

POA – LEGAL ISSUES

CHAPTER 1 ETHICS IN THE SECURITY PROFESSION

Kidder values of business ethics:

- honesty, responsibility, respect, fairness, and compassion.

There have always been unethical practices in business.

Vicarious Liability – employers bear for the negligent acts of employees.

- ie. Corporate reputations.

Motivation to commit unethical behavior: Desire, rationalization, and opportunity.

- are they becoming more common or are they simply better reported?

Ethics

- discipline or system of moral principles governing human actions and interactions.
- Contextual interpretations, not objective absolutes.
- Is it legal? Is it balanced? How will it make me feel about myself?
- Descriptive ethics – attempts to explain or describe ethical events.
- Analytical ethics – examines ethical concepts to achieve a deeper understanding of their meaning and justification.
- Applied ethics – most relevant to business – is active (not descriptive or prescriptive), applying ethical concepts in specific business situations.
- business ethics can be applied at three levels:
 - individual employee.
 - the organization.
 - society.

(The role of business ethics is the reconciliation of these three conflicting levels).

Ethical vs. Legal?

Causes of Poor Ethical Choices

- Convenience.
- Winning.
- Relativism – rationalization. Situational ethics. Posits that there are no true ethical values – may simply just do what is legal.
- Perspective – people seldom hold themselves to the same standards to which they hold others.
- Corporate code of ethics is not a sure sign of ethical altruism.

Hidden Costs of Unethical Behavior (Josephson Institute)

decrease in sales or stock prices, productivity, efficiency, communication and trust, recruiting and retention; increase risk from scandal, misconduct, sabotage.

Ethics is about how we meet the challenge of doing the right thing when that will cost more than we want to pay.

A security professional code of conduct holds him to a higher ethical standard.

Ethics Code and an Ethics Program

- a **code** states the underlying principles and a **program** provides the guidance and structure for compliance.
- Altruistic – the right way to do business.
- Practical – good business decision. Avoid problems.

Ethics Code

- statement from the chief executive – organizational values and commitment to the code. (ie. Mission statement – cornerstone – Compass).
- Field tested and widely announced and distributed.

Ethics Program

- guides and supports employees in adhering to the code.
- Mid-level, operating managers may tend to favor economic performance over ethical considerations as they are measured by economic criteria.
- Business principles and executive behavior are more influential than the individual conscience.

Federal guidelines provide for reduced fines for companies with an ethics program.

Executive hiring interviews – ethics weighted as much as competence/performance.

Instilling or reaffirming ethics is a process, not a one-time event – must be reviewed continually.

ASIS Code of Conduct – specific behavioral guidelines.

- binding condition of membership.
- Truthfulness, honesty, integrity, faithful, diligent, competent, honorable.
- Safeguard confidential information.
- Shall not act in conflict of interest without disclosure and approval.
- Shall not accept a task beyond competence or pretend to have it.
- In a legal proceeding, the member may be required to testify to information received in confidence from his principal over the objection of his principal's counsel.
- A member who knows, or has reasonable grounds to believe, that another member has failed to conform to the ASIS Code of Ethics should inform the Ethical Standards Council.

CHAPTER 2 LABOR LAW AND STRIKE SECURITY

National Labor Relations Act (1935)

- Robert Wagner.
- Gave workers the right to representation – Collective Bargaining.
- Mutual aid or protection.
- Defined “unfair labor practices” – interfering, encouraging or discouraging, refusal to bargain collectively.
- Outlawed “closed shop” – must be a union member before hiring.
- Created the NLRB to oversee elections, certify representatives, adjudicate charges or unfair labor practices.

Labor Management Relations Act (1947) – also called Taft-Hartley.

- forbade unions to engage in certain practices.
 - o ie. Featherbedding – coercing an employer to pay for work not done.

Labor Management Reporting and Disclosure Act (1959) – Landrum-Griffin Act.

- established safeguards on the conduct of union management and membership.
- Added “Hot Cargo” as an unfair labor practice. A hot cargo agreement is a voluntary agreement between a union and a neutral employer in which they refuse to deal with products from a company with which the union has a dispute.

State Labor Relations Laws

- “little Wagner Acts”.
- Federal law prevails in cases of conflict.

Unfair Practices

- must be committed by an employer, not one employee against another.
- Security is an agent of the employer.
- If a labor union wants to distribute material in a non union enterprise, may distribute but not during normal working hours.
- If prohibited from areas due to safety/security – it may be necessary to allow them into parking lots and other neutral territory.
- NLRB may not order reinstatement of a worker terminated for cause.
- NLRB is the trier of fact.
- Evidence of anti union behavior = unfair labor practice.
- Undercover operations during labor turmoil is not recommended.
- Another possible security exposure is discrimination against protected activities.
- If information was found during an investigation, although inadvertent, it could still be considered an unfair labor practice. (This info. Includes past union membership).
- Security actions should always be planned with labor relations in mind.

- Do not solicit union affiliation information from applicants for employment.
- Security personnel actions = employer actions.
- The effectiveness of the security department is sacrificed if the workforce comes to regard it with suspicion and dislike.

Just Cause Discharges

- must establish misconduct or unsuitability, not merely allege it.
- Must:
 - o Be serious or involve serious misconduct.
 - o Worker must actually be responsible for the misconduct.
 - o Must have known that the matter would constitute serious misconduct.
- Rule must be: reasonable, within management's authority, properly publicized, and uniformly enforced, unambiguous and known to the employees, worker actually violated the rule, and behavior of security personnel must have been reasonable under the circumstances.

Arbitration of Grievances

- outside, impartial arbitrator.
- The first name on which both sides agree is the arbitrator
- Arbitration is final and binding.
- Arbitrator determines what is in his power to decide.
- Rules of evidence do not apply. In labor arbitrations, generally all evidence is admissible if either party wants to submit it.
- Whole point of arbitration is to achieve speedy and practical resolution of disputes.
- Security should apply principles of criminal law and constitutional fairness.
- NOT legally required to provide *Miranda*, but advisable.
- Any actions that would be challenged in a criminal trial if performed by the police will have trouble in the arbitration.
- If suspension or less – "Industrial due process" will be less.

