, which by statute and training has a limited, traffic-related role in Colorado, the state has no police agency with statewide authority. Therefore any other police agency could legally operate in the City and County of Denver only in assisting the Denver Police Department or with express statutory authority. The presence of a "foreign" police agency would necessarily involve policy problems concerning qualifications, scope of authority, command and control, and the ability to interface with support services and equipment. Finally, budgetary questions would have to be resolved. It is clear that no other county or municipality in the state has a comparable number of officer-involved shootings to make an "exchange" of services in this regard practicable, and certainly none would be in a position to absorb the costs of such a service.

In the investigation of any shooting, but especially an officer-involved shooting, which typically involves important nuances of timing and perception, the ability to respond to the scene expeditiously and with qualified personnel is crucial. Physical realities are such that any attempt to replace the Denver Police Department as the primary investigative agency for

officer-involved shootings in the city would have a substantial impact on the effectiveness of the investigation. And for that cost, not a great deal would be gained. Denver is a large city with a professional police force of more than 1400 officers. There is little likelihood that officers conducting an investigation will have a close personal relationship with the officers they are investigating, and if that situation were to occur, rules governing conflicts of interest should require removal of the affected officer. In any event, given the size of the department and the impersonal nature of its procedures, there is no realistic chance that particular officers could control an investigation to such an extent that evidence could be purposefully altered, destroyed, or covered up. The appearance of bias or interest arises more from the general sympathy that police officers might be expected to exhibit for a fellow officer, and therefore changing the investigative agency would at best improve appearances only minimally. Despite the recurring criticism, the commission has not encountered any specific complaint about the conduct of an officer-involved shooting investigation or any suggestion of how a different agency could have better or more thoroughly, fairly, or honestly conducted the investigation. The commission sees no realistic way for the initial investigation to be conducted by any agency other than the Denver Police Department without doing far more harm than good to the overall investigation and charging process.

Of the models from other jurisdictions studied by the commission, none suggested completely replacing the “venue” agency (the law enforcement agency in whose jurisdiction

the incident occurred) as the primary investigating agency. Of those jurisdictions using some form of multi-agency approach, all were motivated by an attempt to allow for the involvement of the "employer" agency (the agency by which the involved officer is employed), where it is different from the "venue" agency,[18] or to provide support for smaller or less experienced agencies that could benefit from the assistance of their neighbor-agencies.[19] All of the schemes examined by the commission that used a multi-agency approach also involved multi-agency judicial districts, making all of the participating agencies subject to the prosecuting authority of a single district attorney. Since the Second Judicial District and the City and County of Denver have the same territorial limits, there is no other law enforcement agency within the jurisdiction of the same prosecuting authority

[18] A primary model for the multi-agency approach, which has been copied by numerous other jurisdictions, is the "Officer-involved Fatal Incident Protocol" for Contra-Costa County, California, *See* Appendix V, which includes more than 20 member-agencies. It is a very formal and detailed protocol, which calls for an investigation by a task force consisting of the venue agency, the employer agency, the highway patrol (where applicable), and the district attorney's office. Rather than substituting another investigative body for the police agency within whose geographical jurisdiction the incident occurred, that venue agency always participates and has ultimate authority to decide irreconcilable investigative issues. When an officer-involved shooting incident involves an officer from the venue agency and is not within the jurisdiction of the highway patrol, the situation mimics what will always be the case in denver and calls for an investigation by the venue agency and the district attorney, substantially the same as recommended by the commission for Denver.

[19] A local example of this kind of multi-agency approach can be found in the Critical Incident Protocol of the 18th Judicial District. Including over 25 signatory-agencies from the four-county judicial district, this protocol is designed to provide investigative assistance and expertise, when *requested* by the agency in whose jurisdiction the incident occurred, through a Contra-Costa-like critical incident team, in order to avoid a serious drain on the resources of any one department.

that could participate in the investigation, with the exception of the office of the district attorney itself.

The current practice of using the Homicide Bureau of the Denver Police Department to investigate officer-involved shootings, with the immediate participation of senior members of the district attorney's office, is designed to make the greatest expertise available in the shortest time to maximize the thoroughness and validity of the investigation. Even the substitution of the Homicide Bureau for the Internal Affairs Bureau, which investigates other allegations of wrongdoing against police officers, is a recognition of the training and experience considered essential for this type of investigation.

The presence of the district attorney's office as early as possible during the investigation is important for two reasons. First, the district attorney can provide important legal advice about gathering and preserving evidence in a way that insures its later effectiveness in proving a criminal case. This is especially true of witness interviews, which are likely to provide the critical evidence in cases like these, which rest largely on the question of legal justification or excuse. But the presence and participation of another agency in the investigation, especially the representatives of the district attorney who will evaluate the investigation to make a filing decision, also provides a spot-check to insure that procedures are strictly followed and short-cuts are not taken, hopefully enhancing public confidence that the investigation was fairly conducted.

The district attorney's office and the police department in Denver have worked effectively in this way for many years. The success of this arrangement has allowed it to remain moderately informal, which ironically may now be detracting from the credibility of the investigation and may in fact contribute to allegations of favoritism and lack of objectivity. The commission therefore believes it to be important for the district attorney not only to continue the practice of immediately responding to the scene of officer-involved shootings but also for the police department and district attorney's office jointly to develop a more defined, written policy delineating, for example, the qualifications of those assigned to this duty, specifying the duties of the district attorney "shoot team," and formalizing the relationship with the police with regard to both command responsibility and respective duties.

The commission believes that the presence of the district attorney can be made more effective by creating a team of several trained staff members to attend officer-involved shooting investigations. The team should include a broad range of expertise. An increase in the actual number of participants and range of expertise would permit greater district attorney advice and assistance, a different perspective on the investigation at a critical time before opportunities to find and preserve evidence might be lost, and a greater capacity for oversight.

III. THE INITIAL INVESTIGATION.

The Denver Police Department should take additional steps to more effectively demonstrate the thoroughness and objectivity of its investigation and reduce the appearance of preferential treatment by modifying its written procedures with regard to officer-involved shootings to require greater documentation of its actions, greater standardization of the testing and handling of the involved officer, and greater formality in the differentiation of its roles as employer and investigator.

The commission examined the policies and procedures of the Denver Police Department governing the investigation of officer-related shootings and found them to be extremely thorough and detailed. However, they are clearly designed, as one might expect, to discover, gather, and preserve the evidence necessary to prove what occurred rather than to demonstrate the objectivity of the investigation. Especially where police officers are investigating a shooting by a fellow officer, claims of bias or favoritism will be inevitable, and therefore establishing the circumstances of the shooting cannot be the investigation's sole consideration. Equally important is public confidence that the investigation was conducted fairly and competently and that every reasonable effort was made to discover all available evidence and witnesses. Because a thorough review of the investigation can be undertaken only if the steps taken in the investigation are carefully documented, the commission considers it important for the department to modify its written procedures for officer-involved shootings to require a level of documentation beyond even the current, stringent reporting standards. Although time consuming, such a written record can be beneficial to both the police department, the district attorney, and the community.

An investigation of police officers ostensibly acting in the line of duty by other police officers has an added dimension because of the relationships involved, whether or not the officers personally know or have had any previous contact with each other. Even apart from the question of appearances, in the absence of a fairly rigid format or procedure that must be followed, standardizing certain steps that must be taken by the individual investigators, the thoroughness of the investigation might actually suffer. Basic human experience dictates that even a trained police investigator can become the victim of unconscious assumptions about, and uncritical acceptance of the explanation of, a fellow officer, with whom he shares a common understanding of the dangers and necessities of police work. Formalizing the investigative procedures applicable to such situations can be a useful technique not only for answering later questions about the investigation but also for helping to avoid mistakes and omissions by the investigators.

While it is important for an involved officer to be given appropriate support as a trauma victim, it is equally important for those involved in the investigation of the incident to maintain a degree of separation from this support function. With regard to the investigation of most other allegations of wrongdoing by officers, the department is clearly aware of this distinction and gives it formal recognition by maintaining an Internal Affairs Bureau, a unit with just such formal segregation. In part because the initial investigations of officer-involved shootings do not necessarily involve any allegation of wrongdoing by the officer

and in part because of the need for particular investigative expertise in this area, shooting investigations in Denver are conducted by the homicide detectives, just like other shootings. Especially because the officers investigating officer-involved shootings are not from the Internal Affairs Bureau, it will be more important to emphasize the formal role of the investigators which separates them from those providing assistance and support to their fellow officers. As is often the case in a large governmental agency with multiple duties, the Denver Police Department can use formal mechanisms to separate its investigators, channel their discretion, and document their efforts to enhance both the appearance and reality of objectivity.

Although the specific details of such procedures and checklists must necessarily be left to those with expertise in the area, certain examples can illustrate the commission's intent. Denver police regulations already require such actions as the removal of the involved officer's firearm for testing and the segregation of involved officers until they have given statements, but they do not currently require documentation of those events or hold specific individuals accountable for their compliance. In addition, the use of scientific or empirical tests wherever possible can serve to corroborate or contradict officer statements and counterclaims by shooting victims or their survivors. Just as officers may not be required to make a statement for criminal purposes, they may not, in some cases, be forced to submit to chemical tests. But every material fact that can be established, or ruled out, by empirical

testing reduces the need to rely on the subjective perceptions and recollections of witnesses, even where there does not appear to be any disagreement among them. Public confidence in the actions of law enforcement officers is important, and it can best be maintained by making available the most compelling and unchallengeable evidence of the appropriateness of those actions. Even the refusal of individual officers to cooperate, should it occur, can be important information in determining whether questions of justification or excuse for their actions should be decided by a jury.[20]

Similarly, documentation of unsuccessful attempts to find evidence or witnesses can be useful if only to establish the thoroughness of the investigation. Recording the names of all those who could possibly have been witnesses, even if they turn out to have nothing of significance to contribute, permits follow-up investigation during a review and dispels accusations of selective evidence gathering. Establishing a prior connection between the victim and any weapon found on or near him, as well as detailing all attempts to establish a

[20] Lack of officer cooperation has not been a problem under the present protocols. The commission's investigation indicates that in every officer-involved shooting in Denver since 1979, the involved officers have made voluntary, sworn statements to the investigators.

link between the victim and the involved officer that might provide a hidden motive are essential. Precisely because the police are charged with a duty to protect the community and are authorized to use deadly physical force to do so if necessary, public acceptance demands that an investigation of a police shooting go beyond the apparent explanation that the police were merely doing their duty. The investigation must make every reasonable effort to satisfy the public that the shooting was neither the result of deliberate misconduct nor criminally bad judgment.

IV. REVIEW OF THE INVESTIGATION.

Apart from the evaluation of the evidence for filing purposes, a review of the thoroughness of the investigation independent of the Denver Police Department can enhance public confidence in the objectivity of the investigation and the validity of the charging decision.

In current practice, the police department presents its completed investigation of an officer-involved shooting to the district attorney's office, which then evaluates the evidence to determine whether to file criminal charges. If the prosecutor's office needs additional information to make that determination, and it appears from the investigation presented to it that other leads could be pursued or ambiguities in the evidence could be cleared up, that office can request further investigation by the police department or pursue further investigation through resources of its own. However, the focus of the review is currently on the adequacy of the evidence to support the filing of criminal charges and the related policy considerations involved in making that decision.

In line with its concern for an increased formality in the conduct of the investigation and the relationship between the police department and district attorney's office, the commission recommends that there be a formal review of the investigation, separate and apart from an assessment of the evidence of criminal wrongdoing. Although the distinction may be subtle, the question whether the police strictly followed procedures that are designed to insure a thorough, impartial, and verifiable investigation is different from the question whether the evidence uncovered by the investigation indicates criminal conduct by the officer. The answer to the former question, which appears to have been largely taken for granted in the absence of some specific reason to doubt it, is not only important for public confidence in the final charging decision; it is also a material factor in assessing the value of the evidence uncovered by the investigation and therefore in making the filing decision itself. For the public to have confidence in a decision not to file criminal charges, in addition to knowing that there was insufficient evidence to prove a crime, it must also have confidence that all available evidence was pursued and impartially evaluated.

For such a review to serve its purpose without unduly interfering with other important aspects of the process, it must be both clearly defined and limited. The purpose served by a more formal review of the investigation is verification, for the benefit of the public, subsequent review, and the charging authority itself, that the police department complied with the formalities developed to insure an objective investigation. Realistically, it cannot

and should not be an attempt to conduct an additional investigation.

Viewed in this light, the review should be in the nature of a formal audit, comparing the final investigation presented to the charging authority with the police regulations prescribing the conduct of the investigation. As envisioned by the commission, it should include a review of the police and lab reports, witness statements, and physical evidence, with an eye not only toward omissions or violations, but also inconsistencies or contradictions. The reviewer should formally certify the results of his review, including findings of shortcomings, if any, and recommendations for further investigation.

The timing of the separate review of the investigation is also crucial. Elsewhere the commission identifies speed in reaching a charging decision and making public the results of the investigation as perhaps the single most important factor in avoiding public misperception and maintaining public confidence in the process. Although any procedure that unnecessarily delays the final filing decision should therefore be avoided, a review of the investigation must still take place before evaluation of the evidence for charging purposes, if it is to have any impact on the charging decision rather than merely subjecting both it and the investigation to later criticism.

If all other considerations were equal, some advantage in terms of public perception might be gained by selecting the reviewing authority from outside both the police department and the district attorney's office. However, recognizing the specific and limited nature of a

review at this stage, the real benefits of injecting a new and additional public office into the process would be small while the disadvantages would be substantial. The creation of another panel or commission would be impractical. But even the appointment of a single individual as reviewer of the investigation would surely be plagued by issues ranging from the choice of an appointing authority to finding a qualified but independent person who would be both able and willing to accept the assignment. With an average of less than ten police shootings a year, the duty would be sporadic at best but would nevertheless require the ability to drop everything else and devote full attention to the investigation on short notice.

It would also require the enactment of some enabling legislation or ordinance defining the scope of both the duties and powers of the new office, giving it the official status it would require to handle confidential investigative materials and otherwise participate in the investigative/charging process. More practical problems might include rationally establishing a level of funding for the position and necessary logistical support in light of the intermittent, but immediate, demands for the reviewing officer to act, and establishing accountability of the office in such a way as to make it answerable and yet sufficiently independent of the police department and city government.

