

**MANAGING THE USE OF
FORCE INCIDENT**

ABOUT THE AUTHOR



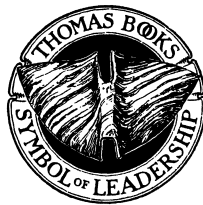
Howard Webb is the executive director of the American Council on Criminal Justice Training (ACCJT), a 501(c)(3) nonprofit public safety training institution. Prior to founding the ACCJT, Howard was the Director of the Montana Law Enforcement Academy. A nationally and internationally recognized use of force expert and criminal justice trainer, he has developed over seventy training courses, instructor development programs, and academy training curriculums. As a Lieutenant for the Oregon Department of Public Safety Standards and Training, Howard developed the National Police Corps academy curriculum and managed the first Police Corps Academy. He was an original member of Macho Products' Redman Advisory Board. As the director of training for DHB Armor Group, Howard developed the Hitman simulation-training suit. He is a police liability consultant and expert witness, who has testified in over three hundred excessive force and officer misconduct lawsuits in state and federal courts.

MANAGING THE USE OF FORCE INCIDENT

For Criminal Justice Officers,
Supervisors, and Administrators

By

HOWARD WEBB



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This book is dedicated to the late Bruce Combs, former lieutenant of Oregon Department on Public Safety Standards and Training. Lieutenant Combs is an Oregon law enforcement-training icon. He was my mentor and good friend. His devotion to excellence lives on through the dedication and service of Oregon's law enforcement officers.

INTRODUCTION

The Los Angeles Police Department is considered one of the most progressive law enforcement agencies in the United States. The L.A.P.D. developed D.A.R.E. and created the first police S.W.A.T. team. It has been the law enforcement muse for countless television dramas and blockbuster movies. However, because of an improperly managed use of force incident, the public primarily remembers the Los Angeles Police Department for the Rodney King incident.

A Google news search of the phrase “police excessive force” identified 1,199 newspaper articles that mentioned lawsuits involving the alleged use of excessive force by police or corrections officers. Keep in mind, these are only the lawsuits that the news media deemed noteworthy. According to a study conducted by the U.S. Department of Justice, law enforcement agencies annually receive, on average, 430,000 complaints of excessive force. Do you think law enforcement agencies are having a problem managing their use of force incidents?

Managing the Use of Force Incident reveals a new and innovative approach to law enforcement liability management. Rather than recite the traditional reactive remedies to department and officer liability, the novel solutions presented in this tome underscores the proactive strategies that officers, trainers, supervisors, and administrators can implement to prevent lawsuits and create an effective preemptive defense against citizen complaints and excessive force litigation.

This proactive liability management philosophy is the product of a professional career spanning over two decades reviewing use of force incidents, consulting with police defense attorneys, and defending criminal justice officers as a use of force expert. The insights into the pitfalls, trends, and strategies explained in this book were developed from an analysis of over nine hundred use of force incidents as a litigation consultant and a defense expert witness, who has testified in over three hundred civil and criminal trials alleging the use of excessive force by police and corrections officers.

As a result, *Managing the Use of Force Incident* addresses excessive force litigation with four inventive strategies:

1. *Understand Causation.* To minimize excessive force litigation, officers, supervisors, and administrators must develop an understanding of the underlying causes of police misconduct lawsuits. An officer's use of sarcasm, vulgarity, or his inability to properly manage perceptions at the scene promotes civil rights litigation by creating a negative perception of the officer's use of force. A supervisor's failure to address an officer's lack of professionalism, poor work performance, or abusive behavior creates liability that could have been prevented. An administrator's inability to predict the negative consequences of a newly written use of force policy, the failure to clearly define management's expectations regarding the use of force to department personnel, or the implementation of a new use of force option without first considering its possible consequences bring about litigation through a lack of administrative foresight. These are just a few examples of the causative issues that are addressed.

2. *Focus on Prevention.* If litigation is predictable, then it may be preventable. It is a given that criminal justice officers will use force. The question is whether the force is objectively reasonable. If a department employs an officer who is reluctant to "go hands on" with a suspect, that officer will eventually overact and use excessive force. If the same department, employs an officer who is hyperaggressive, that officer will eventually use too much force for the circumstances. Both these situations are predictable. And, therefore, preventable with the proper training and supervision.

The historical evidence shows that when cops are given new use of force tools without the proper forethought regarding the consequences of their implementation, it is like giving Donald Duck the atom bomb. The Taser is a classic example. The Ninth Circuit Court of Appeals restricted the use of the Taser because of law enforcement's inability to conclude, on our own, that shocking passively resisting people with a 50,000 volt electronic stun device is excessive force. Who could have predicted that? Chapter 10 provides the information necessary for officers, trainers, supervisors, and administrators to objectively evaluate the potential liability of less-than-lethal force options. Also, Chapter Ten will offer recommendations for the development of performance, training, and administrative solutions to prevent officer and department liability.