Union Representation During Investigative Interviews

ILGWU v. Quality Manufacturing Company and *National Labor Relations Board v. Weingarten*:

- Union representation during interview if it may lead to disciplinary actions and the employee requests. Grant the request or forgo the interview.
- Non-union employees – another coworker present.
- If they don't ask for it, don't provide it.

Strikes and Other Labor Disturbances

Strike – concerted stoppage of work, slowdown, or interruption of operations.

Security organization must be seen as taking a neutral position, but must:

- pre-strike planning.
- Strike operations.
- Poststrike analysis and evaluation.

Prestrike Planning

- a company neglecting any detail in security preparations may incur high legal fees and be required to pay significant damages.
- Company with collective bargaining units should establish a Cross-functional strike task force.

Varieties of Strikes

- most strikes are over economic issues – (ie. Failure to negotiate a contract).
- Unfair labor practice strike – (ie. Employer violates unfair labor law practice)
 - o Can occur suddenly.
 - o Should be allowed to return to work even if replacements are hired.
- In an economic strike, the employer cannot threaten to hire permanent replacements, but can once a strike begins. Striking workers have no right to return to jobs filled by replacements.

Special Settings

Private Sector Critical Infrastructure – special considerations apply.

Private Security at Federal Buildings – in some cases, may not strike.

- National security exception to collective bargaining.
- Not protected by the NLRA.

Early Policy Decisions

- some companies try to maintain business as usual, while others determine what elements of the operation can be postponed until the dispute is resolved.
- Decision is made by senior executives.

Liaison – strike task force should formulate a detailed communication plan.

- employees, suppliers, and service companies.
- Business courtesy and may be a crucial element in any civil action.

Training – all non-striking personnel trained to handle threats and confrontations.

Communications

- cellular and satellite phones. Unencrypted can be intercepted.
- Cellular jamming is a concern.
- Telephone closets should be locked and equipped with intrusion alarms.

Access Control

- Change cylinders on all exterior doors as soon as the strike starts.
 - o Use changeable cores – quicker to change.
- Card, token or biometric access systems should be backed up and change authority should be verified.

Routine Supplies – to preclude the need for shipments across picket lines.

- heating oil and vehicle fuel.

Lodging and Transportation

- security provided at lodging site.

Strike Operations

Premises Access

- chief weapon is to discourage other individuals from entering.
- Seek legal advice as to where picketing should be allowed.
- If engaged in illegal behavior – record and document to be taken to court for an injunction.
- Use the fewest entries as possible.
- Situated so that loss of control by police would cause traffic control problems....Better response from police.

Access Methods

- strewn nails – utility vehicle trailing a broom or magnet.
- Vehicular access to a facility is preferred – protection inside vehicle.
- Meals should be brought in for employees.

The Lockout

- if a lockout commences in response to a strike, the employer must give notice to the bargaining unit.
- If no lockout, members who come to work, MUST be admitted.
- May hire temporary replacements as long as there is no specific proof of antiunion motivation.

Shipments In and Out

- trash, biohazard materials, etc.
- typical tactic is to follow trucks and intimidate the drivers away from police.
- Transshipment – nearby intermediate point, several unidentified vehicles.

Chain of Command

- Chief executive is the final authority.
- Executive management should establish a temporary organization chart.
 - o With on-the-spot decision making authority.
- operating manager – in charge of physical security if position doesn't exist.
- Central Planning Center/Group – internal operations and strike strategy.
 - o (Duty Executive)
- Security Planning Center – Physical security – picket line coverage, plant prevention, fire prevention, police liaison.
 - o (Security manager)
- Directions to the security forces should come from only the security dept.

Police Liaison

- most important external relationship.
- Police can be discouraged by a management team that demands immediate police action but the refuses to process formal criminal complaints.
- Police do not need injunctions to take action legally.
- Legal strike action cannot be enjoined.

Amnesty – not in the interest of good citizenship, good labor relations, or good management to ignore criminal acts.

- arrests are a key to strike violence prevention.

Documentary Strike Coverage

- pictures, video, note taking, affidavit preparation.
- Refrain from documenting legal activities, only illegal activities.
 - o In and of itself, could be an unfair labor practice.
- documentation teams.

Facilities Security – access control, fire, medical, etc.

- best to follow incident command protocols.

Access to Facilities

- smallest number of entrances possible should be used.
- The fewer used, the most police available at each.
- 3 squads at a gate:
 - o 30 police officers can control several hundred strikers.
 - o Senior squad commander is gate commander.

Buffer Zone – between the property boundary and any area with vehicles/materials.

- 65-100 feet left open (20 to 30 meters).
- Police have enforcement and incident control up to the inner zone.
 - o Police control street to buffer.
- Security force has the boundary and inside it.
 - o Security controls buffer inward.

Fire, Medical and Other Emergencies

- all automatic detection and alarm equipment should be serviced just before the strike deadline to ensure reliability.
- Trained emergency rescue team – to dispense first aid.

Protection of Struck Premises

- some states place licenses in jeopardy if they provide security staffing EXCLUSIVELY for strikes.
- If no guard force available – supervisory personnel should be organized into a patrol group....Not to enforce the law – Detect and Report.
- Contemporaneous notes of any incident.
- Security Log should be maintained.

Strike Wind-Down

- dismantle strike defenses quickly, and restore the appearance of a normal environment.

Post-Strike Issues

Notification of Police – as soon as settlement is reached.

Threats and Retaliation – expressed position that retaliatory behavior will not be tolerated.

Internal Surveillance – casual walking observations.

- first day or two back to work – lingering ill will – sabotage.

Investigative Follow-Up

- threats or intimidating conduct – Rapid resolution.

Security Critique – “hotwash” – should be accomplished while strike operations are still vivid in the memories.

Strike Checklist

Security Forces:

- security reserve force among management for interior patrol, observation and communication.
- Gates to be used.
- Security Control Center.
 - o Alternate away from plant property.

Administration

- 24 hour capability to communicate with fire and police, suppliers, transportation companies, neighboring plants and businesses.
- Database of management personnel.

- Review property and liability insurance.

Communications

- secure main telephone switch room and all telephone closets.
- Inventory all communications resources.
- Cellular or satellite phones.

Perimeter Protection

- protective screens on windows within 100 feet (30m) of public property.
- Exclusion zone within the perimeter fence.
- Inspect perimeter lighting and install protective screens.
- Heavy equipment at gates to push immobile vehicles.