Importantly, however, the natural body to perform the function of insuring a complete and objective investigation is the charging authority, which already has the resources and authority to conduct a further investigation if necessary and which must ultimately decide the

effect of any shortcomings in the investigation. The commission concludes that unless there is a particular conflict of interest in an individual case, the Denver district attorney is the appropriate officer to make the charging decision, and for the same reasons, it concludes that the district attorney's office is the appropriate office to separately review the investigation and either verify its completeness or conduct further investigation itself. While not dramatic or complicated, the mere designation of a point in time at which someone in the prosecutor's office is required to review and certify compliance with regulations governing the conduct of the investigation serves the three critical purposes of forcing the officers to document the steps taken by them in the investigation, forcing the charging authority to evaluate the quality of the investigation before assessing the weight of the evidence, and providing a record for subsequent reviews of the charging decision already provided for by the laws of the city, state, and federal governments.

While the commission acknowledges that a number of internal office considerations must come into play in determining the specific personnel to conduct the review of the investigation and coordinate with those making the charging decision, it notes that an added degree of objectivity might be achieved by distancing the review function from the evaluation and prosecution function and housing the former in a division of the office that does not ordinarily come into close contact with the police department. By assigning this review function to a non-trial unit, like the appellate division of the office, the district

attorney can emphasize the objective, audit-like nature of the review, and at the same time insure that this function is performed by personnel who are the least likely to have dealt with the police as witnesses in other cases.

The separate review of the investigation recommended by the commission is merely one, discrete step in an otherwise fluid process of criminal investigation and charging. It is designed to enhance rather than replace the existing mechanisms for reviewing and challenging both the investigation and charging decision. Without unduly interfering with either the police or district attorney in reaching an initial decision about criminal conduct, it provides a basis for further review by the FBI and United States Attorney for possible criminal prosecution of civil rights violations; by the Colorado Attorney General, who already has the statutory authority, when requested by the governor, to investigate and prosecute for violations of state law, notwithstanding the decision of a local district attorney to the contrary; by a victim's survivors, who have the power to challenge a decision not to prosecute in the district court as arbitrary or capricious and seek the appointment of a special prosecutor, or to pursue civil remedies; and by the Internal Affairs Bureau of the Denver Police Department and the Denver Public Safety Review Commission for purposes of administrative discipline of the involved officers.

Therefore, the commission recommends that *before* the evidence is evaluated for charging purposes, it be critically reviewed by someone in the office of the charging

authority to determine whether the police followed their own procedures, whether any failure in this regard is likely to have resulted in the loss or failure to preserve evidence, and whether further investigation is required. If further investigation is merited, the district attorney has the ability to reinterview witnesses, seek independent lab tests or expert opinions, and to use his own trained personnel to reinvestigate the scene. In appropriate cases, he also has at his disposal extraordinary investigative tools, like the grand jury. In addition to having an effect on the filing decision and providing a more complete record for any subsequent review, following the filing decision, a formal review process may also have a beneficial effect on the investigative process as a whole in future cases.

V. THE CHARGING AUTHORITY.

Unless there is an identifiable conflict of interest because of the circumstances of a particular officer-involved shooting, the Denver District Attorney is the proper officer to make a criminal filing decision and should avoid seeking a special prosecutor from outside his office.

The District Attorney for the Second Judicial District is the elected official with the constitutional and statutory duty to represent the state in the prosecution of violations of the criminal law within the City and County of Denver. Colorado already has one special prosecutor statute that permits the court to appoint a special prosecutor from among the other district attorney offices in the state or, in special cases, from the private bar, when the district

attorney has an interest or has been employed as counsel in a case,[21] and a second special prosecutor statute that permits the court to order the prosecuting attorney to file charges or appoint a special prosecutor whenever it is demonstrated that the prosecuting attorney's decision *not* to file charges was made arbitrarily and capriciously.[22] Guided by the ethical rules that govern the behavior of prosecutors and lawyers generally, the appellate courts of the state have developed a substantial body of law with regard to the disqualification of prosecutors.[23]

Although the fact that the police and district attorney often work in a cooperative effort in criminal cases commonly raises the criticism of bias or interest when a police officer is the

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[21] *See* §20-1-107, 8B C.R.S. (1986).

[22] *See* §16-7-209, 8A C.R.S. (1986).

[23] *See, e.g., People v. Garcia,* 698 P.2d 801 (Colo. 1985); *People v. District Court,* 189 Colo. 159, 538 P.2d 887 (1975).

subject of a criminal investigation, the mere relationship between the two agencies is not considered a disqualifying interest in this or any other jurisdiction of which the commission is aware. Not only are the district attorney's office and the police department separate offices, subject to different appointing authorities and chains of command; they are also responsive to different governments, the latter being a part of local and county government while the former is a constitutionally created, state elected office. A sweeping rule of prosecutorial disqualification whenever any law enforcement officer from the same judicial district is involved would be both unrealistic and counterproductive.

In the absence of a specific conflict of interest in a particular case, which would require appointment of a special prosecutor whether the party under investigation were a Denver police officer or not, the district attorney is the officer best situated to prosecute officer-involved shootings in his jurisdiction. He is the official who has been elected to make the criminal charging decisions and to act as the legal advisor to the grand jury in his district, and he is answerable to the electorate for his decisions. He is funded and staffed for these purposes and has the familiarity with the courts in his district to make the most informed, speedy, and consistent charging decisions. By contrast, although sometimes necessary, appointing a special prosecutor from another district involves substantial disadvantages, including the burden it imposes on that office and the lack of attachment and interest that a special prosecutor typically has in this community. As a matter of political reality, there is

usually no incentive for officials to pursue controversial cases in which they are likely to be criticized no matter what decision they make, especially when the cases are outside the district they have been elected to serve.

Our constitutions and statutes provide elaborate and well thought-out checks and balances on the various officials and branches of government to protect against abuses of authority at all levels, including abusive charging decisions by elected prosecuting officers. The Colorado Legislature has provided a legal mechanism by which individual victims or survivors of victims can petition the judicial branch of government if they feel that a district attorney has abused his discretion in refusing to file criminal charges. If the district court agrees, it can either order the district attorney to prosecute or it can appoint a special prosecutor to do so.[24] The grand jury in Denver is a constitutional body with broad investigative powers, which can ask that a case be presented to it whenever it wishes. Significantly, the governor of the state has the express statutory authority, whenever he deems it appropriate, to require the state attorney general to investigate and prosecute a criminal case in the name of the People of the state, for all intents and purposes replacing the district attorney.[25] Lastly, the federal government, through the United States Attorney and

[24] *See* §16-5-209, 8A C.R.S. (1986).

[25] *See* §24-31-101(1)(a), 10A C.R.S. (1988); *see also* Chuck Green, *It's Time Romer Intervened*, Denver Post, June 15, 1997, at B1 (recalling Governor Romer's use of this provision in July 1988 to order the attorney general to investigate accusations of child abuse at a day-care home

the Federal Bureau of Investigation, has the power to investigate and prosecute any police officer who it believes has violated an individual's civil rights while acting under color of state law. Existing law therefore already provides for removal of a district attorney from a prosecution when he has a conflict of interest, whether he acknowledges it or not, and contains a host of mechanisms for proceeding with criminal charges even though the district attorney may choose not to do so.

VI. THE CHARGING DECISION.

By developing and following more definite, written procedures for making the charging decision in cases of officer-involved shootings, including the allocation and prioritization of resources, the establishment of time limitations, and the articulation of filing considerations, the Denver District Attorney can expedite and enhance public confidence in the objectivity of his decision.

For many years, by unwritten or partially written policies within the district attorney's office, police officer-involved shootings have been handled differently from other shootings. To their credit, the district attorneys in Denver have given greater priority to police shootings and made the investigation and charging considerations more public than virtually any other jurisdiction examined by the commission. Among other things, the filing decisions in these cases are made personally by the district attorney, after consultation with senior staff;

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in Akron, and calling for intervention by the state in a current Boulder murder investigation).

any decision not to file charges is accompanied by a letter of explanation; and the investigative file is opened for public inspection. However, for the same reasons that the commission has recommended formal, written procedures to be followed at the stage of the initial investigation and the review of the investigation, it also recommends the promulgation of specific, written policies and procedures governing the decision-making process at the filing stage.

While it would be impractical and in fact counterproductive to call for a special prosecutor whenever police personnel are the subject of a criminal investigation concerning the use of deadly physical force, there is reason to believe that by following a specific procedure and considering predelineated factors in making a filing decision, the district attorney can enhance public confidence in the objectivity of the process and perhaps make the charging decision itself more objective. Moreover, such a checklist or standard operating procedure for these cases could help solve one of the most critical shortcomings of the current procedures, prioritization and allocation of the necessary resources to expeditiously reach and make public a final filing decision. One of the most intractable problems in dealing with past police shooting incidents has been the delay in announcing a filing decision. Although the delay seems to have been caused largely by attempts to insure that the investigation was complete and thoroughly evaluated and that all relevant considerations had been taken into account by the district attorney personally, until a decision not to file has

been made, the information that can be made public is necessarily limited. Criminal justice standards and ethical limitations on public prosecutors and other lawyers prohibit the release of information, by either the prosecutors or police, that will probably be disseminated by the news media as long as there is a likelihood that it will adversely affect the rights of a potential criminal defendant to a fair trial.[26] Predictably, the typical effect of delay has been a partial airing of the circumstances of the shooting in the public media, leading to

[26] *See, e.g.,* Colorado Rules of Professional Conduct Rules 3.6 and 3.8(e), 7A C.R.S. (1996); Model Rules of Professional Conduct Rules 3.6 and 3.8(e) (American Bar Association, 1983); Standard for Criminal Justice 8-1.1 (American Bar Association, 3d Ed. 1993); National Prosecution Standards, Amended Standards 33.1 - 35.2 (National District Attorneys Association, November 1996 Revisions).

speculation about police misconduct. Even if allegations or innuendos are persuasively disproved by the investigation, that information, if disseminated at all,[27] frequently comes too late to correct misimpressions in the minds of the public.

[27] During the course of the commission's work, the Denver District Attorney released a

letter declining to file criminal charges against an officer who had shot and killed a motorist named Manuel Moreno-Delgado, whom he claimed cocked and pointed an automatic pistol at him. *See* Appendix VII. An automatic pistol was found between the dead man's legs, and the subsequent investigation established that the same pistol had been bought at a pawn shop and given to the purchaser's cousin, who was a roommate of Moreno-Delgado. The roommate claimed that the pistol disappeared when Moreno-Delgado moved out about 2 years earlier. Establishing a prior connection between a police shooting victim and a weapon in his possession is of obvious importance in disproving any accusation that the police themselves "planted" the weapon on the victim after the shooting. For whatever reason, in its twelve-paragraph story covering the decision not to file criminal charges, the Denver Post not only omitted any mention of the connection between Moreno-Delgado and the pistol, but actually suggested the contrary by including the statements of a friend criticizing the decision and asserting that Moreno-Delgado never carried a gun because he was afraid for his children's safety. *See* Mike Mcphee, *Denver Cop Cleared in Shooting Death of Drunken Motorist*, Denver Post, April 8, 1997.

Expeditious completion of the investigation and the charging decision may be the single most effective way to educate the public about all of the relevant facts in a timely manner. While the current practice of describing the incident and evidence in detail, in conjunction with announcing a decision not to file criminal charges, may have been well-intentioned, to the extent that it seriously retards the announcement of a no-file decision itself, it may do more harm than good. Filing decisions in other serious cases involving death or wounding by shooting are often made in a much shorter time. The promulgation of specific regulations designed to expedite the decision-making process can greatly reduce criticism of the current process.

Finally, the commission recommends that the district attorney promulgate written guidelines for the exercise of his discretion in making the filing decision. For a number of years the district attorney's office has released, along with every letter declining to file charges, a statement indicating that it will file criminal charges only if there is sufficient evidence to convince a jury of twelve beyond a reasonable doubt of the defendant's guilt. While this statement is clearly intended as a helpful summary of the factors involved in the charging decision, and one that can be easily understood by the media and the public, it is also a simplification of the national criminal justice standards and guidelines that the Denver District Attorney adheres to and of the complex analysis that the Denver District Attorney actually undertakes. If the district attorney's purpose in explaining his decision is to

demonstrate that the applicable standards for the particular offenses at issue were applied objectively, consistently, and fairly, that purpose could be more effectively accomplished by giving the public a more detailed, written articulation of the factors involved in making criminal filing decisions.

Although there is no question that a public prosecutor must retain great discretion in making a decision whether to charge a crime, in large part because the complexities involved are not reduceable to an exact formula, guidelines and policies are necessary for consistency and fairness even in the smallest of offices. Reducing those guidelines to writing can serve not only the internal purposes of the district attorney's office but also enhance public confidence in the objectivity of the process by permitting the public to compare the district attorney's decisions in particular cases with his policies.

The precise content of the charging standards is itself a complex matter that is beyond the expertise of the commission. However, the American Bar Association Standards on Criminal Justice provide important guidance. They indicate that a prosecutor *should never* file criminal charges in the absence of sufficient admissible evidence to support a conviction but that a prosecutor *ordinarily should* file charges if after full investigation he finds that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty. Prosecutors are never bound to file charges, and there are a number of factors that can militate against filing even where the evidence

might support a conviction. One of these factors is the prosecutor's personal belief that there is reasonable doubt as to the guilt of the accused, despite sufficient evidence to support a conviction. Another is the prosecutor's belief in the likelihood that a conviction will not be obtained. However, a prosecutor should not be dissuaded from pursuing criminal charges if the only reason for a likely acquittal would be something like widespread corruption or hostile community attitudes toward the victims. Whatever the exact content of a particular prosecutor's guidelines, by articulating in writing the standards to be followed and the factors to be weighed, the district attorney subjects his philosophy to greater scrutiny but hopefully guards against charges of arbitrariness or partiality in making particular filing decisions.

VII. THE GRAND JURY.

A district attorney is typically subject to as much criticism for presenting a controversial case to a grand jury as for not doing so, but by promulgating written guidelines for the use of the grand jury, indicating the types of cases that would be appropriate for grand jury consideration and the nature of the factors upon which a decision to present a case to the grand jury would be based, the Denver District Attorney can help standardize the use of the grand jury and counter charges that the decision in any individual case was either arbitrary or politically motivated.

The grand jury is a constitutionally created body, independent of the executive branch of government. It has the statutory authority to investigate violations of the state criminal law and to charge by indictment, separate and apart from the district attorney's authority to charge by information or felony complaint. However, the district attorney is the statutorily designated legal advisor to the grand jury, and as a practical matter it may therefore be

limited by the district attorney's presentation of evidence to it and his advice regarding the law and its application to the facts of a particular case.

