

RAINS, LUCIA & WILKINSON LLP

CRITICAL INCIDENT REPRESENTATION

A CLIENT INFORMATION BULLETIN
AN ULTIMATE BACKUP NEWSLETTER SUPPLEMENT

<i>Pleasant Hill</i>	<i>Sacramento</i>	<i>San Jose</i>	<i>Santa Rosa</i>
2300 Contra Costa Blvd., Ste 230 Pleasant Hill, CA 94523 Telephone: 925-609-1699 Facsimile: 925-609-1690	2485 Natomas Park Dr., Ste 340 Sacramento, CA 95833 Telephone: 916-646-2860 Facsimile: 916-646-2861	333 West Santa Clara St., Ste 800 San Jose, CA Telephone: 408-287-3803 Facsimile: 408-279-1998	2300 Bethards Dr., Ste F Santa Rosa, CA 95405 Telephone: 707-576-8954 Facsimile: 707-526-4018

GETTING REPRESENTATION IMMEDIATELY AFTER A CRITICAL INCIDENT

Rains, Lucia & Wilkinson has a rotational on-call attorney system to ensure that 24-hours a day, 7-days a week, 365-days per year there is a designated attorney available whose primary responsibility is to respond to critical incidents. Because this systems relies on pager technology, we also have a designated secondary “back-up” on-call attorney. Consequently, when the emergency pager goes off, *two* attorneys receive notification.¹

The on-call attorney should be contacted *IMMEDIATELY* following any critical incident. Depending on the protocol of your particular association, the on-call attorney can be contacted using one of the following methods:

- ★ Through your designated association representative
- ★ By contacting the PORAC LDF Hotline at 800-255-5610
- ★ Rains, Lucia & Wilkinson Offices: 925-609-1699 or 916-646-2860
- ★ Rains, Lucia & Wilkinson Emergency Pager: 1-800-777-5194

If your association is a member of PORAC LDF, it is best to call the PORAC LDF Hotline to initiate contact with the on-call attorney. PORAC LDF will then either contact directly the attorney in closest proximity to your agency, or use the RLW emergency pager system. This process is very effective at providing a prompt response to the critical incident.

¹ Unfortunately, pager technology is not perfect, and we have discovered that in many law enforcement facilities, especially jails, pages cannot be received. To limit the opportunity for pager failure, we have implemented the secondary on-call backup attorney system.

WHAT SHOULD HAPPEN AFTER AN OFFICER-INVOLVED SHOOTING OR OTHER CRITICAL INCIDENT

A critical incident is best defined as either an officer-involved shooting, a death-in-custody, a fatal vehicle collision, or, in some circumstances, where serious injury results from an officer's application of force. Such situations generally triggers a "criminal" investigation, although consideration must also be given to policy issues, and the prospect of civil liability. The specific manner of handling critical incidents should be set out in departmental policies and procedures. Generally, it is advisable to proceed as follows:

1. At the scene, the involved officer may provide a ***limited and brief overview*** of the incident to a field supervisor (i.e., a public safety statement), in order to facilitate apprehension of outstanding suspects, or in order to help the supervisor make decisions regarding the scope of the investigation, the dimensions of the crime scene, and providing for the public safety. ***The officer should provide the field supervisor only those facts necessary to ensuring public safety and securing the crime scene, such as direction of shots fired, number of suspects, etc., and should not include details concerning the officer's state of mind or the reasons the action was taken.***
2. The involved officer should be removed from the scene of the incident as soon as possible, and assigned a Department or Association "monitor" whose role is to accompany the officer, monitor his or her actions, assist the officer in making contact with family members, and ensure that ***no*** discussion of the incident occurs with anyone until the appropriate time in the investigation process. The involved officer and the monitor ***should not*** discuss the incident.

If there is more than one involved officer, the officers should be separated and each assigned a monitor. Sometimes, due to the number of involved officers, one-on-one monitoring is difficult. Under such circumstances, a single monitor can be assigned to a group of officers remaining in the same location. To preserve the integrity of the investigation and the officers individual rights, the involved officers ***should not*** discuss the incident amongst themselves, with the assigned monitor, nor with family, friends or colleagues.

3. ***Legal counsel for the involved officer(s) should be contacted*** immediately. The involved officer should consult with legal counsel before deciding whether to give or decline an interview statement and before deciding whether to give or decline a blood or urine sample.
4. The involved officer(s) ***should not*** discuss the facts of the incident with any Association representative other than legal counsel, because POA and DSA representatives may be forced to disclose that information in connection with the criminal investigation (Government Code section 3303(i). However, Association representatives can and should play a vital role in providing support to the officer during a critical incident, including obtaining food and water, a change of clothes,

providing a contact link for the officer's family, and shielding the officer from inquiring individuals. Any such support must avoid any discussion of the incident.

5. ***Providing a Formal Statement:*** The most difficult and critical determination that is made in connection with the critical incident is whether the involved officer will give or decline a voluntary statement. This determination must always be made on a case-by-case basis with the advise of legal counsel.

Rains, Lucia & Wilkinson LLP subscribes to the philosophy that it is ill-advised for law enforcement officers to decline to make a voluntary statement following *most* critical incidents. That is because, usually, the involved officer's actions that caused serious bodily injury or death to an injury were consistent with established law and department policy. However, there will be some situations in which an officer should decline to make voluntary or even involuntary statements concerning their actions. Rather than adhere to a single policy of always giving or always refusing to give statements, RLW assist the officer in thoroughly assessing the pros and cons of providing a statement on a case-by-case basis.

SUMMARY

- ★ **Contact Legal Representation Immediately**
- ★ **Avoid the temptation to “vent”, “purge” or share details of the incident**
- ★ **Do not provide a detailed statement without advice from legal counsel. If the Department insists on an immediate statement or orders your cooperation without legal counsel, read the following non-waiver statement:**

“I HAVE BEEN REFUSED THE RIGHT TO HAVE A REPRESENTATIVE OF MY CHOICE. I UNDERSTAND THAT I AM BEING ORDERED TO MAKE A REPORT OR ANSWER QUESTIONS AND THAT IF I DO NOT COMPLY WITH THE ORDER, I MAY BE DISCIPLINED FOR INSUBORDINATION. THEREFORE, I HAVE NO ALTERNATIVE BUT TO ABIDE BY THE ORDER. HOWEVER, BY DOING SO, I DO NOT WAIVE MY CONSTITUTIONAL RIGHTS TO REMAIN SILENT UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, OR UNDER THE PROTECTIONS AFFORDED ME BY CASE LAW.”

- ★ **Do not provide a blood or urine sample until after consulting with legal counsel.**

Be sure to call Rains, Lucia & Wilkinson now if you have any questions about how critical incidents should or will be handled in your agency. Don't wait until you are involved in a critical incident to obtain answers to your questions. While all of us at RLW hope that you and your agency do not have to be involved in a critical incident, if you do, an advance plan of action and an advance understanding of the process will certainly make the incident handling proceed more smoothly.