Building and Property Protection

- adequate supply of replacement lock cylinders or cores.
- Test intrusion alarms.

Fire Protection

- remove handles from outdoor sprinkler system post indicator valves.

Records Protection

- fire resistant containers.
- Off-site duplicate storage.

During the Strike

- coordinate with legal counsel re: Tactics.
- Primary security function is to prevent violence and protect property.
- Keep a Contemporaneous Log.

Principles for Guidance of Supervisors

- security department has exclusive responsibility and authority.
- Batons will not be carried but will be issued and stored at all fixed posts.

Temporary strike duty chart – suspending existing duty chart.

- Assignments, tour hours, temporary posts.

Bomb Threat Procedures - location, time set to detonate, type and appearance, time planted, estimated power or force, identity of person making threat.

Message Center Operations – status board.

Camera Coverage – Routine film coverage not permissible. Only situations or conditions that manifest or threaten violence and disorder. (ie. Mass or “lock-step”, violence, significant traffic, picket captains at each location on each picket shift.

CHAPTER 3 CRIMINAL LAW AND PROCEDURE

Legal Information

Primary Source – in-state or federal statute or case.

Secondary Source – another state or jurisdiction.

Statutory Law – each law or statute combined with others passed before.

Cities, towns and villiages – ordinances or local laws – NOT statutes.

Case Law

- primary source.
- Cases decided by the appellate courts of a state or federal jurisdiction.
- Reporters – volumes published with appellate court decisions.
- Stare Decisis – “let the decision stand” - precedent.

Secondary Sources – useful in understanding, but not primary.

- Law Review articles – ie. Lexis/Nexis, Westlaw.
- Trade publications – last choice. May be biased by vendors.

Supremacy Clause and Minimum Standards

- Article VI – laws made under the Constitution shall be “the supreme Law of the Land”.
- Minimum standards – states can exceed those standards.
- *Pennsylvania v. Mimms* – police can order a driver/passenger from the vehicle as “a matter of course”.
- *Commonwealth v. Gonsalves* – must later demonstrate “reasonable concern for their safety”.

Judicial Rulings and Settlement Agreements

- Judicial – bench trial.
- Settlement Agreements – popular method to avoid the unpredictability of courtroom outcomes.

Crimes – acts or omissions, criminal statutes or codes.

Federal Criminal Law

- Title 18 of the United States Code.

State Crimes

- *Crime* – misdemeanor or a felony.
- *Misdemeanor* – 15 days to not more than one year.
- *Felony* – in excess of one year.
- *Offense* – conduct punishable by a sentence...provided by a law, order, rule, or regulation.

- Wrong against the general public – individual victim does not have the prerogative to determine whether a suspect is prosecuted.

Criminal Intent

- *mens rea* – guilty mind – acting intentionally.
- Criminal negligence – does not require a guilty mind, only the completion of the act. *Actus reus* – strict liability crimes.

Establishing guilt – prosecutor decides if the evidence is sufficient to proceed.

Crimes Based on Unauthorized Entry or Presence

- ie. Burglary – unlawfully entering or remaining, with the intent to commit a crime therein.
- Ensure locations are secured and marked as prohibited.

Crimes Based on Theft or Larceny

- taking of property of another with intent to permanently deprive....
- Must establish the true ownership.
- Company owned property – identification marking and record keeping.
- Shoplifting arrests – beyond the checkout area. Off property arrests can be dangerous.

Crimes Based on Force or Threats of Force Against Persons

- most serious.
- Use or threat of force.
- Knowingly and Intentionally.
- Could be justified by law.

Crimes Based on Damage or Threat of Damage to Property

- becomes more serious when threat or force involves persons.

Computer-Related Crimes

- Computer itself targeted:
 - o Confidentiality.
 - o Integrity – attacks that harm data.
 - o Availability – denial of service attack by sending it too much data.
- Computer used to facilitate a traditional offense – ie. Fraud, larceny.
- Computer as storage device in criminal activity – ie. Child pornography.

Data commingling – impermissible review of seized privileged materials and secure the return of improperly seized property.

Environmental Crimes

- also occupational health and safety issues.
- Resource Conservation and Recovery Act (RCRA)
 - o Disposal of toxic waste. “Cradle to grave”.
- Comprehensive Environmental response, Compensation and Liability Act (CERCLA)
 - o Criminal liability for failure to report release of hazardous substance.
 - o Notice to the Environmental Protection Agency (EPA).
 - o Record keeping

Management/Corporate Officer Liability Resources

- *respondeat superior* – “let the master answer”. Employer is liable for the acts of employees in the scope of their employment.

Sentencing

- judge has discretion – curtailed by Federal Sentencing Guidelines.
- Executed or suspended. Suspended = person remains subject to the court.
- Greater penalties for businesses that make no effort to deter, detect, or report crimes – and lesser penalties for those that do.
 - o Score and fine may be reduced for effective program.
 - o High-level mgmt. oversees, communicated to employees, monitor and audit, compliance standards, take steps to prevent future offenses.

Foreign Corrupt Practices Act (FCPA)

- criminal offense to offer a bribe to a foreign official to obtain or retain business.
- Must have internal accounting controls.
- “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”, Org. for Econ. Cooperation and Development (OECD)

Criminal Procedure

Government Action vs. Private Action

- constitutional safeguards protect citizens from the government not other private citizens.
- Evidence may be admissible obtained by a private person.
- If a security officer claims police officer status for arrest purposes, they cannot disclaim it for interview or interrogation purposes.

Arrests – taking into custody.

- warrant – upon probable cause.
- Police officer – reasonable cause.
- Security Officer – not shielded by a defense of reasonable cause.
 - o A person unlawfully arrested can resist with reasonable force.

Interviews and Interrogations

- must be voluntary.
- *Miranda* decision placed restrictions on police and government.
 - o Does NOT apply to private citizens- unless agent of the state.
- Custody can occur without a formal arrest.

Searches and Seizures

- 4th amendment.
- Only applies to government.
- Search by private citizen, not at the direction of gov't = admissible.
- Warrantless search incidental to an arrest – reachable area.
- Recommended for employees:
 - o Permit employee to leave and file a criminal complaint.
 - o Take disciplinary action.

Entrapment

- affirmative defense.
- Inducement of a person, not otherwise disposed to...
- Mere act of providing opportunity is NOT entrapment.