Since the district attorney has the statutory authority to initiate by information, felony complaint, or complaint any criminal prosecution that can be initiated by grand jury indictment, there is no situation in Colorado in which a case must be presented to a grand jury. Nevertheless, grand juries have certain investigative powers that district attorneys do not by themselves have, most notably the power to subpoena witnesses to appear for testimony and bring documents for inspection, which makes them particularly valuable for the investigation of certain types of crimes. In practice, the use of grand juries in Colorado varies considerably from district to district, based on the philosophy of the individual prosecuting attorney.

Although it is sometimes argued that controversial cases should be presented to a grand jury because it is less subject to influence or represents the will of the community better than the district attorney,[28] the district attorney is actually the official elected expressly to exercise charging discretion and advise the grand jury, and experience teaches that he is just as likely to be criticized for deferring to a grand jury as for exercising his charging discretion

[28] *See, e.g.,* Patricia Callahan, *Integrity of Probe Questioned: Focus of Truax Case Shifts to DA's Office*, Denver Post, April 15, 1996, A1 (briefly recounting the history of handling police shootings in Denver and quoting several law enforcement figures from other major cities that regularly use the grand jury).

personally.[29] On its face, the grand jury also can return an indictment based merely upon a finding of "probable cause," a lower standard than national criminal justice guidelines would require of public prosecutors, but in practice a grand jury may be no more likely to return a criminal charge since it is never obliged to indict, regardless of the amount of proof, and ethical standards governing the prosecutor who is its advisor require him to recommend

[29] *See* Al Knight, *Nurses on Trial*, Denver Post, May 11, 1997, F2 (commenting on a metro-area district attorney's decision to present a controversial case to the grand jury: "Was this an instance where the DA took the easy way out and in turning it over to a grand jury ducked making the tough call himself? Keep in mind that it is the district attorney's responsibility not to bring a charge unless he is convinced he can prove the case beyond a reasonable doubt. That isn't a finding he necessarily needs to reach in a grand jury indictment").

against indictment where he believes the evidence would not warrant the initiation of criminal charges in the absence of a grand jury.[30]

[30] *See* Standards for Criminal Justice 3-3.6(c) (3d Ed. 1993)

Until very recently statutory confidentiality requirements that made it difficult to learn about the grand jury's investigation or reasons for not returning a "true bill," or indictment, provided an additional disadvantage in referring officer-involved shootings to the grand jury. During the pendency of the commission's work, however, the state statute governing the issuance of grand jury reports was substantially amended,[31] ostensibly removing some of the hurdles to the issuance and publication of grand jury reports. A report explaining the evidence and the grand jury's rationale for not returning an indictment can now be released when the district attorney and the grand jury agree that certain conditions are met, primarily that the grand jury's findings are supported by the evidence and that the report is not issued solely for the purpose of disparaging someone it has chosen not to charge.[32] At the very least, confidentiality surrounding the grand jury's reasons for not returning a criminal charge no longer seems to present the impediment that it may have in the past.

[31] The primary impetus for the bill came from the Denver District Attorney and the Colorado District Attorneys Council.

[32] *See* House Bill 97-1009, 1997 Colo. Sess. Laws 313. Appendix IX.

Because the circumstances of officer-involved shootings differ and there are many cases in which presenting a case to the grand jury would provide no real advantage and might actually subject the district attorney to the charge of avoiding responsibility, the commission does not recommend that the grand jury be used for every police shooting. However, along with its recommendations for written policies and procedures in other areas, the commission does recommend that the district attorney promulgate specific guidelines to be followed in deciding when to use the grand jury for the investigation and charging of officer-involved shootings. The grand jury's power to subpoena and assess the credibility of witnesses clearly militates in favor of its use where there are material conflicts in the statements of an involved officer or among the statements of key witnesses. Similarly, a lack of cooperation by a potential witness, especially an involved officer, may in itself be reason to subject the witness to an examination under oath. Even substantial violations of police regulations or other irregularities during the conduct of the investigation, which could suggest improper behavior, might be appropriate grounds for turning to the grand jury.

For many of these reasons, the grand jury is not the panacea that it often appears to be in the public mind, but it has definite advantages in certain cases. By indicating in advance the factors that enter into the district attorney's decision to present or not to present a case to the grand jury, he can demonstrate the objective nature of his decision and perhaps enhance public confidence in it in any particular case.

VIII. PUBLIC INFORMATION.

Public misperception and speculation about officer-involved shootings can be minimized by making available to the media as much information as possible, without prejudicing a criminal investigation or proceeding, and by taking steps to affirmatively educate the public about the thoroughness of the investigation and the reasons for the filing decision.

One of the most difficult and yet important problems to resolve with regard to the handling of officer-involved shootings is the release of information to the public. As with any criminal investigation and potential prosecution, there are strict statutory and ethical limitations in Colorado on the release of information that would be likely to prejudice a criminal proceeding, and these limitations must be honored. At the same time, however, there are important countervailing considerations that favor making information about police use of deadly force available to the public as quickly as possible. Not only is the use of deadly force to enforce the law a matter of legitimate public concern, but paradoxically, compliance with rules designed to protect the rights of more typical criminal defendants or potential defendants to a fair trial may actually work to the disadvantage of a police officer whose use of deadly force in the line of duty is under investigation and bring suspicion upon other officers and the department as a whole.

By their very nature, police-involved shootings are extensively reported by the media and are matters of great public concern. They are usually situations in which an officer has intentionally shot someone, and the investigation is concerned primarily with whether the

officer was legally justified in doing so. The fact of the shooting is therefore reported, but evidence of the shooting victim's activities and the officer's perceptions that will determine the issue of justification for the shooting often remains to be developed by the investigation, leaving the public and media to speculate about the basis for the officer's actions. The inevitable rumor, conjecture, and innuendo that circulate throughout the community not only generate criticism of the police department and pressure for criminal prosecution, but also create lasting impressions that may never be overcome, even if evidence is finally released contradicting them.

The only way to accommodate these competing, legitimate interests may be to complete the investigation and make a filing decision as quickly as possible. Once a decision is made not to file charges, there is arguably no longer any substantial likelihood of prejudicing a criminal proceeding, and the results of the investigation can immediately be made public. However, even while the investigation is proceeding, making every effort to provide as much information as possible, even if it is not a great deal, can help to avoid speculation and the appearance of special treatment. In this regard the commission recommends that the police department adopt policies to establish a definite and predictable schedule for coordinating with the district attorney and presenting periodic updates on the progress of the investigation, releasing as much information as is consistent with its obligation not to prejudice criminal

proceedings. An orderly process of releasing information that can be anticipated by the news media may reduce pressures for some extraordinary disclosure.

As alluded to above, however, the choice to release information about a potentially prosecutable shooting is not entirely within the discretion of the prosecuting attorney or the police. In addition to the persuasive, nationally-accepted standards limiting extrajudicial statements, the Colorado Rules of Professional Conduct are actually binding on the district attorney and require him to use reasonable care to prevent the police from making any extrajudicial statements that he could not make.[33] While those rules generally prohibit the release of information that is likely to create a grave danger of imminent and substantial harm to the fairness of an adjudicative proceeding, they enumerate kinds of information that ordinarily should be considered to fall within this prohibition, and that enumeration includes many of the kinds of information that would be important for the public to know in evaluating the justifiability of the involved officer's conduct.

Whether the officer gave or refused to give a statement or take any test and the content of such a statement or the results of such a test are types of information that neither the prosecutor nor the police can ordinarily release for dissemination by the media. Similarly,

[33] *See* Colorado Rules of Professional Conduct, Rule 3.6 ("Trial Publicity") and Rule 3.8(e) ("Special Responsibilities of a Prosecutor").

any information about the character, credibility, reputation, or criminal record of any witness to the incident, or even the identity or expected testimony of a witness, is information that ordinarily cannot be released.

The commission is clearly aware of the need to regulate the public dissemination of information that would deprive a criminal defendant of a fair adjudication of his guilt or innocence and intends no suggestion that the police ignore these considerations merely because it may be to their advantage to publicly justify the officer's conduct as soon as possible. However, especially where their is no living victim and the involved-officer is the only subject of a criminal investigation, and where the information at issue tends to justify the officer's conduct or discredit accounts to the contrary, the commission recommends that the hands of the police department not be tied by any presumption about particular kinds of information in the ordinary case, without a careful legal analysis of the circumstances of the particular case. Presumptively prejudicial information may be releasable to the media under some circumstances without actually creating a grave danger of imminent and substantial harm to the fairness of a particular criminal proceeding, and if so, then it should be released.

With regard to release of the evidence uncovered by the completed investigation itself and the reasons for the ultimate filing decision, both the Denver Police Department and District Attorney have for years been extremely public and open. The Denver District Attorneys have articulated the reasons for their decisions in a letter to the chief of police and

made the letter and the entire investigative file available for inspection by members of the media and any concerned members of the public. Nevertheless, these efforts have not always been successful, either in publicizing the relevant circumstances and evidence or in satisfying public concern about the incident. This appears to be due in large part to the content of the report or letter, its limited distribution, selective coverage by organs of the media, and the delay between the incident and the release of the completed investigation. While the entire investigation may be open to the public, very few individuals will have either the time or interest to review it, and those who do might naturally be expected already to have doubts about the filing decision. Especially after initial reports of a police shooting raising unanswered questions about its propriety, the community would be better served by some affirmative action by the police and district attorney to defend their decisions.

Probably no single factor can have a greater impact on this situation than the expeditious review of the investigation and announcement of a decision declining criminal prosecution. However, it is the opinion of the commission that once a decision is made and the investigation can be released to the public, the district attorney and police should take affirmative steps, whether through a decision letter or some other mechanism, like a press conference or use of public information television, to publicize not only the findings of the investigation but also the thoroughness of the investigation, including the procedures followed to guarantee its objectivity. When a decision is made not to file criminal charges,

rather than taking a passive interest in publication or even minimizing publicity about the decision, the district attorney and police department have a duty in the public interest to educate the public and defend the decision if necessary.

CONCLUSION

The commission has spent more than a year studying the procedures according to which officer-involved shootings in Denver are investigated and criminal charging decisions are made. While it has expressed views and made suggestions in this report that are designed to strengthen those procedures, the commission has found no fundamental flaws in the procedures that are currently being followed. Those procedures have been adequate to protect the public interest for a considerable time. The commission has suggested further safeguards to fortify the existing procedures and to insure and demonstrate that they are followed.

APPENDIX I

Biographical Information About Commission Members

WILLIAM H. ERICKSON

CAREER:

1971-1996 Trial lawyer in Denver until appointment as a Justice, Supreme Court of Colorado on February 1, 1971; Deputy Chief Justice (1980-1983); Chief Justice (1983-1985); Retired May 1, 1996.

1972-1984 Faculty, New York University Appellate Judges School

1979 Woodrow Wilson Fellow and Lecturer, Washington & Lee University

1982-1986 Distinguished Board of Visitors, Colorado University Law School

1973 One of four selected to be the Watergate Prosecutor, the other nominees were Warren Christopher of Los Angeles, Judge Harold Tyler of New York, and Judge David Peck of New York;

1976 Chair, President's National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (5 Volume Report to Congress).

ASSOCIATION MEMBERSHIPS AND POSITIONS:

President, Denver Bar Association (1968-69); Former Member, Board of Trustees of the Denver Bar Association, and Board of Governors, Colorado Bar Association; Chair, Criminal Justice Section, American Bar Association (1971-72); Vice Chair, Senior Lawyers Division, American Bar Association (1995-96); Co-founder and faculty member, National College for District Attorneys and National College of Criminal Defense Lawyers and Public Defenders, University of Houston Law School. Member, House of Delegates, American Bar Association (1972-91); Board of Governors, American Bar Association (1975-79); Director, National Judicial College (1975-79); Former Director American Judicature Society; American Bar Association Judges Advisory Commission On Ethics And Professional Responsibility (1990); Chair, Colorado Bar Press Committee (1972).

Chair, Fellows of the American Bar Foundation (1985-86); Fellow, American College of Trial Lawyers (State Chair 1970); Fellow International Society of Barristers (President 1971); Member of the Courts Task Force, National Advisory Commission On Criminal Justice Standards and Goals; Chair, Colorado Courts Task Force On Criminal Justice Standards and Goals; Member of Drafting Committee of PROMIS (Prosecution Management Information Systems); Chair, Supreme Court Committee On Pattern Criminal Jury Instructions (1972-1983; 1988-1989); Fellow, International Academy of Trial Lawyers (former Director and Secretary-Treasurer); Board of Directors, American Board of Trial Advocacy (1984-94); Council, American Law Institute (1973-).

Chair, Standing Committee, American Bar Association, that prepared the Second Edition of the Standards of Criminal Justice (1986).

Executive Committee, National Commission for formulation of Standards for Accreditation of Law Enforcement Agencies (1980-83).

AWARDS:

Colorado Bar Association Award of Merit (1989)
Colorado School of Mines Distinguished Achievement Award (Silver Medal) (1990)

CO-AUTHOR:

United States Supreme Court Cases and Comments, Erickson & George (4 volumes, supplemented annually, Matthew Bender)
Judges Bench Book, Search and Seizure, Erickson & Neighbors (1981)

EDUCATION:

Colorado School of Mines - Petroleum Engineer 1947
The University of Virginia Law School - 1950 (Order of the Coif)

REGIS GROFF

PERSONAL AND PROFESSIONAL PROFILE

MILITARY SERVICE

1953-1957 United States Air Force, Honorable Discharge, A/1C October 1957.

EDUCATION

Graduated from Monmouth High School - Monmouth, Illinois
Graduated from Western Illinois University - Macomb, Illinois, 1962, B.S. in Education (Social Science)
Graduated from the University of Denver - Denver, Colorado 1972, M.A. in Secondary Education (History)
Graduated from Program for Senior Executives in State and Local Government John F. Kennedy School of Government, Harvard University 1980.

PROFESSIONAL EXPERIENCE

March 1994 - Present Director of the Youthful Offender System - Colorado Department of Corrections
The Youthful Offender System (YOS) targets youthful felons who have been found guilty in the adult court of Class 3-6 felonies involving the use or threat of use of a deadly weapon. The YOS program is calculated to firmly and vigorously break down gang affiliations, and negative peer influence, to instill a respect for others, affirming the dignity of self and others, and the value of work and self-discipline.