3. *Create a Proactive Defense.* Sun Tsu states, "If you know yourself and you know your enemy, even in a thousand battles you will never be in peril." It is impossible to prevent every lawsuit, but an officer and his department can approach every use of force incident expecting a lawsuit to be filed. Chapters 1 and 2 provide examples of the mistakes officers, supervisors, and administrators make that plaintiffs' attorneys look for and exploit in the use of force incident. With this information, you will get to know your enemy. Conse-

quently, you will learn tactics and strategies that build powerful preemptive defenses to excessive force litigation. Rather than play a reactive role against accusations of excessive force and misconduct—as an officer at the scene—you will learn to proactively manage witness and juror perceptions of the use of force incident. As a supervisor or administrator, you will learn to predict potential liability problems and make the necessary changes in policy, supervision, or training to prevent lawsuits. In addition, you will come to understand the importance of a proactive defense, in the event that a lawsuit is filed.

4. *Effective Use of Force Training.* Training does not prevent liability. Effective use of force training, which is well-thought-out, prevents liability. Officers are not sued for using a specific force option; officers are sued for making poor use of force decisions. A classroom use of force lecture does little to enhance an officer's use of force decisions-making abilities. Only a scenario-based use of force training program can effectively minimize officer and department liability. Accordingly, Chapter 12 provides you with a comprehensive overview of the Confrontational Simulation program. This program was the first nationally recognized scenario-based use of force training model.

Moreover, Chapter 12 explains the benefits of an integrated use of force training program. Customarily, training in the use of nondeadly force options (arrest and control tactics, baton, less-lethal impact munitions, pepper spray, and electronic control devices) occur in separate unrelated training modules. This disjointed approach to less-than-lethal and less-lethal force training can unintentionally create officer and department liability. The proactive solution to this liability problem is to implement an integrated approach to less-than-lethal force training. In an integrated use of force program, officers practice the transition from one nondeadly force option to another. This innovative training methodology circumvents a panic-induced overreaction. A panic-induced deployment of nondeadly and deadly force is a major cause of wrongful death litigation.

Managing the Use of Force Incident is the first treatise written that addresses the real world causes of excessive force litigation and provides real world proactive solutions. I will be the first to admit that the observations and recommendations presented in this book are vastly different than those offered in other publications or seminars regarding the use of force by criminal justice officers and liability management strategies for supervisors and administrators. What makes my perspective unique is that it does not originate from a solely academic, administrative, or theoretical understanding of the use of force. It is a culmination of over twenty years of professional experience as a liability consultant, expert witness, law enforcement officer, criminal justice manager, and use of force instructor.

Consequently, this book was written by a cop for cops. As such, the manner and tone in which the information is presented originates from a cop's perspective. This is not to say that the information contained within these pages will not benefit noncriminal justice professionals. The liability management concepts discussed in the following chapters will assist anyone who has a vested interest in minimizing criminal justice civil liability: attorneys, insurance authorities and companies, public administrators, and risk managers.

However, be forewarned, the examples and the dialogues used in my narratives are realistic representations of what occurs on the street and in the correctional facility. Cops are not saints, but they do spend their entire professional lives dealing with sinners (metaphorically speaking). As a result, *Managing the Use of Force Incident* was not written to be a children's bedtime storybook. Some of the examples contained herein may seem a little salty to the civilian reader or the reader expecting a purely academic experience. With that said, as you move forward into the following chapters, if you encounter an example that causes you to raise an eyebrow, I apologize in advance for offending your sensibilities, but not for the context or the purpose for which the example is given.

While preparing to write this book I was actually told by a book publisher (not the publisher of this book) that cops do not read books and their departments buy very few publications. At first this statement offended me. Then, after some reflection on the comment, I came to the conclusion that cops do read books. We just don't read romance novels, self-help books, or fiction. Mainly because cops believe that we have the romance thing nailed down, that we're OK—but everyone else has a problem, and that the real world is crazy enough without reading someone else's distorted fantasies. So, in step with that insightful observation, I would like to thank you for purchasing my book. You are living proof that cops do read, and you will be relieved to know that my next book will not be a romance novel, a self-help book, or fiction.

The concepts explained in the following chapters may take you out of your managing the use of force incident comfort zone. This is a good thing. Because the status quo of liability management research and understanding has failed to successfully address the underlying causes of excessive force litigation. Conventional wisdom may be conventional, but it can be neither wise nor effective. If you contemplate the admonishments, concepts, strategies, and tactics offered in *Managing the Use of Force Incident*, you just might become a little wiser and more enlightened regarding the prevention of officer and department liability.