Use of Force

- reasonably necessary force = minimum amount necessary
- DPF – fear of one's own life; or prevention of crime with Deadly weapon.
- *Tennessee v. Garner* – DPF for non-serious threat is unconstitutional.
- *Scott v. Harris* – “reasonableness test”.

Locks, alarms, warning notices, etc.

- Deterrent.
- Basis to support criminal sanctions.

Criminal Statutes Relevant to Security

Economic Espionage Act – to combat foreign economic espionage for theft of trade secrets by a foreign power. Domestic thefts of trade secrets as well.

- Must take reasonable steps to keep secret information not readily available to the public.

Eavesdropping Statutes

- unauthorized listening – in person or by electronic means or other.
- Most laws apply to government.

Federal Law

- Title III – Omnibus Crime Control and Safe Streets Act.
- Electronic Communications Privacy Act – extended Title III to cellphones, etc.
- Mobile Tracking Devices.
- Pen register and Trap and Trace Devices.
- Foreign Intelligence Surveillance Act – National Security.
- Communications Assistance for Law Enforcement Act – requires telecommunications carrier to assist L/E in court authorized interceptions.
- Law address electronic message delivery systems such as email or other wire or electronic communications.
- Federal law prohibits – devices that are primarily used for the surreptitious interception of communications
 - o Does not include baby monitors, contact microphones (listen through walls, ie. rodents), small voice recorders.

State Laws

- can be more restrictive.
- Some states do not allow interception unless all parties agree.

The greatest risk of eavesdropping comes from private, illegal eavesdroppers, NOT government entities.

Deception Detection Instruments

Federal Law on Polygraphs

- Federal Polygraph Protection Act of 1988 (EPPA) – prohibits any private employer (interstate commerce) from requiring or requesting any employee or prospective employee to take or submit to any lie detector test, or from using the results of any lie detector test.
 - o does not apply to paper and pencil or oral honesty tests.
- *Veazey v. Communications and Cable of Chicago* – any device that renders a “diagnostic opinion” is considered a lie detector test (ie. Voice recorder).

Lie Detector – a device used to reach an opinion as to honesty or dishonesty.

Polygraph – continuously records changes in:

- cardiovascular (blood pressure).
- Respiratory (breathing).
- Electrodermal (skin electrical property) patterns.

Prohibitions:

- employee or prospective employee.
- Discipline.
- Employee who refuses.
- Discriminate on the basis of the results.
- Simulated use of polygraph – is a violation of the act.

Exemptions:

- Government and national security exemptions.
- Ongoing investigations if:
 - o Limited to the polygraph, ongoing investigation of economic loss, employee had access, reasonable suspicion, employer provides a written statement.
 - o Specific incident or activity – not random testing.
 - o Not for alcohol or drug testing.
- Security Services exemption if:
 - o Security related business.
 - o US national security or health.
 - o Currency or commodities.
 - o Prospective employee.
 - o Polygraph – no other type of lie detector.
 - o Not for custodial type workers.
- Drug Security exemption
 - o Manufacturer.
 - o Prospective employee who will have direct access.
 - o Only employers licensed by the DEA.

Restrictions on exemptions

- employer must have independent evidence that the employee had access, reasonable suspicion, employee made admissions.

Rights of Examinee

- can terminate the test at any time.
- Needlessly intrusive questions not asked.
- Examinee is given written notice.
- Examinee can review all questions before the test.
- Test is at least 90 minutes long.
- Operator cannot administer more than 5 tests that day.

Qualifications of the Examiner

- valid polygraph license.
- Maintains charts and records for 3 years after the test.

Enforcement

- civil penalties up to \$10,000 for violations.

Admissibility of Polygraph results in Evidence

- *Daubert* decision – when seeking the admissibility of evidence the trial judge may consider five nonexclusive factors:
 1. has the technique been tested?
 2. Has the technique been subject to peer review and publication.
 3. Known or potential rate of error.
 4. Maintenance of standards and controls.
 5. Degree to which the technique has been generally accepted within the scientific community.

Jurisdiction

- The federal courts of appeals generally allow the trial courts to decide on admissibility of polygraph evidence. The US Supreme Court has declined to hear any polygraph tests.

National Labor Relations Board – rejected union arguments that polygraph tests were unfair labor practices. NLRB deals only dismissals or discrimination because of union membership or activities or other collective activities. It does not prohibit the use of polygraphs to uncover employee dishonesty.

Military – use in courts martial is prohibited. May play a role in pre-trial hearings.

Labor Arbitrators – generally speaking, have excluded polygraph evidence and ruled against refusals, or for situations in which guilt has not been established by other sources.

Federal Law on Voice Stress Analysis

- prohibited in the workplace for firms regulated under the EPPA (Employee Polygraph Protection Act).
- Use in the private sector for purposes other than employment screening or incident investigations is not regulated under the federal act.

CHAPTER 4 CIVIL AND ADMINISTRATIVE LAW

- private rights and remedies.
- 50 titles in the United States Code (USC).

State Statutory Law

- number of subjects much greater than the criminal code.
- Largest volume related to the specific state's economic center.

Important Subjects in Statutory Law

- licensing, labor law, personal property law, civil rights law, business law, and areas of law related to a given industry or institution.
- Keeping current is a task for legal counsel, not the security manager.

Civil Common Law

- collection of decisions at various levels of government.
- Early beginnings in English courts.
- If heard by federal court, principles of the state in which the court sits are used. When there is no common law precedent in that state, the court can use any source it deems appropriate.
- Contract Branch – deals with matters arising from agreements.
- Tort Branch – deals with alleged wrongs.

Contract Law – “an agreement between 2 or more persons that creates an obligation to do or not do a particular thing.

- express or implied, written or oral.
- Express – conditions stated in words.
- Implied – not stated in words but implied as to what the parties intended.
- Contract implied in law – an obligation for obtaining a benefit from another.
 - “quasi-contract”.
- Contract implied in fact – based on conduct, even if words or agreement are absent.

Some precautions

- best to avoid oral agreements and rely on written documentation.
- A written agreement, generally may not be changed by oral statements.
- The subject matter MUST be lawful.

Warranties

- statements that things done or said, or products or services, rendered by them are as described.
- ie. Alarm services, devices, weapons, investigative and guard services, courier service, and safe deposit service and facilities.