1993 Consultant to the Chancellor, University of Colorado at Denver - Denver, Colorado.

1977-1984 Community Affairs Coordinator - Denver Public Schools Administration Offices. Responsibilities consist of, but are not limited to, monitoring the human relations compliance requirements in 16 elementary and secondary schools. Also responsible for assisting school administrators in planning human relations workshops and seminars.

1977 - 1984 Intergovernmental Relations Specialist - Denver Public Schools Administration Offices. Responsibilities consisted of developing and maintaining cooperative relations with federal, state, and local units of government and the Denver community. Also responsible for identifying and facilitating the acquisition of human and material resources for projects that enhance educational opportunities for Denver Public Schools. Responsible for teaching American History, American History mini-courses (nine-week units) covering pre-Civil War, 1820-1861, post Civil Way, Reconstruction Period, 1865-1880. Co-author of a semester senior seminar unit at Denver East High School consisting of the humanities, outdoor and experiential education in Mexico,

Pike National Forest, and Dinosaur National Monument. The seminar also included study of various units of government: national, state, and local.

1969 - 1977 Teacher, East High School - Denver Public Schools. Responsible for teaching American History, American History mini-courses (nine-week units) covering pre-Civil War, 1820-1861, post Civil War, Reconstruction Period, 1865-1880. Co-author of a semester senior seminar unit consisting of the humanities and outdoor experimental education in Mexico, Pike National Forest and Dinosaur National Monument.

1972 - 1977 Served as coach of a varsity golf team for five years.

1969 - 1977 Developed and taught Afro-American History.

1967 - 1969 Teacher, Lake Junior High School - Denver Public Schools. Responsible for teaching five units of American History.

1963 - 1967 Teacher, Smiley Junior High School - Denver Public School. Taught American History and United States Government.

1962 - 1963 Caseworker - Cook County Department of Public Aid - Chicago, Illinois. Responsible for determining eligibility of aid for dependent children, disability assistance and blind assistance.

ADDITIONAL TEACHING POSITIONS

Summers of 1972,
1973, & 1975 Instructor of Black Humanities Seminar, University of Denver. Responsible for developing and teaching History of Black Americans from 1619 to Present. Required to develop and teach Black American Involvement in the Political System of the Seventeenth Century.

1972-73; 1986-88 Instructor, Black Politics, Metropolitan State College - Denver, Colorado. Taught course of Black Involvement in the American Political System.

1972-74; 1987 Instructor, Black History, Colorado State University - Fort Collins, Colorado. Responsible for teaching the History of Black Americans from 1916 to Present.

1974 - 1975 Instructor, Black History, University of Colorado - Boulder, Colorado. Responsible for teaching the History of Black Americans from 1619 to Present.

EDUCATION WORKSHOPS, INSTITUTES, SEMINARS

Graduated from Urban Affairs Institute - Los Angeles, California. Twelve months (1972). Certificate in Urban Studies.

Participated in Black Studies Seminar, San Francisco, California (December 1970).

Staff person for the National Council of the Social Sciences - Denver, Colorado. Designed an inquiry approach for the study of American History.

Staff and participant of the History of Minorities, University of Denver (1969). Developed a course of study for the History of Minorities. Visiting instructor at Santa Clara University Extension - Denver, Colorado (April 1973 - Special and Ethnic History of Colorado).

CIVIC INVOLVEMENT

Vice President - Denver Federation of Teachers (1968-1970)
President of Black Educators United (1970-1972)
Board Member - Denver Federation of Teachers (1969-1971)
Delegate - National Black Convention (March 1972)
Board Member - Black Educators United (1972-Present)
Instructor - National Conference of Christians and Jews, Annual Summer Youth Conference (1971-1973)
Board Member - Colorado Department of Education Steering Committee (1970-1972)
Board Member - Black Education Advisory Committee (1971)
Member/Facilitator - Police/Community Relations Workshop and Advisory Committee, East Area - Fort Collins, Colorado
Member - Capitol Arts commissions
Board Member - Park East Mental Health Center (1974-Present)
Delegate - National Democratic Convention (1976)
Member - Northeast Denver Optimist Club
Member - Colorado Education Association
Member - American Federation of Teachers
Member - National Education Association
Member - Community Advisory Council, Auraria Campus Complex
Board Member - American Civil Liberties Union
Board Member - PUSH
Board Member - Colorado Affiliated Family Services
Board Member - Park Hill Association for the Advancement of Colorado People
Delegate - National Democratic Mid-Year Convention (1982)
Board Member - Commission on Children and Their Families
Board Member - Partners, Inc.
Member - Colorado Fuel Conservation Policy Council
Advisor - Greater Park Hill Secondary Education Committee
Chairman - Rachel Noel Scholarship Fund (1973)
Member - Advisory Board Public - Private Sector Cooperation
Member - Board of chemical People (Drug Deterrence)
Board Member - Colorado Student Loan Program
Member - Advisory Board - Denver City Golf Courses
Member Executive Committee - Denver Organizing Committee, NCAA Final Four Tournament
Founder and Chairman of the Board of Colorado African Caribbean Trade Office
Member - Denver Foundation Advisory Committee
Member - Juvenile Justice and Prevention Council

AWARDS

The Coloradan Award Presented by Colorado Education Association

Legislator of the Year - Presented by Colorado Chapter of the National Association of Social Workers 1978-79
Delta Psi Lambda Chapter of Alpha Phi Alpha Fraternity, Inc., Citizen of the Year 1977
Distinguished Service Citation - Presented by the United Negro College Fund 1978
Certificate of Award - Lane College Alumni Association, Inc. April 1978
Certificate of Appreciation - Presented by the Optimist Club of Northeast Denver, November 1976
Booster Award - Presented by Colorado Black Women for Political Action Movement 1976
Western Illinois Alumni Achievement Award
Project Pride and Unity Award - Presented by the Eastside Action Movement 1976
Bi-Centennial/Centennial Leader of the Year - Presented by Thomas Jefferson High School 1976
Certificate of Appreciation - Food Service Industry 1976
Appreciation Award - Black Adults for Our Youth
Legislator of the Year Award - Associated Press, 1981

INTERNATIONAL

1980 Lectured throughout the Country of Nigeria on the State Legislative System as a guest of the Nigerian Government.

1981 Attended meetings on the improvement of trade between states in the United States and Caribbean countries. These meetings were held on the Islands of St. Lucia and Barbados.

1982 Invited by the United Nations committee on Namibia to present a paper entitled "The Military Implications of Mercenary Activity in Namibia" at the International Center, Vienna, Austria.

1983 Chaired meeting on Caribbean/U.S. state level trade relations held in Kingston, Jamaica.

1984 Studied the Mutual Housing System of West Germany. Met in Cologne, Dusseldorf, Munster, Oberhausen, Papenberg, Laten, and other cities.

1985 Visited Israeli officials, scholars, military, et al., including some on the West bank, as a member of an Anti-Defamation League mission to enhance Black-Jewish dialogue through better understanding of Israel.

1988 Visited Canadian provincial legislators to discuss international trade and public education. Meetings were held in St. Johns, Newfoundland.

1989 Fact finding visit to the Republic of South African and Bophutaswana.

1990 Meeting for U.S. Israel Student Exchange Program Coordinators, Israel.

1990 Traveled to the Republic of South Africa as a part of State Legislators South African Task Force Study Tour.

1991 Study tour to Taiwan as a guest of the Republic of China Foreign Affairs office.

1991 Led a group of Black legislators on a study tour of South Africa as guests of the South African Forum.

1993 Visited the Republic of China for fact finding and good will tour with a small group of legislators from around the U.S.

DANIEL S. HOFFMAN

Practice Areas

Complex Litigation, including:

- Commercial
- Employment Law
- Toxic Torts
- Copyright and Trade Secrets

Education

LL.B., *magna cum laude*, University of Denver College of Law, 1958

B.A., University of Colorado, 1951

Bar and Court Admissions

Colorado

U.S. District Court for the District of Colorado

Other Professional Affiliations

American Bar Association

American Bar Foundation (fellow)

American College of Trial Lawyers (fellow)

Colorado Bar Association

Colorado Bar

Daniel Hoffman joined McKenna & Cuneo's Denver, Colorado office in 1994. He currently serves as chair of the firm's Litigation Department. Prior to joining the firm, he was a senior member at Holme Roberts & Owen, LLC.

Mr. Hoffman has more than 30 years' courtroom experience. He has handled a broad spectrum of complex commercial, employment, insurance, toxic tort, negligence and professional liability litigation matters for individuals and numerous major corporations and partnerships.

Mr. Hoffman has served as lead counsel in major toxic tort cases on behalf of Lockheed Martin and Shell Chemical. He headed the trial team that won a jury verdict in early 1994 for entertainer Michael Jackson in copyright infringement litigation. In the sports arena, Mr. Hoffman was co-counsel for the American Basketball Association in the merger between the National Basketball Association and the American Basketball Association. He was counsel for the American Psychiatric Association in a consulting role in the Brady litigation against John Hinckley's psychiatrist arising out of the assassination attempt on President Ronald Reagan. Mr. Hoffman was defense trial counsel in a consolidated securities fraud class action and a related derivative suit class action against Storage Technology Corporation. He was lead trial counsel for Lockheed Martin Corporation in consolidated private and EEOC age discrimination litigation. Mr. Hoffman currently is lead co-counsel for The Gates Corporation in a theft of trade secrets and Lanham Act suit against Bando Chemical Industries, a Japanese corporation, and its American subsidiaries.

Mr. Hoffman also has broad experience in alternative dispute resolution. He is an arbitrator/mediator panelist for the American Arbitration Association and Center for Public Resources. He has arbitrated cases involving the U.S. Olympic Committee and the U. S. Football League.

The November 7, 1994 special supplement of the

Foundation (fellow) Denver Bar Association	National Law Journal has an article on Mr. Hoffman's background and lists him as one of the top trial lawyers in America.
International Society of Barristers (fellow)	Mr. Hoffman is the only person to have served as president of both the Colorado Bar Association and the Colorado Trial Lawyers Association, and as state chairperson of the Colorado chapter of the American College of Trial Lawyers. He is also a member of the International Society of Barristers. Mr. Hoffman was chair of the Judicial Planning Council's Committee on Judicial Performance (the Colorado Supreme Court's sub-committee on the evaluation of judges), member and chair of the Merit Screening Committee for the Bankruptcy Judges in the Colorado federal district court, and chair of the Rocky Flats Blue Ribbon Citizens Committee.

TIMOTHY W. LEARY

NOT AVAILABLE ON THE INTERNET

CHARLES R. LEPLEY

NOT AVAILABLE ON THE INTERNET

JAMES E. MEJIA

NOT AVAILABLE ON THE INTERNET

DEBORAH L. ORTEGA

CAREER

1995 Re-elected in 1995, Councilwoman for Council District Nine. District Nine is unique in the demographics, and is culturally and economically diverse.

1987 Elected as Councilwoman, District Nine

Prior to being elected to the Denver City Council, worked for many years as Staff Assistant to former Councilman Sal Carpio, Jr., District Nine.

ORGANIZATIONS and COMMITTEES

Active Chair of Del Norte Neighborhood Development Corporation.
Board member of Hispanic Elected Local Officials (HELO) and National Association of Latino Elected Officials (NALEO).
Member Urban Energy and Transportation Corporation's Advisory Committee .
Member Public Safety Committed for the Colorado Municipal League to the National League of Cities.
Advisory member of Public Technology Inc (PTI).
Chairperson for the Land Use Committee.
Member of Business Issues Committee, Finance and General Government Committee, and Human Services Committee.
Member of the following special assignment committees: Management Review Oversight; Sports Facilities Task Force (Pepsi Center); Urban Drainage and Flood Control

EDUCATION

West High School
Barnes Business College

SAMUEL WILLIAMS

CAREER:

1997 to Present	Plans and Programs Youth Offender System Department of Corrections State of Colorado
8/96 to Present	Director, Colorado Child Care Capital Corporation
1/96 to Present	Coordinator, Business Commission on Child Care Financing
1978 to Present	Real Estate Broker International Traders Realty, Co-Owner Breckenridge and Denver, Colorado
6/96	Consulting Team for financial and marketing analysis of the Denver Golf Enterprise Fund (6 Denver City Golf Courses)
6/88 to 12/91	Director, Commercial Leasing, Village at Breckenridge Resort Responsible for commercial leasing, contracts, and approximately 20 leases.
1957 to 1977	United States Army, Retired Lieutenant Colonel Served a variety of assignments in Korea, Okinawa, Vietnam, Republic of China, and Germany. Assignments included command, staff, attache, civil administration and foreign area specialist. Major command experience as Commander, South Germany Exchange Region supervising retail service operations of more than 56 facilities grossing $13.1 million per month and employing 10,000 employees. Military awards and decorations include the Combat Infantryman's Badge, the Legion of Merit, the Vietnam Cross of Gallantry, the Vietnam Medal of Honor, the Bronze Star, the Air Medal, Meritorious Service Medal and the Parachute Badge (U.S., Korea).

ELECTIVE OFFICES:

Breckenridge Town Council, 1978

Elected to Colorado House of Representatives in 1986, serving House District 62 (D)-Breckenridge.

Served as Minority Whip 1988.

Assistant Minority Leader 1990.

Elected House Minority Leader in 1992.

LEGISLATIVE COMMITTEES:

Served on Agriculture and Natural Resources; Local Government; State Affairs; Legal Services; Legislative Council; Transportation and Energy; and Education Committees.

Major Legislation Sponsored: Sponsored legislation to add foreign language to the model content standards for statewide student assessments to be adopted by the State Board of Education. Sponsored legislation for continuing education of realtors, legislation dealing with mass transit for rural counties, conflict of interest for municipal officials, water quality control, school finance and toxic air emission standards.

GOVERNMENTAL BOARDS AND COMMISSIONS:

Commission on Productivity and Efficiency in State Government, Economic Development Commission, Community Education Advisory Council. Chairman of Energy, Environment and Transportation Committee-National Black Caucus of State Legislators. Executive Committee-Western Legislative Council. Served as chairperson of the Rocky Flats Monitoring Council from 1988 to 1994. Commissioner, Merit System Council, Colorado Department of Human Services. Supreme Court Justice Erickson's Commission on the Use of Deadly Force.

AWARDS:

1994 Legislator of the Year - Colorado Congress of Foreign Language Teachers.
Freshman Legislator of the Year - 1987
Legislator of the Year - 1990 - Colorado Ski Country USA, Political
Service Award - Association of Realtors
Citizen of the Year Award - Summit County Realtors
Guardian of Small Business - 1990.