ACKNOWLEDGMENTS

This book was made possible by the direct and indirect contributions of the following individuals and institutions:

Attorneys Joseph Diaz, Robert Franz, Jr., Steven Kraemer, Lou Kurtz, Steven Sherlag, Robert Wagner, Miles Ward, and Leonard Williamson: Their insights into criminal justice liability and managing the use of force incident form the foundational core of this text.

The Oregon Public Safety Academy: The academy afforded me the professional opportunities that made this treatise possible. Further, the Oregon Academy's progressive training environment cultivated the conceptualization, implementation, and refinement of the proactive liability management strategies that grace these pages.

Captain William Garland (retired) of the Oregon Department of Public Safety Standards and Training: Bill's courage, leadership, and vision were instrumental in my professional development, of which this treatise is based.

Montana Law Enforcement Academy: The MLEA was the proving ground for the leadership, supervisory, and management concepts presented in this text.

Deborah Butler: Deb's editorial skill, guidance, and wisdom were invaluable in the development of this book. As an attorney and a law enforcement trainer, she brought two very important perspectives to this project.

Nick Flores, my lifelong martial arts instructor: Sensei Flores taught me to see the strategic and tactical strengths and weaknesses in all things.

Michael Payne Thomas, my publisher: Michael acutely recognized law enforcement's need for a comprehensive text that addresses the proper management of the use of force incident and the causation of police and corrections liability.

My wife Kelly (an author's widow) and sons Coleman (Spike) and Case: Their unwavering faith in me provided the focus and motivation to start and finish this important project.

LETTER OF RECOMMENDATION

Northland Insurance Companies
400 Country Club Road, Suite 200
Eugene, Oregon 97401

To Whom It May Concern:

RE: Howard R. Webb—Police Liability Expert

Dear Sir or Madame:

I am the Assistant Vice President of Claims for an insurance company that has a significant public entity business. We provide first dollar coverage for liability exposures of Cities and Counties nationally. Police liability is a significant part of that exposure.

We try a high percentage of our police liability claims because of the nature of the business.

Over the last several years we have sought out the expertise of Howard Webb to assist in the evaluation of these difficult cases and to serve as an expert for us in State and Federal Court trials. We have found Mr. Webb to be extremely helpful in the evaluation stage because of his tremendous knowledge of the area and his ability to identify and analyze the issues.

In addition, we have found his expert testimony at trial to be crucial to our success rate in defending police misconduct charges. It is clear from the results that the juries and judges have found his testimony to be credible and convincing. He has demonstrated the ability to adeptly explain to the juries the basis for officers' actions and the training that supports the actions.

I would highly recommend Howard Webb to anyone in need of a trial expert or to merely review a case for liability analysis.

Sincerely yours,

James R. McWilliams, CPCU
Assistant Vice President
Branch Claims Manager

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**MANAGING THE USE OF
FORCE INCIDENT**

Part I

**UNDERSTANDING THE
USE OF FORCE INCIDENT**

Chapter 1

LAWSUITS ARE PREDICTABLE, PREVENTABLE, AND WINNABLE

Lawsuits are a fact of life for the criminal justice officer. There are only two strategies that you can implement to prevent a lawsuit. Strategy # 1: Don't go to work. Strategy # 2: If you do go to work, don't talk to anyone, don't touch anyone, and don't drive anywhere. Of course, these are not realistic strategies for the prevention of lawsuits, but they make a point. If you are doing your job, the odds are that you will be—at some point in your career—a defendant in a lawsuit. In fact, the more enthusiastically you do your job, the more likely it is you will be sued. I am not suggesting that you go about your duties in a state of paranoia and fretting about being sued. However, I am recommending that you start every official action with the expectation that it will end with you being a defendant in a lawsuit. Or worse, with you being criminally prosecuted.

Gordon Graham, former California Highway Patrol Lieutenant, lawyer, and police liability expert, states in his seminars that if a lawsuit is predictable, it is preventable. I believe this strategic truth can be taken one step further: If a lawsuit is predictable, it is winnable. It is true that if you can predict officer or department liability; then you can take the necessary steps to prevent the actions, behaviors, or circumstances that create that liability. However, you can do everything within your power to prevent a lawsuit and still get sued. The best strategy for managing law enforcement liability is a two-pronged proactive defense. First, develop the power of foresight. To cultivate the ability to foresee the liability in a given situation is easier than you may think. As Oscar Wilde said, "The power of accurate observation is often called cynicism by those who do not have it." If you can accurately identify a potential liability problem, you can establish the policies or training programs to help prevent it. The second defensive prong emphasizes properly managing the use of force incident at the officer's level. An officer who prop-