Limitations of Liability

- vendors usually rely on specific language to limit their liability.

Agency – whether one person is acting on behalf of another.

- a trustee acts in the interests of another.
- An employee acts in the interest of the employer.
- Principal/Agent relationships – express agreement in which the principal (employer) tells the agent (employee) to perform specific tasks or duties.
- Apparent Authority – when a person (the principal) is in a position to know the agent is acting as such and the principal does not disclaim the actions.
 - o Acting as an agent of the company.
- Wrongful – held to mean negligently wrongful rather than intentionally wrongful.

Vicarious Liability – liability for the acts of another without personal fault.

- if a guard acts negligently, the employer guilty of no personal fault, may have to pay a judgement.
- Respondeat superior – “let the master respond”.
- Hold-harmless – Indemnity provision in which the security firm agrees to indemnify the company for acts of the security firm’s employee.
 - o without this clause – the security firm might be able to recover part of the judgment under a doctrine called **contribution** – jointly negligent.

Scope of Employment

- for the employer to be liable, the employee must have been acting within the scope of his/her employment. (ie. Off-duty volunteer work).

Tort Law – willful or negligent wrong done to another.

- does not require an agreement.
- Actor does an act that results in injury to another.
- Tort of slander – deliberate false and defamatory spoken words.
- Tort of False Imprisonment – physical custody or intimidation without proper cause.
- Tort of Negligence – unnecessary negligence. (not a willful tort).

Torts or civil wrongs in common law

- battery – use of force.
- Assault – fear of force, does NOT involve physical contact.
- False imprisonment.
- Conversion – appropriation of the personal property of another.
- Fraud or misrepresentation.
- Nuisance.
- Defamation: oral(slandorous). Written (libelous).
- Invasion of privacy – without justification or proper cause:
 - o Intrusion into secret affairs, placing of another in false public light, appropriation of some private or secret aspect for commercial gain.
 - o Typical charge of those claiming unlawful search.
 - o Might arise re: parcel and locker searches.

Negligence

- failure to use reasonable care and due diligence.
- Does NOT require intent.
- Exemplary damages are awarded as a special deterrent to such conduct.

Federal Tort of Claims Act (FTCA)

- provides a limited waiver of the federal government's sovereign immunity.
- Allows individuals to recover from acts of negligence by federal employee in the performance of the job and within the scope of duties.
- Liability of the U.S. determined based on law of the place of occurrence.
- Substitution provision – if the employee was acted within the scope...the U.S. will be substituted as the defendant.

Civil Rights

- statutory law – to protect against discrimination for race, color, religion, sex, national origin, or handicap. Applies to any employer with more than 15 employees, engaged in interstate commerce with federal, state or local governments.
- Discrimination in Employment Act of 1967 – over age 40.
- Equal Pay Act of 1963 – re: sex.

State Statutes – apply to intrastate activities not touched by federal civil rights.

Test for Discrimination

- any practice that cannot be shown to be job related. (*Griggs v. Duke Power*).
- *Gregory v. Litton* – use of arrest record for rejection disallowed.
- *Green v. Missouri Pacific RR*– using even convictions discriminates against minorities.
- *Carter v. Gallagher* – if conviction is job related, not discriminatory.

Trends in Civil Rights

- courts look with disfavor if not job related. Discriminates against minorities.
- Language MUST be related to the demonstrated need, not in general form.

Administrative Law

- functions, powers, and procedures of federal, state, and local governments.
- Make determinations, adjudicate cases, conduct investigations, issue or revoke licenses, institute prosecutions.
- Area of application of law. The application of statutory civil law to activities of government agencies.
- Due process does not require adherence to formal rules of evidence or procedures used in court.
- Need for government regulation and the required expertise or competence.
- Administrative Procedures Act (APA).
- 50 major independent administrative agencies in the U.S.
- power to determine private rights through rule making, investigations, prosecution, licensing, and other informal actions.
- In cases where an administrative agency has no direct authority to award a penalty, it may make a preventative order – violating could lead to contempt in federal court, with a fine or imprisonment.

Rule Making

- determination is made by the agency itself. If disputed later, the question is resolved through judicial review.
- Federal Agencies:
 - o Agency must give notice.
 - o Must give interested persons an opportunity to participate.
 - o Agency must respect the right of interested persons to request issuance, amendment, or repeal of a rule.
 - o Publish the notice and final rule in the Federal Register published by the National Archives and Records Section of the GSA. Published 5x per week.
 - o Codified in the Code of Federal Regulations (CFR).
 - Regulatory counterpart to the US Code (USC).
- State Agencies:
 - o Similar to the federal codes (ie. Fire and building codes).

Citations, Complaints, and Investigations

- usually have authority to investigate and issue citations and complaints.
- Subpoena – legal process issued by a court or authorized executive agency.

Hearings

- not limited by the formal rules of evidence or procedure in court.
- May not compel a person to testify against himself.
- Subpoenaed individual must argue to establish that the items are irrelevant or that the subpoena is vague or unreasonable.
- Sunshine laws often require hearings to be held in public with exceptions.

Adjudications and Awards

- the crux of any agency's authority.

- Agencies may make declaratory orders (defining the rights or obligations of parties before an alleged violation arises) for the purpose of removing uncertainty or terminating controversy.
- License matters:
 - o Written notice by the agency.
 - o Opportunity to demonstrate or achieve compliance
 - o License does not expire until finally determined if applicant has made timely and efficient application for renewal.

Judicial Review

- courts review the actions of administrative agencies.
- Judicial review is limited (ie. No technical expertise).
 - o When additional remedies for redress remain available within the agency itself (*the exhaustion of remedies doctrine*).

Extent of Available Review

- whether the agency was legislatively empowered to act.
- Whether agency observed statutory or its own published procedures.
- Whether agency provided a fair hearing.
- Whether the record shows at least some facts that led to determination.

Requirements and Restrictions on Disclosure

Freedom of Information Act (FOIA)

- release and disclosure of certain kinds of information by the federal government.
 - o Publication in the Federal register.
 - o Distribution of material for public inspection and copying.
- Many broad exceptions, including but not limited to:
 - o Personnel, medical, and personal records.
- Keep sensitive information within the agency if possible.
 - o Provide minimum information to comply.
 - o Mark all sensitive documents.
 - o Obtain an agreement from the agency stating it will not disclose.