CIVIC & PROFESSIONAL ORGANIZATIONS:

Adoption Option-Board Member
American Legion
Omega Psi Phi
Summit County Association of Realtors
Rotary Club
VFW
Summit Foundation
Denver Metro Commercial Association of Realtors

EDUCATION:

B.S. - Central State University, Wilberforce, Ohio 1957 (Alpha Kappa Mu Honor Society)
M.S. - Cornell University, Ithaca, New York, 1965
Ph.D. Course Work and Orals Completed. Degree pending completion of dissertation. International Management (1973-1976).

APPENDIX II

Report To Commission by Professor William T. Pizzi
University of Colorado Schoolof Law
NOT AVAILABLE ON THE INTERNET

APPENDIX III

Denver Police Department Operations Manual Excerpts Pertaining To Use of Force, Police Officer Shootings and Discharge of Firearms

NOT AVAILABLE ON THE INTERNET

APPENDIX IV

Denver District Attorney Protocol For
Investigation of Police Officer Shootings

SHOOTINGS BY PEACE OFFICERS IN DENVER, COLORADO

INVESTIGATIVE PROCEDURE AND THE COLORADO LAW

A. William Ritter, Jr.
Denver District Attorney

When a peace officer shoots and wounds or kills a person in Denver, a very specific and formal procedure is used to investigate and review the case. The following will assist you in understanding the procedures and the law that apply in the investigation and review of cases involving shootings by peace officers.

When a shooting occurs, it is immediately reported to the police radio dispatcher, who then notifies all persons on the Police Shooting Call-Out List. This includes: Division Chief of Investigations, Captain of Crimes Against Persons Bureau, Captain of the Crime Lab, On-Call Chief Deputy District Attorney, Homicide Detectives, Crime Lab Technicians, Division Chief of Patrol, District Commander of involved area, Involved Officer's Division Chief and Commander. The Manager of Safety, Chief of Police and Public Information Officer are notified of the shooting.

The investigation is conducted under the direction of the Division Chief of Investigations with the direct participation of the On-Call Chief Deputy District Attorney at all stages of the investigation. The Chief Deputy D.A. responds to the scene of the shooting to assist with legal advice, then to the Crimes Against Persons Bureau to participate in the taking of videotaped statements from key witnesses and the involved officers. He is available for legal advice and assistance in preparing arrest and search warrants when needed and with strategical decisions concerning the investigation.

Standard investigative procedures are used at all stages of the investigation and there are additional specific procedures in the Denver Police Department's Operations Manual for cases involving shootings by peace officers to insure the integrity of the investigation. For example, the procedure calls for the immediate separation and sequestration of all key witnesses and all involved officers. This is done in an effort to insure totally independent statements and to avoid even the appearance of collusion.

In most cases, the bulk of the investigation is concluded in the first twelve to twenty-four hours. However, there are certain aspects of the investigation that cannot be completed that quickly. For example, the testing of physical evidence by the Crime Lab, such as firearms examination, gun shot pattern testing, blood typing and other testing commonly associated with these cases. In addition, where a death occurs, the autopsy and autopsy report take more time and this can be extended substantially if it is necessary to send lab work out for very specialized toxicology or other testing.

After the investigation is concluded, the entire case file is turned over to the District Attorney for final review and a decision whether any criminal charges are fileable. If criminal charges are not fileable, a formal letter stating the facts of the case and the legal conclusions is sent to the Chief of Police with copies to the involved peace officer and other appropriate officials. If the peace officer is from another law enforcement agency, the letter is directed to the head of that agency. At this time the entire written case file is available and open to the public at the Denver District Attorney's Office, unless a criminal case is pending against the party who was shot. In that event, the file becomes available and open to the public at the conclusion of the criminal prosecution.

THE DECISION

In making our filing decision, we use the following analysis:

1. Based on the totality of the investigation we determine the facts of the case.

2. Based on the determination of the facts of the case, we determine the Colorado law that applies.

3. To the facts and the law we apply the charging standard: A reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses.

This is the same standard that we apply to all of our charging decisions. It is a standard used nationally and is approved by the American Bar Association and the National District Attorney's Association.

THE COLORADO LAW

In cases involving shootings by peace officers, the applicable Colorado law is found at C.R.S. 18-1-707, Use of Physical Force in Making an Arrest or in Preventing an Escape, and 18-1704, Use of Physical Force in Defense of a Person. 18-1-707 applies only to peace officers, while 18-1-704 applies to all citizens, including peace officers. These statutes are found under Part 7 of the Criminal Code which sets forth "Justifications and Exemptions from Criminal Responsibility." These are “Affirmative Defenses" to acts that might otherwise be criminal.

The statutes read in pertinent part as follows:

18-1-707. USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING ESCAPE. (1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary.

(a) To affect the arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or

attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary;

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest or to prevent the escape from custody of a person whom he reasonably believes;

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

18-1-704. USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON.

(1) Except as provided in subsection (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily harm; or

(b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary as defined in sections 18-4-202 or 18-4-204; or

(c) The other person is committing or reasonably appears about to commit kidnaping as defined in sections 18-3-301 or 18-3-302, robbery as defined in section 18-4-301 or 184-302, sexual assault as set forth in part 4 of article 4 of title 18, or assault as defined in sections 18-3-202 or 18-3-203.

"Deadly Physical Force" means force the intended, natural or probable consequence of which is to produce death, and which does in fact produce death. Therefore, if the person

shot does not die, by definition, only physical force has been used under Colorado law.

In cases where an affirmative defense is available under the law, our burden of proof not only to prove beyond a reasonable doubt all of the elements of the crime charged, but also to disprove any affirmative defense beyond a reasonable doubt. To justify a criminal filing, we must in good faith believe that there is a reasonable likelihood that all of the elements of the crime charged can be proved, and affirmative defenses disproved beyond a reasonable doubt, unanimously, to twelve jurors at trial.

Our decision, based on this analysis and standard, does not affect administrative or civil actions, where less stringent laws and legal levels of proof apply.

Even though criminal charges are unwarranted in a given case, the Denver Police Department review of the case may result in a finding that departmental actions are appropriate, such as individualized training, changes in firearms policies and procedures, changes in officer assignment and others. .

The Denver Chief of Police has established a Firearms Discharge Review Board which examines all firearms discharges by active members of the Department. The Board is investigative in nature and responsible for making recommendations on administrative justification, administrative case filings,Departmental policy modifications, training and commendations.

GENERAL COMMENTS

APPENDIX V

Contra Costa County, California,
Officer-Involved Fatal Incident Protocol

CONTRA COSTA COUNTY, CALIFORNIA
POLICE CHIEF'S ASSOCIATION

OFFICER-INVOLVED FATAL INCIDENT PROTOCOL

March 13, 1984
Revised: November 22, 1989
Revised: March, 1991

Project Coordinator: Bob Hole 510-646-5342

This Protocol was unanimously adopted by the Contra Costa County Police Chiefs' Association, the members of which are:

Chief Leonard Herendeen
ANTIOCH POLICE DEPARTMENT

Chief Russell Quinn
HERCULES POLICE DEPARTMENT

Chief Harold E. Taylor
BAY AREA RAPID TRANSIT
DISTRICT POLICE DEPARTMENT

Chief James Bray
KENSINGTON POLICE DEPARTMENT

Chief James A. Frank
BRENTWOOD POLICE DEPARTMENT

Chief Gerald Boyd
MARTINEZ POLICE DEPARTYMENT

Captain Robert H. Tindel
CALIFORNIA HIGHWAY PATROL

Chief Robert T. Hughes
MORAGA POLICE DEPARTMENT

Chief Norm Venturino
CLAYTON POLICE DEPARTMENT

Chief Leonard Castiglione
PITTSBURG POLICE DEPARTMENT

Chief Robert Redfern
CONCORD POLICE DEPARTMENT

Chief Theodore Barnes, Jr.
PINOLE POLICE DEPARTMENT

Gary T. Yancey
District Attorney
CPNTRA COSTA COUNTY

Chief James R. Nunes
PLEASANT HILLPOLICE DEPARTMENT

Sheriff Richard K. Rainey
CONTRA COSTA COUNTY

Chief Earnest Clements
RICHMOND POLICE DEPARTMENT

Chief Peter Sarna
EAST BAY REGIONAL PARK DISTRICT
DEPARTMENT OF PUBLIC SAFETY

Chief Douglas Krathwahl
SAN PABLO POLICE DEPARTMENT

Chief Daniel G. Givens
EL CERRITO POLICE DEPARTMENT

Chief Karel A. Swanson
WALNUT CREEK POLICE DEPARTMENT

Joseph P. McKeown, Chief of Police Services, CONTRA COSTA COMMUNITY COLLEGE DISTRICT

FORWARD

Investigations of fatal incidents involving police employees often place extraordinary demands upon the individuals and agencies involved. In addition to the knowledge, skill and resources required to investigate civilian homicide cases, officer-involved fatal incidents present unique combinations of complexities.

These cases tend to attract considerable interest from segments of the public and from the news media. The public's right to know what occurred may require balancing with investigative necessity, rights of privacy or rights to a fair trial. Doubts may be expressed by some about the propriety of police agencies conducting investigations of fatalities which involved their own officers as actors or victims.

The individuals and agencies involved in such fatal incidents, as well as those involved in subsequent investigations, must realize that each incident has potential social, civil, administrative and criminal consequences. Incident investigators and agency managers must understand the legal rights, obligations and authority of the agencies and individuals involved. They must specifically recognize and reconcile police officers' constitutional rights against the rights and obligations resulting from the employer/employee relationship.

Confusion and even conflict can occur among individuals and agencies based upon their different interests, duties, perspectives, authority, training and resources. Unless resolved in advance, questions such as who conducts the investigation, what type of investigation should be performed and who can be present when an involved officer is interviewed, can delay and compromise investigations.

Because these demands and complications exist, this Protocol [34] was developed by the Contra Costa County Police Chiefs' Association to serve as a model or guideline for the investigation of officer-involved

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[34] **This Protocol is actually a revision of the Officer-Involved Fatal Incident Protocol which was unanimously adopted by the Contra Costa Police Chiefs' Association in March 1984. That document remained in effect until superseded in November 1989 by this addition. Revisions included a few substantive changes, several substantive additions, and a chance in the document's format. In March 1991, a few minor revisions were made.**

fatal incidents in Contra Costa County. The goal of the Protocol is to help assure that such cases are thoroughly and fairly investigated.

While this Protocol represents the understanding and agreement among member agencies about how such cases are to be investigated, it is anticipated that individual agencies will make minor modifications, not effecting inter-departmental provisions, to meet agency requirements.

This Protocol, which is neither a statue, ordinance or regulation, is not intended to increase the civil or criminal liability of member agencies or their employees, and it shall not be construed as creating any mandatory obligations to, or on behalf of, third parties.

1. DEFINITIONS (1)

A. "Officer-Involved Fatal Incidents"/"Incidents" (2)

Incidents occurring in Contra Costa County involving two or more people, in which a police agency employee is involved as an Actor, Victim or custodial officer, where a "Fatal Injury" (see paragraph # 29 for definition) occurs. Such "Incidents" include but are not limited to the following:

1. Intentional and accidental shootings, including police tactical incidents involving specialized response teams. (3)

2. Intentional and accidental use of any other dangerous or deadly weapons. (4)

3. Assaults upon police officers; assaults on other police employees who are on duty or are acting for a law enforcement purpose. (5)

4. Attempts by police employees to make arrests or to otherwise gain physical control for a law enforcement purpose. (6)

5. Physical altercations, mutual combat, and domestic violence in which the police employee is acting in a private citizen capacity. (7)

6. Any fatal injury in police custody, but excluding fatal injuries of prisoners which occur while the inmate is under physician's treatment for a disease or other natural condition which has been diagnosed prior to death and which does not involve custodial trauma, custodial suicide or custodial ingestion of toxic substance. (8)

7. Any fatal injury to a person who is a passenger of a police officer (such as ride-alongs, emergency transports, etc.) (9)

8. Vehicular collisions, and specifically (10)

a. including any vehicle fatality which occurs: (11)

1) after, although not necessarily as a proximate cause of, police gunfire directed at the suspect or the suspect vehicle (12)

2) in connection with use of vehicle(s) by police as an "enforcement intervention" technique intended to apprehend a suspect.("Enforcement intervention" includes vehicle ramming, roadblocks, and forcing a vehicle to alter its course by cutting in front of it or by contact.) (13)

b. excluding any vehicle fatality which involves: (14)

1) off-duty non-sworn police employees who are not at the time of the Incident acting for an actual, apparent or purported law enforcement purpose; (15)

2) solo vehicular collisions in which the only injury is suffered by a police employee who was the driver and sole occupant of a vehicle which was not involved in a collision with any other occupied vehicle; (16)

3) police pursuits wherein the suspect vehicle which is being pursued by police vehicle(s) collides with another vehicle, a pedestrian or an object, where that collision did not result from collision contact between the suspect vehicle and a police vehicle or from "enforcement intervention"). (See paragraph #s 12 and 13.) (17)

B. "<u>Police Employee</u>"

This Protocol applies to employees and to certain other people affiliated with the law enforcement agencies which are members of this Protocol agreement, as follows: (18)

1. Full-time, part-time, and hourly sworn officers, whether on-duty or off-duty, and whether acting for a law enforcement or a private purpose at the time of the Incident; (19)

2. Full-time un-sworn employees who are on-duty at the time of the Incident, or who are acting actually, apparently or purportedly for a law enforcement purpose at the time of the Incident; (20)

3. Part-time un-sworn employees: same as paragraph # 20 above; (21)

4. Reserve police officers who are on-duty or who are acting actually, apparently or purportedly for a law enforcement purpose at the time of the Incident; (22)

5. Temporary employees and volunteers whether paid or unpaid, who are on-duty or who are acting actually, apparently or purportedly for a law enforcement purpose at the time of the Incident. This category includes Informants when they are working under the direct control and supervision of a police officer. (23)

C. "<u>Actor</u>" (24)

1. A person whose act is a "proximate cause" of a fatal injury to another person; or (25)

2. A person who intends that his act be a "proximate cause" of serious bodily injury or death to another person who is actually killed by another. (26)

D. "Victim"

The person who is injured by the act of the Actor, whether or not intentionally. When used in this Protocol, this word does not imply existence of criminality; it is used simply to designate the person who is physically injured. (27)