Privacy Act

- access information about themselves held by federal agencies.

Health Insurance Portability and Accountability Act (HIPAA) – 1996

- all medical records and health information.
- Applies equally to private and public sector entities.
- Patient Rights:
 - o Give patients a clear written explanation.
 - o Patients can obtain copies of their records.
 - o Patients' consent before sharing information.

- Patients can file a formal complaint with provider or HHS about violations.

Medical Records Use and Release

- without explicit authorization from the individual.
- Does not apply to disclosure of medical records for treatment to physicians, specialists, and others as necessary.

Policies and Procedures

- privacy safeguards and standards.
 - Written privacy procedures.
 - Train employees.

Penalties – Congress provided for penalties.

Permitted Disclosures

- emergencies, DOA identification, public health needs, limited law enforcement, national security, etc.

State Confidentiality Laws – stronger state laws continue to apply.

Compliance and Enforcement

- enforced by the HHS Office for Civil Rights (OCR).

Patient safety and Quality Improvement Act (PSQIA)

- voluntary reporting system for data to resolve patient safety and health care quality issues.

Future Effects of Civil Law on Security

- new security technology.
- Surveillance technology.
- Tracking devices.
- Most likely, implemented first, then challenged in civil court, and then regulated by a government body.
- Consider the reactions of 12 average citizens (jury).
- Strive to be proactive and creative in forecasting and interpreting potential problems before they occur.

CHAPTER 5 HUMAN RESOURCES IN SECURITY MANAGEMENT

The Workplace Environment and the Disabled

- accessibility is the key to accommodating disabled persons.
- Accessible route is a continuous unobstructed path connecting accessible elements and spaces in a building or facility.
- Barriers come in many forms.

Legislation and Significant Court Decisions

1965 National Commission on Architectural Barriers to Rehabilitation of the Handicapped. (prevention of access).

1968 Architectural Barriers Act (federal facilities).

1973 The rehabilitation Act of 1973 (created the Access Board).

1990 Americans with Disabilities Act – ADA.

- accessibility guidelines, technical assistance, research.
- Title I - Attitudinal barriers.
- Title II and III - physical barriers.

Todd v. American Multi-Cinema – captioning. Not required.

Frotton v. Barkan – who must comply, mall owners or tenants?

- both were made parties to the plaintiffs' lawsuit.
- See: ADA Technical Assistance Manual.

Key Definitions

- Disabled – not handicapped.
- Impairment – the condition itself.
- Disability – restriction due to impairment. (Physical or mental)
- Handicap – interferes with what is normally expected, such as the ability to care for oneself.
- Physical or mental and may not be visible:
 - o Physical function, mental function, motor function, senses, hidden.

Architectural Issues – related to accessibility.

- Standards and Guidelines for ADA and Related Laws.
- Consult legal counsel.

Management Issues

- if a disabled person is hired, security must be notified in case that person needs to be protected in an emergency.

Enforcement and Sample Settlements

Safeway Inc. (removal of architectural barriers)

- compliance officer, identify barriers, report, train personnel, educate store mgrs., access, signage, level of service provided to all, etc.

Eastern College Athletic Conference (auxiliary aids; hearing impaired)

- official is deaf, reasonable appropriate auxiliary aids, ADA coordinator, provide staff instructional materials regarding procedures.

Westin Hotel (guest room; wheelchair accessibility)

- toilet seats in bathroom too low, parking spaces, cash registers, entrance doors, TTY phones, modifications to rooms.

Equal Employment Opportunity and Security

1964 24th amendment – barred poll taxes (“one man, one vote”).

- required specific goals, numbers and timetables.
- affected class (80% of the workforce).

Enforcement Bodies

- more than one agency may be involved.
- Office of Federal Contract Compliance – non-complying federal contractors.

Equal Employment Opportunity Commission (EEOC)

- created by the Civil Rights Act of 1964.
- Investigates employment discrimination that violates Title VII.
- Major class-action suits regarding practices and patterns.
- Assumes jurisdiction 60 days after a complaint made with an authorized state agency (deferral agency).
- EEOC attempts conciliation.
- Can also bring additional charges.

State Deferral Agency

- EEOC grants deferral status when that agency has authority.
- Most cases, EEOC will allow deferral agency to handle for 60 days.
- An organization may have to defend against both federal and state investigations.

Federal and State Courts

- federal court system has jurisdiction in all Title VII cases.
- Court is NOT bound by findings of EEOC investigation.
- State deferral agencies have laws at least as strict as federal.

U.S. Attorney General - Jurisdiction under certain circumstances.

Office of Federal Contract Compliance (OFCC)

- economic sanctions.
- Companies that do business with the federal government.
- OFCC and EEOC have concurrent jurisdiction in discrimination matters.
- Every federal contract agrees to a seven-point equal opportunity clause.
- Required to take “affirmative action” re: proper interview process.

National Labor Relations Board (NLRB)

- all forms of unfair labor practice.
- NLRB defers to EEOC in discrimination matters.

Disparate Treatment and Adverse Impact

Disparate Treatment – when employees/applicants are treated less favorably.

Disparate Impact – when practices, though facially neutral, fall more harshly on one group, without justification of business necessity.

- “Four-fifths” rule for proving disparate impact.

Common Misconceptions

- some useful investigative data are denied to the security professional because the contract compliance agency may take issue with the company on discrimination practices.
- Federal law might not prohibit the collection of arrest and conviction records, but state law might.
- *Gregory v. Litton Systems* – individual who had frequent arrests but no convictions, could not be denied employment on that basis alone.
- Age discrimination – asking for DOB is not, in itself, a violation.
- Fair Credit Reporting Act – edit out information that is not to be considered.

The Security Role in Equal Employment Opportunity and Affirmative Action

- develop an effective EEO/AA program.
- Help in regulation’s record keeping requirements, since security often maintains personnel identification records.
- Ensure equal employment opportunities in security.
- EEOC may use “testers”.

Gender Discrimination and Sexual Harassment

Pennsylvania State Police v. Suders- if there is a tangible job action (ie. Demotion), the employer’s liability is absolute. If not tangible, should they have known of the harassment and did they take action.

- affirmative defense if no job action and clear policy in effect and the victim did not take advantage of the policy.

Legislative and Political History

1963 Equal Pay Act – equal pay for equal work.

Gender Discrimination

- basis of sex is strictly prohibited unless there is a bona fide occupational qualification (BFOQ) necessary to the normal operation of the enterprise or business.

Reverse Discrimination

- “favored” or majority group alleges discrimination by a member of a “disfavored” or minority group.
- Must also prove that the employer is the “unusual employer” that discriminates against the majority.

“Sex Plus” Discrimination

- when an employer discriminates not against all women but only against a **subset** of them (ie. Child bearing age, kids, etc.)
- *Gee-Thomas v. Cingular Wireless* – compared herself to man with children who got the position but it was proven he was the most qualified candidate.

EEO Legislation

- employers of 15 or more.
- Promotion, training, benefits, wages, testing devices, membership in labor union, participation in EEO proceeding.
- EEOC enforces and files charges under Title VII.
- Class action – pattern or practice.

Age Discrimination in Employment Act of 1967

- 20 or more employees.
- 40 or more years old.
- Bona fide occupational age qualifications are permissible.
 - o ie. Young man to play the role of a youth.
- EEOC seeks voluntary compliance through informal conciliation.

Equal Pay Act of 1963

- wage discrimination.
- Administrator of the Wage and Hour Division of the Department of Labor administers the act.
- May pay different rates at different establishments.

Rehabilitation Act of 1973

- requires covered employer to hire physically and mentally handicapped and develop an affirmative action program and include an AAP clause in all contracts.
- Employment Standards Division (ESD) of the Department of Labor enforces the act.

Other Applicable Statutes

- Civil Rights Act of 1991.
- Education of the Handicapped Act Amendments of 1990.
- Glass Ceiling Act of 1991.
- Older Worker Benefit Protection Act.

* Employer must correct violations by raising the pay of the lower-rated worker.

CHAPTER 6 SECURITY REGULATION

Private Security Officer Employment Authorization Act (PSOEAA)

- requires cooperation between public and private sectors.

***** Much of the nation's critical infrastructure is in private hands.**

- Since the 1970s, private security personnel have outnumbered public law enforcement officers.
- Private security outnumbers public law enforcement 3 to 1.
- concerns regarding possibility of a lawsuit based on a negligent hiring decision and lack of due diligence in the hiring process.
- Regulation – most appropriate at the level of the state or municipality.
- federal/state governments must establish public welfare is involved and unregulated activity would likely harm the public.
- Reluctance of many industry groups to go on the record due to liability issues.
- Support Ant-terrorism by Fostering Effective Technology Act (SAFETY Act).
 - o Designation award limits the designee's liability.
- DHS Voluntary Private Preparedness Accreditation and Certification Program (PS-Prep) – encourages private sector preparedness.

Self Regulated Failures:

- Airport Security – TSA Screening Partnership Program – qualified private contractors.
- Publicly Traded Companies
- Little regulation has been instituted in the security industry.

Government Regulation

- Control of the activity or the raising of revenue through taxation.
- *Shorten v. Millbank* – provisions are for the protection of the public.

Early Regulatory History

1972 Rand Corporation.

- regulation at state level, proprietary directors/managers licensed, employees registered, background investigations and employment verification for 7 years, training, weapons should stay on company property.
- illegally obtained evidence, by private individuals, should be subject to suppression:
 - per se basis (as is the case in L/E if illegally seized).
 - ad hoc (with the judge or magistrate weighing the equities).
- Jurisdiction should regulate color of uniforms and titles used.

Regulatory Methods

- licensing of the primary controlled business.
- Licensing/registration of anyone not listed on original application.

Regulated Industry Sectors

- Security Officers (guards and guard services) – contract security officers.
 - o Proprietary officers are often exempt.
- Armed vs. unarmed security officers – may need different requirements.
- Private Investigators.
- Alarm companies.
- Guard dogs.
- Special police are generally private security personnel with limited authority to act as police or peace officers in some area of their employment (such as a private residential community).

Federal Regulation – (mostly failed).

- Security Officers Employment Standards Act of 1991 – hiring/training requirements.
- Security Officers Quality Assurance Act of 1992 – regulations would apply to all security personnel.
- Private Security Officer Quality Assurance Act of 1993.
- Private Security Officer Quality Assurance Act of 1995 – expedited state review of criminal records.
 - o “sense of Congress” – not binding if passed but Congress thinks it’s a good idea.
- Law Enforcement and Industrial Security Cooperation Act of 1996 – encourage cooperation between public and private sector.
- PASSED: Private Security Officer Employment Authorization Act of 2004.
 - o State and national fingerprint criminal history check.
 - o Written consent is required.

State Regulation

- extremely fluid.
- One division may regulate security officers, while another regulates private investigators, each imposing different requirements.

Local Ordinance

- municipalities, in the absence of federal or state licensing/regulation.
- Local crime prevention codes – elements of physical security.
- Establishes minimum requirements.

CHAPTER 7 OSHA AND THE SECURITY PRACTITIONER

Convergence – usually used to describe the marriage of physical and IT security, is more likely to be used in smaller firms to describe the coalescence of security and safety.

Secretary of Labor v. Summit Contractors – extended the liability of corporations to include OSHA violations by subcontractors.

Before OSHA there was no nationwide standard.

- OSHA provided a legislative basis for safety activities.
- General duty clause – protect workers from recognized hazards.
- Security programs and devices, training, procedures.

General Purpose of the ACT

- ensure that employers furnish workplaces that are free from recognized hazards that are causing or likely to cause **death or serious physical harm**.
- US Secretary of Labor sets standards.
- Found in C.F.R.
- Enforcement – US Department of Labor (DOL).
- Head of OSHA = Asst. Secy. Of Labor for Occupational Safety and Health.
- If state legislation is found to be at least effective, state will be permitted to regulate.

National Consensus Standards

- Nationally recognized standard producing organizations.
 - such as National Fire Protection Assoc., etc.
- or designated as such by the secretary of labor after consultation with other federal agencies.
- secretary may also issue emergency temporary standards.

Requirements of the Act

General Duty Clause – employer to provide a working environment free from recognized hazards.

- Catch-all provision.

Special Duty Clause – to comply with standards listed in the Act or published by the secretary of labor.

State Standards – at least as effective as those of the Federal OSHA.

- may be in compliance with OSHA but still in violation of a stricter state standard.