E. "Proximate Cause"

A cause which, in a natural and continuous sequence, produces the fatal injury, without which cause the injury would not have occurred. Reasonable foreseeability of the fatal injury is not a factor relevant to this definition. (28)

F. "Fatal Injury"

Death, or injury which is so severe that death is likely to result.(29)

G. "Venue Agency"

The agency, or agencies, within whose geographical jurisdiction the Incident occurs. (See paragraph # 58+ for Venue determination factors.) (30)

H. "Employer Agency"

The agency by whom the involved police employee is employed or with which he/she is affiliated. (In many cases the Venue Agency will also be the Employer Agency.) (31)

I. "Criminal Investigators"

Those investigators assigned by the Venue Agency(cies), the Employer Agency(cies), the California Highway Patrol (when applicable) and the District Attorney's Office to conduct the criminal investigation of the Incident. (32)

J. "Administrative Investigators"

Those investigators assigned by the Employer Agency to conduct the Administrative Investigation of the Incident. (See paragraph # 202+.) (33)

K. "Member Agencies"

The law enforcement agencies in Contra Costa County which are members of this Protocol agreement. (34)

2. INVOCATION OF THIS PROTOCOL (35)

A. Automatic and Immediate:

Upon the occurrence of an Officer-Involved Fatal Incident (as defined in paragraph # 2+), this Protocol is automatically effective immediately upon the occurrence. (36)

B. Optional: (37)

1. Each Member Agency of this agreement, when in the capacity of a Venue Agency or Employer Agency, may itself invoke this Protocol upon the occurrence of any sensitive or critical event involving a police employee which may have possible criminal liability attached. Upon this unilateral invocation, the matter will be investigated under the provisions of this Protocol. (38)

a. Examples: (39)

1) a fatality which is not covered by this Protocol (40)

2) an officer-involved incident where the injuries are not fatal (41)

3) any other sensitive or critical event involving a police employee where criminal conduct is a possibility to be investigated. (42)

b. The District Attorney has discretion to decline participation in optional invocations. (43)

2. In lieu of invoking this Protocol, the involved agency(cies) may, of course, investigate the matter by itself or may seek aid from other agencies. (44)

3. <u>INVESTIGATIVE AGENCIES, FORMATS AND RESPONSIBILITIES</u>:

To properly recognize and accommodate the various interests and the various rules of law which may be involved in any Incident, investigations of these matters must be performed under two separate investigative formats: (1) the Criminal Investigation; and the (2) Administrative Investigation (see paragraph # 202+). (45)

A. <u>The Criminal Investigation</u>: (46)

1. The Criminal Investigation has investigative priority over the Administrative Investigation and it begins immediately after an Incident has occurred. (47)

2. It is performed by criminal investigators from the Venue Agency(cies), the Employer Agency(cies), the California Highway Patrol (when applicable), and the District Attorney's Office formed into a Task Force for each Incident. The participating agencies are co-equal within the investigation, but the agency within whose geographical jurisdiction the Incident occurs has the ultimate authority to decide irreconcilable investigative issues. (48)

3. Its goal is to develop all available relevant information about the Incident. This information will be used in two ways: (49)

a. To determine presence or absence of criminal liability on the part of all those involved in the Incident. Specifically: (50)

1) To determine whether the nature and the quality of the conduct involved is prohibited by statutes which provide for criminal penalties upon conviction; and (51)

2) If criminal conduct does exist, determine the identity of the person(s) responsible for that conduct; and (52)

3) If criminal conduct does exist, determine the degree of the crime(s); the existence of any factual or legal defenses to that crime; and to determine the presence or absence of any factors which would mitigate or aggravate punishment for that crime. (53)

b. To incidentally provide factual information to the Employer Agency's management for its internal use.

(While the Criminal Investigators do not direct their investigative attention to Administrative concerns, it is recognized that the Criminal Investigation's results are of proper interest to Agency Management for its internal use and those results are fully available for that purpose.) (54)

4. The investigation is required to follow the rules of law which apply to all criminal proceedings including constitutional, statutory and case law regarding rights which are covered by the United States Constitution's 4th, 5th, 6th, and 14th Amendments. (55)

5. It is performed in a manner that provides both the appearance and the reality of a thorough, fair, complete and professional investigation which is free of conflicts of interest. (56)

6. Within the Task Force, the Criminal Investigators will be divided into one or more teams (the number depending upon the complexity of the Incident and upon the number of people to be interviewed). Each team will consist of one criminal investigator from the Venue Agency(cies), the Employer Agency(cies), the California Highway Patrol (when applicable), and from the District Attorney's Office. The Task Force investigation will be led by a primary team which is composed of the primary investigator from each of the Task Force agencies. (57)

7. Venue Determination: (58)

a. When an Incident occurs in part in two or more jurisdictions, each of those jurisdictions is a Venue Agency. (59)

b. When an Incident occurs on the boundary of two jurisdictions, or at a location where the relevant boundary is not readily ascertainable or is in dispute the Venue Agency(cies) shall be: (60)

1) the Employer Agency if the Actor is employed by either boundary agency (61)

2) both boundary agencies if Actors are employed by both (62)

3) the agency which has the greater interest in the case by virtue of having the predominant police involvement in the Incident or by virtue of having had the majority of acts leading up to the fatality occur within its jurisdiction (63)

c. For custodial deaths, the agency having custody of the person at the time his/her distress was first discovered is a Venue Agency. Also a Venue Agency is the one within whose jurisdiction any fatal stroke was inflicted. (64)

1) If the death was caused by conduct which was apparently criminal, the lead Venue Agency is one within whose geographical jurisdiction the act occurred. If there is apparently no criminal conduct involved in the cause of death, the lead Venue Agency is the one having custody of the victim when distress was first discovered. (65)

d. Special Venue situations (66)

1) Districts (67)

a) East Bay Regional Park District (EBRPD) and Bay Area Rapid Transit District (BART),

and Contra Costa Community College District:

These agencies shall be Venue Agencies for Incidents occurring on their property. City police departments and the Sheriff's Office having concurrent jurisdiction will participate in the Criminal Investigation only upon request of these Districts. (68)

e. If an on-duty police officer (sworn) is involved as the Actor in an Incident which occurs within the jurisdiction of another Member Agency, and if that officer was acting in the performance of his/her duty at the time of the Incident, the/a Venue Agency may elect to relinquish its role in the Criminal Investigation to the other Task Force agencies. (69)

8. When a Venue or Employer Agency lacks sufficient resources, or when it believes it cannot properly investigate an Incident for another reason, it has two options: (70)

a. Obtain criminal investigative assistance from other Member Agency(cies). Borrowed officers would then be assigned to the Criminal Investigation Task Force as members of the requesting agency. (71)

b. Relinquish criminal investigative responsibility to another Member Agency or to the California Department of Justice. (72)

9. Vehicle collision Incidents: (73)

a. Accidental collision fatalities shall be investigated by Task Force criminal investigators (see paragraph # 48), joined by accident investigation specialists from the California Highway Patrol (CHP) or from another agency. The accident investigation specialists have the primary responsibility for documentation, collection and preservation of physical evidence. On-scene collaboration with the Sheriff's Criminalistics Laboratory is encouraged. (74)

b. If the fatality results from a collision that was not accidental (e.g. use of "enforcement intervention" techniques), OR if vehicle movement was merely incidental to a fatality which was caused by non-vehicular means, the accident investigation specialists may be used by the Task Force for that phase of the investigation, but their role will be limited to investigation of physical movement of the vehicle(s) and to collision reconstruction. (75)

10. Scene security:

Each Agency has initial responsibility for immediately securing crime scene(s) within its territorial jurisdiction. (See paragraph #s 79 and 99 for scene procedures.) This responsibility includes preservation of the integrity of the scene(s) and its/their contents, access control, and the identification and sequestration of witnesses. Responsibility may be changed by mutual agreement as the investigation progresses. (76)

11. Responsibility for physical evidence collection, preservation and analysis: (77)

a. The Contra Costa Sheriff's Criminalistics Laboratory (Laboratory) has the responsibility for documentation of the scene(s) and for the collection, preservation and analysis of physical evidence except in some vehicular fatalities (see paragraph # 74). (78)

b. Pending arrival of Laboratory personnel, there are several important duties to be performed by police field evidence technicians or others; see Attachment C. (79)

c. In unusual cases the Task Force agencies may all agree that the Laboratory need not be called to process the scene(s) and to collect evidence. The Laboratory shall be used if any Task Force agency desires. (80)

d. If an employee of the Laboratory is involved in an Incident as an Actor or as a Victim, the Laboratory will be

disqualified from participation in the investigation of the Incident. These alternatives are available: (81)

1) The California Department of Justice: for scene documentation, collection, preservation and analysis. (NOTE: Response time maybe as long as 2 to 3 hours.) (See paragraph # 86+ for notification procedure.) (82)

2) Trained and experienced evidence collection officers from Member Agencies, who will have full responsibility for evidence work until the Department of Justice criminalists arrive. These officers may be asked to assist the criminalists upon arrival of the criminalists. Evidence collectors from Venue and Employer Agencies may be used but evidence collectors will not be provided exclusively by the Employer Agency. Officers will document, collect and preserve the physical evidence. Laboratory opinions and analysis will be obtained from a laboratory designated by the Task Force, usually the Department of Justice. (83)

e. The Venue or Employer Agency(cies) may be requested by the Laboratory to furnish officers to assist with evidence and scene documentation, collection and preservation. Officers so involved will work under the direction of the Laboratory's criminalists. (84)

f. Prior to final relinquishment of the scene, the Task Force investigators and the criminalists (and CHP investigators when applicable) will provide the Administrative Investigators an opportunity to assess the need for further evidence processing. (85)

12. Notifications

Upon identifying an occurrence as an Officer-Involved Fatal Incident, the Venue Agency(cies) shall make the following notifications as promptly as possible to: (86)

a. Intra-departmental officers, as required by that agency's procedures. (87)

b. The Employer Agency, if applicable and if not yet aware. (88)

c. The District Attorney's Homicide Watch attorney (directly by telephone, or through Sheriff's Dispatch). (89)

d. The Sheriff's Criminalistics Laboratory (or the Department of Justice if applicable - see paragraph # 81) .

Notification to the Department of Justice Laboratory is made directly to the Santa Rosa Laboratory's director (707) 576-2415 during working hours. At other times contact the Department of Justice Command Center (916) 739-2771 to have the Santa Rosa Laboratory's personnel notified. (90)

e. For vehicular collision deaths, the California Highway Patrol or another agency (see paragraph # 73+).

The California Highway Patrol should be notified through a supervisor at the appropriate field office: (91)

	Business Hours	After Hours
Martinez:	(510) 646-4980	(510) 464-3818
Solano:	(707) 428-2100	(510) 464-3818
Oakland:	(510) 464-3818	(510) 464-3818
Dublin:	(510) 828-0466)	(510) 464-3818

f. The Coroner's Office, upon confirmation of a fatality. This is a required notification. (Body removal can be delayed as necessary for evidence processing.) (92)

g. Custodial death notification law : Penal Code Section 5021 applies to deaths which occur in state prisons, CYA facilities, State Department of Mental Health facilities, and city or county facilities which are used for

incarceration, rehabilitation, holding or treatment of people who are accused or convicted of crime. The statute requires the custodial agency to make an initial report (in person, by telephone or in writing), containing all pertinent facts then known, as follows to: (93)

1. the county sheriff or designated representative, within a reasonable time but within two hours of discovery. (94)

2. the coroner's office, within a reasonable time but within two hours of discovery. (95)

3. the chief of police or designated representative if the facility is within an incorporated city, within a reasonable time but within two hours of discovery. (96)

4. the district attorney or designated representative, as soon as they are on duty. (97)

5. if the death occurs in a CYA or state prison facility, to the Chief of Medical Services in the Central Office of the Department of Corrections or CYA, as soon as a representative is on duty.

The statute further requires a supplemental report to be made in writing to those agencies within eight (8) hours of discovery.

Members of this Protocol agree that, as to the notification to their agencies required by Penal Code 5021, that statute will be considered complied with if the appropriate agencies are promptly notified of the death in accordance with this Protocol and if those agencies are involved in the investigation of the death as a member of the Task Force. (98)

13. Scene Procedures (also see Patrol Sergeant's Checklist Attachment A, in the back of this Protocol.) (99)

a. **Emergency life saving measures have the first priority (100)**

b. **If a person is transported to a hospital with "fatal injuries" (see paragraph # 29 for definition), an officer should accompany that injured person in the same vehicle in order to: (101)**

1) **Locate, preserve, safeguard and maintain the chain on physical evidence. (102)**

2) **Obtain a dying declaration (Evidence Code 1242); a spontaneous statement (Evidence Code 1240); a contemporaneous statement (Evidence Code 1241); a statement of then-existing or previous mental or physical state (Evidence Code 1250, 1251). (103)**

3) **Maintain custody of the person if he/she has been arrested. (104)**

4) **Provide information to medical personnel about the Incident as relevant to treatment, and obtain information from medical personnel relevant to the investigation. (105)**

5) **Identify relevant people, including witnesses and medical personnel. (106)**

6) **Be available for contacts with the victim's family, if appropriate. (107)**

c. **The scene(s) must be secured immediately with a perimeter established for each a sufficient distance away to safeguard evidence. In some circumstances an inner and an outer perimeter are appropriate. (108)**

1) **Access to the scene(s) must be limited to only those officials who must enter for an investigative purpose. (109)**

2) **A written log will be established as quickly as possible to identify all persons entering the scene(s),**

the time of their entry and exit, and the reason for entry. (110)

3) When not needed for life savings efforts, entry by fire and ambulance personnel should be restricted to the absolute minimum necessary to perform the needed duties. (111)

4) No items shall be moved inside the scene(s) or removed from a scene without approval of the Task Force and the Criminalistics Laboratory unless absolutely necessary for public or officer safety or for preservation of evidence. If removal without approval is necessary, the removal must be witnessed and logged. The log shall state the identity of the person removing the described object, the reason for removal, a witness to the removal, and the time of removal. The item should be photographed prior to removal. (112)

d. If any type of weapon or instrument was involved in the fatal incident, the supervisor at the scene will promptly see to the security and/or collection of such items, as follows: (113)

1) If the area is secure, loose weapons or instruments shall be left in place and undisturbed. (114)

2) If the area is not secure, the supervising officer at the scene shall decide whether the items can be safely left in place or whether prompt removal is necessary. If such items must be moved or removed for protection, they should be photographed in place prior to removal if possible. (115)

3) If an involved officer still has personal possession of a weapon he/she used in the Incident, the supervising officer at the scene shall promptly but discretely (i.e. in private, out of view of the public and other officers if possible) obtain possession of the weapon. Sidearms must not be removed from their holsters; obtain the entire gunbelt if necessary

to avoid removing the weapon from its holster. Sidearms should be replaced by the supervisor as quickly as possible if the officer so wishes, unless reason dictates otherwise. (116)

4) In shooting cases, the supervising officer will check the firearms of all officers who were present at the time of the Incident to ensure that all discharged firearms are identified and collected, and to specifically document those weapons which were not fired. (117)

5) The supervising officer collecting any weapon or instrument will make note of its readily visible general description and condition, the appearance and the location of any trace evidence adhering, to the extent these observations can be made without removing a firearm from its holster or otherwise compromising physical evidence. The location where the weapon or instrument was first observed by the supervising officer, and the identity of the person or location from which the weapon or instrument was received shall also be recorded. (118)

a) In firearms cases, the supervising officer will also (see paragraph # 118) make note of whether the firearm is cocked, has its safety "on" or "off", has its hammer back, any apparent jamming of either fired or unfired ammunition; the location and position of the weapon's magazine (e.g. fully or partially inserted, completely separate from the firearm, missing, etc.), to the extent possible without removal of the weapon from its holster (see paragraph # 116). (119)

1) If the mechanism of a firearm is obviously jammed, no attempt shall be made to unload the weapon or clear the jam. (120)

2) If the firearm is cocked (or if a semi-automatic pistol cannot be determined to be cocked or not), the safety may be put "on" by the supervising officer, who must make note of that fact. If the firearm's hammer is back, it may be lowered but note must be made of that fact. (121)

b) Any officer receiving a weapon or instrument from another person or obtaining it otherwise shall note its serial number if readily visible without removing the weapon from its holster or otherwise compromising physical evidence (see paragraph #s 114-121) and shall otherwise maintain the chain of evidence. (122)

c) Otherwise, weapons and instruments will not be disturbed in any way. They shall not be handled by anyone other than the supervising officer and that officer shall handle them minimally to preserve the exact state of the weapon or instrument when received. (123)

6) The collected weapons or instruments shall be transferred to the Criminalistics Laboratory staff upon their arrival, along with the information required under paragraph #s 117-122. (124)

7) If the supervising officer at the scene was himself an Actor or Victim in the Incident, the responsibility for security and/or collection of weapons and instruments shall rest with an uninvolved supervisor or the next-in-line uninvolved officer at the scene. (125)

8) Twelve rounds of the same type(s) of ammunition fired will be collected by the criminal investigators from each shooting officer (or from

another appropriate source if the officer has insufficient similar rounds remaining). (126)

9) Firearms which do not need to be retained in evidence, as determined by the criminal investigators, will be returned to a designated representative of the Employer Agency promptly after the Criminalistics Laboratory has inspected and tested them. The Laboratory appreciates that prompt return of officers' handguns is important, and will return them as soon as possible. (127)

e. Any other 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. Evidence adhering to live participants (such as blood stains), footprints and fingerprints, volatile substances, various types of trace evidence, and firearms discharge evidence, are examples. (128)

f. Transporting and Sequestering of Involved Officers: (129)

1) Officers who were present at the scene at the time of the Incident, whether Actors or Witnesses, will be relieved of their duties at the scene as promptly as possible and shall be sent to their own police station unless other suitable and agreeable arrangements are made for them. Officer(s) not involved in the Incident shall be assigned to accompany these officers, either in a group or individually. Actors should be driven to the station by an uninvolved officer. (130)

2) If circumstances prohibit removal of all witnessing and involved officers from the scene at once, those officers who were Actors should be relieved first. (131)

3) An uninvolved officer shall remain with the involved officers, either in a group or individually,

until they can be interviewed. The sequestering officers are present to ensure the officers have privacy, that their needs are accommodated, and to ensure the integrity of each officer's later statements to investigators. They should not be present during confidential (privileged) conversations (see paragraph # 168). (132)

4) Involved officers are not to discuss the case among themselves, with sequestering officers, or with others except their representatives. (133)

5) While awaiting interviews, involved officers are encouraged to relax and to carefully reflect upon what occurred. They may wish to make notes for their future use, especially for later interviews. (134)

g. Custodial Death scenes:

When an Incident occurs in a jail facility or other location where inmates may have witnessed something, inmates should be identified and separated if possible pending interviews by criminal investigators. (135)

14. Selection of Primary Investigators

Selection of the primary investigator(s) by the Task Force Agencies is of great importance. Generally, the best available investigator(s) should receive the assignment. These qualifications are important. (136)

a. Experience in homicide investigations (or vehicular collisions, if applicable). Investigation experience in other crimes against persons is helpful. (137)

b. Ability to effectively interview people of various backgrounds. (138)

c. Good working knowledge of physical evidence collection and preservation techniques, and an

appreciation of the abilities and limitations of scientific evidence. (139)

d. Good knowledge of police operational procedures and the criminal justice system. (140)

e. Excellent report writing and communication skills. (141)

f. Good organizational and supervisorial skills. (142)

g. Respected professionally by those with whom he/she works for being competent, thorough, objective, fair, and honest.(143)

15. Interviewing Police Employees (144)

a. The Public Safety Officers Procedural Bill of Rights ("The Act") (Government Code 3300 et seq.): (See Attachment B.) (145)

1) This statute has limited application to many interviews conducted by Task Force interview teams: (146)

a) By statutory definition, The Act is applicable only to "Public Safety Officers" (which is defined in Section 3301 to include most peace officers excepts coroners and their deputies, and railroad police). Under this definition, The Act is not applicable to police agency employees who are not peace officers. However, by contract, MOU or otherwise, some police agencies have extended the application of The Act to their non-peace officer employees. (147)

b) The Act is not applicable to interviews with Public Safety Officers who are being interviewed by other than their Employing Agency. (148)

c) Section 3303 of The Act (the section which pertains to the conditions and conduct of interrogations of peace officers) is not applicable to interviews with Public Safety Officers (even when being interviewed by their Employing Agency) when the investigation is concerned solely and directly with "alleged criminal activities." (149)

2) In interview situations where an involved officer is being interviewed by a Task Force interview team, AND when a criminal investigator from the involved officer's Employer Agency is part of that interview team, AND when the involved officer is "under investigation" AND when the interview "could lead to punitive action", the following options may be available: (150)

a) Comply with the statute. (151)

b) Do not comply with the statute on the grounds that the investigation is "concerned solely and directly with alleged criminal activities". (152)

c) Consult with Administrative Investigators regarding the possibility of the Employer Agency agreeing not to use the impending statement against the Interviewee in any punitive action (i.e. “use immunity”, see paragraph #157). (153)

d) Reconstitute the interview team by excluding the criminal investigator from the Employer Agency. (154)

e) Avoid asking questions when the answers to them would be likely to subject the officer to punitive action, if this can be accomplished while still obtaining an accurate

and meaningful statement from the interviewee about the Incident. (155)

f) The Employer Agency may also have the option of foregoing its right to impose administrative punitive action on the interviewee by allowing the interview to proceed without complying with the statute (i.e. "transactional immunity" (see paragraph # 156). (157)

g). The granting of administrative "use" immunity" (Paragraph 149) or administrative "transaction-al immunity" (Paragraph 152) to an interviewee is a serious and often complicated step that must be considered carefully. Early in the investigation, sufficient facts about the employee's conduct may not yet be available to allow an informed and correct decision to be made. Further investigation may reveal that any type of contemplated immunity is not warranted. The desired immunized statement may not actually be necessary or independent alternative means may exist to obtain the information. Authority within the Employer Agency to grant administrative immunity may need to be defined. When immunity is given, it must be carefully and narrowly defined in writing or on audio tape and agreed to by all effected parties. (157)

b. If and when the interview becomes a custodial interrogation, the Miranda cases are applicable. (158)

c. To insure proof of voluntariness in a non-custodial interview, the Task Force interviewers may wish to advise certain interviewees of the following: (159)

1) The interviewee is not in custody and is free to leave at any time. (160)

2) The interviewee is not obligated to answer any questions asked by the investigators and no punitive

action will be taken against the interviewee if he/she refuses to be interviewed by the Task Force Team. (161)

d. Government Code section 3304(a) permits heads of law enforcement agencies to order their officers to cooperate with criminal investigations being performed by other agencies. Failure to comply with such orders may result in a charge of insubordination. When applicable, interviewees may be advised of this provision. (162)

However, officers will not be compelled by threats of administrative punitive action (or otherwise) to answer questions ofTask Force interviewers which would be self-incriminating.

e. Interviews will be conducted separately. (163)

f. Interviews will normally be fully tape recorded. (164)

g. The interviewees will be considered as witnesses unless the circumstances dictate otherwise. (165)

h. Police employees have the same rights and privileges regarding Task Force interviews that any other citizen would have, including the right to consult with a representative prior to interview and the right to have the representative present during the interview. (166)

1) The representative should be allowed to consult about the facts of the incident privately with only one police employee at a time. (167)

2) If the representative is not a doctor, lawyer, psychotherapist or priest, or an agent of such professional, the contents of private conversations between the representative and his/her police employee "client" are not privileged. (However, Government Code 3303(h) prohibits compelling the representative to disclose any information received

from an officer who is under investigation for non-criminal matters.) (168)

16. Intoxicant Testing (169)

a. Criminal Investigation

Police employees have the same rights and privileges that any civilian would have regarding intoxicant testing. When Task Force investigators determine that a police employee's state of sobriety is relevant to the investigation, they have these options: (170)

1) Obtain the blood and/or urine sample by valid consent. (171)

2) Obtain the blood and/or urine sample incidental to valid arrest. (172)

3) Obtain a search warrant. (173)

4) When applicable, utilize Vehicle Code section 23157 for vehicular driving Incidents. (174)

5) If an arrestee refuses to comply with the request for a sample, attempts will be made to obtain the sample in accordance with case law. (175)

b. Administrative Investigation (176)

1) Intoxicant test results obtained by Task Force investigators are available to the Administrative Investigators. (177)

2) In the event the Task Force does not obtain samples for intoxicant testing, the Employer Agency may then seek to obtain samples. The Task Force investigators have the first opportunity however. (178)

a) Authority for the Employer Agency to obtain samples includes (1) valid consent, and (2) ordering the employee to provide the samples based on the employment relationship. (179)

b) Some departments have blanket orders regarding employee intoxicant testing while other departments make decisions on a case-by-case basis. (180)

c. Miscellaneous (181)

1) Blood is the best fluid for alcohol testing, while urine is best for drug screening. Optimally, samples of both should be obtained for most complete results. (182)

2) Samples should be collected promptly after the Incident for most meaningful results. (183)

3) A police employee may volunteer to provide sample(s) for intoxicant testing even if Task Force and Administrative Investigators haven't obtained samples. Similarly, a person from whom Task Force or Administrative Investigators have obtained samples may request that another sample be taken for independent testing. The taking of this sample and subsequent testing will not be at the expense of the Task Force or Employer. Such a request will be promptly honored. (184)

17. Autopsy (185)

a. At least one member of the Task Force's primary investigative team will attend the autopsy, as will a District Attorney's representative from the Task Force. Investigators representing other Task Force agencies may also attend. (186)

b. The autopsy pathologist will receive a complete briefing prior to the post mortem examination. This

briefing, which includes all information known to that time which may be relevant to the cause, manner and means of death shall be attended by at least one member of the Task Force's primary team, a District Attorney's representative and a member of the Criminalistics Laboratory. (187)

c. For autopsies conducted in Contra Costa, and for autopsies conducted in other Counties where the pathologist agrees, the Contra Costa Sheriff's Criminalistics Laboratory has the responsibility for documenting and collecting physical evidence. In vehicular collision deaths the California Highway Patrol or other accident investigation specialists have the responsibility with assistance if appropriate from the Laboratory (see paragraph #s 73-75). (188)

d. If the Actor is employed by the Contra Costa Sheriff's Department, or if the death occurs while the decedent is in custody of the Sheriff, a forensic pathologist not regularly employed by or associated with the Sheriff's Department will be engaged by the Sheriff-Coroner to perform the autopsy. (189)

e. Although the Coroner has authority to determine who attends an autopsy, it is usually advisable to allow attendance by a licensed medical doctor or licensed private investigator, or by a recognized professional criminalist, who has been retained by representatives of the decedent. (190)

18. The District Attorney's Office (191)

a. The District Attorney's Office has the following roles in Incident Investigations: (192)

1) Participate co-equally with the Venue and Employer Agency(cies) and the California Highway Patrol (when applicable) in the Task Force performing the criminal investigation. (193)

2) Assist and advise the Task Force on various criminal law issues which may arise, such as Miranda, voluntariness, search and seizure, probable

cause to arrest, detentions and releases, elements of crimes, immunity, legal defenses. (194)

3) Upon completion of the Criminal Investigation, analyze the facts of the Incident as well as the relevant law to determine if criminal laws were broken. If so, prosecute as appropriate. (195)

b. The District Attorney has his own separate investigative authority. When deemed appropriate by the District Attorney (or his designated alternate in his absence), the District Attorney's Office may perform an independent investigation separate from the Task Force. (196)

19. Report writing: (197)

a. All criminal investigators will write reports documenting their participation in the investigation. (198)

b. The investigators within each Task Force team will allocate and divide among themselves the responsibility for documenting interviews and observations. (199)

c. The lead Venue Agency has the ultimate responsibility for report writing and for collecting reports from other agencies. (200)

d. Prompt completion and distribution of reports is essential. All involved agencies and investigators will strive for report completion and distribution within 30 days after the Incident. (201)

B. <u>Administrative Investigation</u> (202)

1. In addition to its concern about possible criminal law violations by civilians and its own employees who are involved in an Incident (which concerns are addressed by the Criminal Investigation), the Employer Agency also has need for information about the Incident for non-criminal purposes: (203)

a. Internal Affairs:

Determination of whether or not its employees violated departmental regulations. (204)

b. Agency Improvement:

Determination of the adequacy of its policies, procedures, programs, training, equipment, personnel programs and supervision. (205)

c. Government and Community Relations:

Informing itself of the Incident's details so it may adequately inform its parent governmental body, and so it may be responsive to comments about the Incident from the public and the media. (206)

d. Claims and Litigation:

Preparing for administrative claims and/or civil litigation that may be initiated by or against the agency. (207)

2. The Employer Agency may use an Administrative Investigation and/or a more specific "civil litigation investigation" format to investigate these concerns as it considers appropriate. While both the Criminal Investigation and the Administrative Investigation are important and should be aggressively pursued, investigative conflicts between the two formats shall be resolved by allowing the Criminal Investigation to have investigative priority. It is intended that this prioritization will preclude competition between the two formats for access to witnesses, physical evidence, and the involved parties, and that it will prevent the Criminal Investigation from being compromised by an untimely exercise of the Employer Agency's administrative rights. (208)

3. The initiation of Administrative Investigations and the extent of those investigations is, of course, solely the responsibility of the Employer Agency. (209)

4. Interview statements, physical evidence, toxicology test results and investigative leads which are obtained by Administrative Investigators by ordering police employees to cooperate shall not be revealed to Criminal Investigators without approval of the District Attorney's Office. Other results of the Administrative Investigation may or may not be privileged from disclosure to others, including the Task Force investigators, depending upon applicable law. See California Penal Code 832.6; California Government Code 3300 et seq.; Vela v. Superior Court, 108 Cal.App.3d 141, People v. Gwillim 223 Cal. App. 3d 1254.) (210)

5. The Employer Agency should immediately assign at least one Administrative Investigator upon being notified of the Incident. This officer can function as a liaison between the Employer and the Task Force, can gather information for the Agency, and can be the Task Force's contact for personnel matters, even if no actual investigation is then warranted by that officer. (211)

6. The Task Force will promptly and periodically brief the Administrative Investigator(s) of the criminal investigation's progress. The Administrative Investigators will have access to briefings, the scene(s), physical evidence, and interviewees' statements. (212)

7. Administrative Investigators are not bound by some of the same investigative restrictions that apply to Criminal Investigators (see paragraph # 55). (213)

4. NEWS MEDIA RELATIONS (214)

A. The interests of the public's right to know what occurred must be balanced with the requirements of the investigation and with the rights of involved individuals. (215)

B. As in all other cases, care must be taken to insure that intentionally misleading, erroneous or false statements are not made. (216)

C. Agencies and individuals who are not well informed and not intimately involved with the investigation's results and progress should not make statements to the press. (217)

D. While any agency cannot be prohibited from making statements to the news media about an Incident, these guidelines are established: (218)

1. The lead Venue Agency has the responsibility for making press releases about the Incident and its investigation for the first 48 hours. (219)

a. Officers in close contact with the Task Force are in the best position to comment about the facts of the case and the progress of the investigation. (220)

2. The Employer Agency.

If the Employer Agency is not also the Venue Agency, fewer problems will arise, especially at the early stages of the investigation, if the Employer Agency limits its comments to the following areas: (221)

a. The employer-employee relationship (222)

b. Factual material revealed by the Employer Agency's own Administrative Investigation of the Incident. (223)

c. Information which has been cleared for release by the Task Force. (224)

3. The Criminalistics Laboratory

Information released will usually be confined to general laboratory procedures, scientific facts and principles, and testing procedures. Specific results of searching, testing and analysis will generally not be released without clearance from an investigator from the Task Force's primary team. (225)

4. The Coroner's Office

Release of information will generally be limited to the following: (226)

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. (227)

b. The identity of those present at the autopsy, including the identity and affiliation of the pathologist(s). (228)

c. The general nature of further medical testing or medical investigation to be done. (229)

d. Information obtained by Coroner's investigators directly from medical sources, the deceased's family members, or witnesses. 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. (230)

e. Information regarding the holding of a Coroner's Inquest. (231)

f. Comments upon the verdict of a Coroner's Inquest Jury, or upon any testimony or evidence presented to the jury. (232)

g. The role of the Coroner's Office in the investigation of death, in general terms. (233)

E. If Task Force 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. (234)

F. Interruptions to the investigators will be minimized if the agencies assign particular individuals to be the sole designated contacts with the news media.(235)

5. INQUESTS (236)

A. In each Officer-Involved Fatal Incident wherein a non-police employee dies, and where no criminal charges have yet been filed, a Coroner's Inquest will normally be held. The purposes of the Inquest are to develop any further evidence regarding the circumstances of the death, and to inform the public through sworn testimony of the facts of the Incident. While the Coroner has the discretion to select the witnesses who will testify, it is generally desirable that all police employees who were present at the scene at the time of the Incident be subpoenaed, as well as any citizens who purport to have relevant personal knowledge. (237)

B. A few cases may arise where the facts of the Incident are very clear, the Actor's conduct was obviously justified, and the public and media interest is low. In such cases, the Sheriff/Coroner, the police chief of the involved agency(cies) and the District Attorney may all decide that an Inquest is not needed. (238)

C. Government Code section 27491.6 provides that the Coroner shall hold an Inquest if requested to do so by the Attorney General, the District Attorney, the Sheriff, city prosecutor or city attorney, or a chief of police in the county where the Coroner has jurisdiction. (239)

6. <u>ACCESS TO REPORTS AND EVIDENCE</u> (240)

A. Material (as defined in paragraph # 241+ below) which is created or collected by, or at the request or direction of, Task Force Criminal Investigators (including the Criminalistics Laboratory) will be made available in a timely manner to those agencies which have an interest in the investigation, including the Administrative Investigators. (241)

B. The material will include: (242)

1. Reports, written and collected. (243)

2. Access to physical evidence. (244)

3. Photograph, diagrams, and video tapes. (245)

4. Audio tape recordings. (246)

C. When the Task Force and/or District Attorney's Office concludes that the physical evidence collected by the Criminal Investigators is no longer needed for criminal law purposes, the Employer Agency shall be notified of that decision so it can assume responsibility for preservation of such evidence if it desires. (247)

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APPENDIX VI

18th Judicial District, Colorado,
Critical Incident Team Policy and Procedure

NOT AVAILABLE ON THE INTERNET

APPENDIX VII

Denver District Attorney
Letter of Charging Decision dated April 7, 1997

NOT AVAILABLE ON THE INTERNET

APPENDIX VIII

Colorado Rules of Professional Conduct, Rules 3.6 and 3.8

RULE 3.6. TRIAL PUBLICITY

(a) A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it is likely to create a grave danger of imminent and substantial harm to the fairness of an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

RULE 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.

(d) make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;
(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

APPENDIX IX

House Bill 97-1009
An Act Concerning Release Of Grand Jury
Reports In Which No Indictment Is Returned

HOUSE BILL 97-1009

**BY REPRESENTATIVES Kaufman, George, Mace, and Nichol;
also SENATORS Perlmutter, J. Johnson, Mutzebaugh, and Rizzuto.**

CONCERNING RELEASE OF GRAND JURY REPORTS IN WHICH NO INDICTMENT IS RETURNED.

Be it enacted by the General Assembly of the State of Colorado:

SECTION (1) Part 2 of article 5 of title 16, Colorado Revised Statutes, 1986 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

16-5-205.5. Grand jury reports. (1) IN ANY CASE IN WHICH A GRAND JURY DOES NOT RETURN AN INDICTMENT, THE GRAND JURY MAY PREPARE OR ASK TO BE PREPARED A REPORT OF ITS FINDINGS IF THE GRAND JURY DETERMINES THAT PREPARATION AND RELEASE OF A REPORT WOULD BE IN THE PUBLIC INTEREST, AS DESCRIBED IN SUBSECTION (5) OF THIS SECTION. THE DETERMINATION TO PREPARE AND RELEASE A REPORT PURSUANT TO THIS SECTION MUST BE MADE BY AN AFFIRMATIVE VOTE OF AT LEAST THE NUMBER OF JURORS THAT WOULD HAVE BEEN REQUIRED TO RETURN AN INDICTMENT. THE REPORT SHALL BE ACCOMPANIED BY CERTIFICATION THAT THE GRAND JURY HAS DETERMINED THAT RELEASE OF THE REPORT IS IN THE PUBLIC INTEREST, AS DESCRIBED IN SUBSECTION (5) OF THIS SECTION.

(2) THE PROVISIONS OF THIS SECTION SHALL NOT APPLY IN ANY INSTANCE IN WHICH THE PROSECUTING ATTORNEY CHOOSES TO FILE CHARGES AGAINST THE PERSON OR BUSINESS THAT WAS THE SUBJECT OF THE GRAND JURY INVESTIGATION.

(3) WITHIN TEN DAYS AFTER RECEIVING A REPORT OF THE GRAND JURY PREPARED PURSUANT TO SUBSECTION (1) OF THIS SECTION, THE PROSECUTING ATTORNEY SHALL NOTIFY IN WRITING ALL PERSONS AND BUSINESSES NAMED IN THE GRAND JURY REPORT TO GIVE SUCH PERSONS AND BUSINESSES AN OPPORTUNITY TO REVIEW THE GRAND JURY REPORT AND PREPARE A RESPONSE TO BE SUBMITTED TO THE COURT WITH THE GRAND JURY REPORT. SUCH NOTICE SHALL BE BY PERSONAL SERVICE OR BY CERTIFIED MAIL RETURN RECEIPT REQUESTED. ANY RESPONSES SHALL BE SUBMITTED TO THE PROSECUTING ATTORNEY WITHIN TEN DAYS AFTER NOTIFICATION.

(4) UPON COMPLETION OF THE TIME FOR SUBMITTING RESPONSES, THE PROSECUTING ATTORNEY SHALL SUBMIT THE GRAND JURY REPORT TO THE COURT,

TOGETHER WITH THE CERTIFICATION OF PUBLIC INTEREST AND ANY RESPONSES THAT MAY HAVE BEEN SUBMITTED. THE COURT SHALL EXAMINE THE REPORT AND MAKE AN ORDER ACCEPTING AND FILING THE REPORT, INCLUDING THE CERTIFICATION AND ANY RESPONSES THAT THE RESPONDENT, BY WRITTEN NOTICE TO THE PROSECUTING ATTORNEY AND THE COURT, HAS AGREED TO RELEASE, AS A PUBLIC RECORD ONLY IF THE COURT IS SATISFIED THAT:

(a) THE GRAND JURY AND THE PROSECUTING ATTORNEY WERE ACTING WITHIN THE STATUTORY JURISDICTION OF SUCH PERSONS IN CONVENING THE GRAND JURY; AND

(b) THE GRAND JURY FOREMAN AND THE PROSECUTING ATTORNEY HAVE VERIFIED ON THE RECORD THAT:

(I) THE CERTIFICATION OF PUBLIC INTEREST BY THE GRAND JURY COMPLIES WITH THE PROVISIONS OF SUBSECTION (5) OF THIS SECTION; AND

(II) THE REPORT IS BASED ON FACTS REVEALED IN THE COURSE OF THE GRAND JURY INVESTIGATION AND IS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE; AND

(III) THE REPORT DOES NOT CONTAIN MATERIAL THE SOLE EFFECT OF WHICH IS TO RIDICULE OR ABUSE A PERSON OR BUSINESS OR TO SUBJECT SUCH PERSON OR BUSINESS TO PUBLIC DISGRACE OR EMBARRASSMENT; AND

(IV) THE REPORT DOES NOT CONTAIN MATERIAL THAT IS PERSONAL IN NATURE THAT DOES NOT RELATE TO ANY LAWFUL INQUIRY; AND

(V) NO CONFIDENTIALITY AGREEMENT WILL BE VIOLATED AND THE IDENTITY OF NO CONFIDENTIAL INFORMANT WILL BE DISCLOSED IN MAKING SUCH GRAND JURY REPORT PUBLIC; AND

(VI) THE FILING OF SUCH REPORT AS A PUBLIC RECORD DOES NOT PREJUDICE THE FAIR CONSIDERATION OF A CRIMINAL MATTER.

(5) RELEASE OF A GRAND JURY REPORT PURSUANT TO THIS SECTION MAY BE DEEMED TO BE IN THE PUBLIC INTEREST ONLY IF THE REPORT ADDRESSES ONE OR MORE OF THE FOLLOWING:

(a) ALLEGATIONS OF THE MISUSE OR MISAPPLICATION OF PUBLIC FUNDS;

(b) ALLEGATIONS OF ABUSE OF AUTHORITY BY A PUBLIC SERVANT, AS DEFINED IN SECTION 18-1-901 (3) (o), C.R.S., OR A PEACE OFFICER, AS DEFINED IN SECTION 18-1-901 (3) (l), C.R.S.;

(c) ALLEGATIONS OF MISFEASANCE OR MALFEASANCE WITH REGARD TO A GOVERNMENTAL FUNCTION, AS DEFINED IN SECTION 18-1-901 (3) (j), C.R.S.;

(d) ALLEGATIONS OF COMMISSION OF A CLASS 1, CLASS 2, OR CLASS 3 FELONY.

SECTION (2) 16-5-205 (4), Colorado Revised Statutes, 1986 Repl. Vol., as amended, is repealed as follows:

16-5-205. Informations - authority to file - indictments - warrants and summons. (4) ~~The court to which a grand jury report is made in which no "true bill" is found shall examine such report and make an order accepting and filing such report as a public record only if the court is satisfied that the grand jury and the district attorney or attorney general were acting within the statutory jurisdiction of such persons in convening such grand jury and that the court is satisfied of the following:~~

~~(a) That the report is based upon facts revealed in the course of a grand jury investigation and is supported by a preponderance of the evidence; and~~

~~(b) That the report does not contain material the sole effect of which is to ridicule or abuse a person or to subject such person to public disgrace or embarrassment; and~~

~~(c) That the report does not contain material which is personal in nature that does not relate to any lawful inquiry; and~~

~~(d) That the report does not accuse a named or unnamed person directly or by innuendo, imputation, or otherwise of any act that, if true, constitutes an indictable offense unless the report is accompanied by a presentment or an indictment of the person for the offense mentioned in the report; and~~

~~(e) That no confidentiality agreement will be violated and the identity of no confidential informant will be disclosed in making such grand jury report public; and~~

~~**(f) That the court finds that the filing of such report as a public record does not prejudice the fair consideration of a criminal matter.**~~

SECTION (3) Effective date - applicability. This act shall take effect October 1, 1997, and shall apply to reports submitted by grand juries convened on or after said date.

SECTION (4) Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Tom Norton
PRESIDENT OF
THE SENATE

Judith M. Rodrigue
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Joan M. Albi
SECRETARY OF
THE SENATE

APPROVED_____

Roy Romer
GOVERNOR OF THE STATE OF COLORADO