Security Industry Specific Requirements

- walking and working surfaces, egress, hazmat, PPE, Medical and first aid, fire protection, toxic substances.
- Other industries can check www.osha.gov.

Standards Variances

- Permanent variance – employers must apply for a variance rule and hearing.
- Temporary variance – must include when an employer tends to comply.
- OSHA uses national defense variances.

Employees Rights

- place of employment free from recognized hazards, to be informed (variances, orders), labeling, PPE, medical examinations, questioned privately by a federal compliance officer, notified of exposure, notice of citations to employer, no discrimination for complaints, not to have variances in effect for more than 6 months.

Employers' Rights

- each employee must comply with safety and health standards.
- Though no penalties are provided for employees who fail to comply.
- Workers compensation typically does not recognize a contributory or comparative negligence defense.

Record Keeping Requirements

- 11 or more employees.
- Injury and illness records.
- Records available to compliance officer.
- *Log and Summary of Occupational Injuries and Illnesses.*
- *Supplementary Record of Occupational Injuries and Illnesses.*
- Must be recorded:
 - o Fatalities, lost workdays, injuries that result in transfer to another job or termination.
- Illness is any abnormal condition or disorder.
- Official log is maintained within 7 working days, current to within 45 days, kept on hand for 5 years.
- Special records for particular equipment, conditions, materials and exposure.

Self Inspection Program

4 phase:

- Phase 1 – identify critical safety points within each zone.
- Phase 2 – Train security officers.
- Phase 3 – safety inspection forms.
- Phase 4 – review any identified issues and action items needed to correct.

Enforcement

OSHA conducts inspections and issues citations and assesses financial fines.

- citations can be a strong bargaining point for unions.
- Usually no advanced notice.
 - o May refuse entry but may return with subpoena.
- Criminal penalties only invoked by court action.
- Compliance officers can only request a shutdown – NOT demand.
- Compliance inspections usually scheduled for:
 - o 2 or more fatalities or hospitalization.
 - o Complaints.
 - o “target industries”.
 - o Random selection.
- Even a first offense is liable to sanction.
- Employer should select an inspection route through the areas with the best safety compliance.
- Vertical standards – apply to a particular industry.
- Horizontal standards – more general, multiple industries.
- Compliance officer makes recommendations and report to OSHA area director who decides whether to issue citations.
- If an employer interferes with photography, it may be considered a denial of entry.

Violations fall into 3 categories:

- general duty
- horizontal safety and health standards.
- OSHA regulations.

Tools used by the OSHA Compliance Officer

- highly sensitive devices, air samplers, noise, ground fault circuit testers, ventilation, etc.
- employer should duplicate all testing at the same time.
 - o 2 hours to retrieve necessary equipment.

Types of Citations

Imminent Danger – expected to cause death or serious physical harm.

Serious – probability of death or serious physical harm, and did the employer know.

Non-serious – injury but not death or serious physical harm.

De minimis – not immediate to safety or health.

Willful – intentionally or knowingly violated the act or was aware.

Repeated Violation/Failed to correct

OSHA citations

- date by which the hazard must be abated.
- Employer must post citation.
- Serious violation = must monetary penalty, non-serious = may.
- No requirement to post *de minimis* notices.
- If employee fails to wear PPE – employer will be cited.
- Penalties may be assessed even if the employer proceeds immediately to abate the condition.
- Payment must be made within 15 working days.

Criminal Violations and OSHA

1. employer's willful violation causes the death of an employee.
2. False representation regarding compliance.
3. When a person gives advance notice of an inspection.

Who has control over the work environment?

- *Stein Inc. v. OSHRC* – “economic realities test” – who do the workers consider to be their employer (ie. Paychecks, etc.).

Employer Defense to Criminal Liability

- Isolated Occurrence or Employee Misconduct Defense.
- Greater Hazard.
 - o Complying is more hazardous than not complying.
 - o Alternative means to protect employees are being used.
 - o Application for variance would be inappropriate.
- Infeasibility or impossibility of compliance.
 - o Must be shown that it explored all possible alternatives.

Citation Appeals Process

- employees and employers.
- Hearing by an OSHRC administrative law judge.
- Any statements that go unchallenged are considered fact.
- 3-member commission.
- Commission has the power to affirm, void, or modify a citation or penalty.

CHAPTER 8 POLYGRAPH

Employee Polygraph Protection Act of 1988 (EPPA)

- curtailed its use.
- US states further regulate.

Based on the assumption than an identifiable physical reaction can be attributed to specific emotional stimulus.

1895 Cesare Lombroso – noted blood pressure and pulse changes.

WW I used a *Sphygmomanometer* – blood pressure cuff.

John A. Larson – 1921 Blood pressure, pulse rate and respiratory changes.

- forerunner of today's polygraph.
- Leonard Keeler added a feature for measuring changes in skin's electrical resistance – known as Galvanic skin response.

Applications:

- Criminal Investigations.
- Periodic employee testing.
- Pre-employment screening – limited class of private employers and law enforcement.

Operation of Instrument

- physiological changes.
- Polygraph – multiple pen instrument.
- Measures:
 - o Breathing pattern.
 - o Blood pressure.
 - o Pulse.
 - o Skin resistance to external current.
- Involuntary changes that occur under stress.
- One or two pneumograph tubes – chest, blood pressure cuff, electrodes attached to fingers.
- Galvanograph – records the variations in the electrical current flow caused by electrochemical changes in the conductance of the skin surface.
- A belief in the machine's accuracy aided the detection of responses.
- Witness in an adjacent room protects against false allegations, trains other examiners, keeps those in police custody under watch.

Pre-Test Questioning – MOST IMPORTANT stage in polygraph process.

- obtain complete history of subject.
- Alleviate subject's nervousness. (extremely nervous subjects no good).
- Establish good rapport or a sympathetic relationship.
- Yes or No questions.
- At the CONCLUSION of preliminary interview – Individual is connected.

Testing

- broad control question – most people have something to hide.
- 3 Techniques:
- Relevant-Irrelevant (R-I) – physiological responses will be stronger to relevant questions than to irrelevant questions. (produces many false positives).
- Control Question (CQ) Technique – unrelated to the subject matter. Designed to induce stress. (neutral, control, relevant).
- Directed Lie Control (DLC) Technique –similar to CQ.

Dos and Don'ts

- Don't if declines to submit.
- Don't when other leads should be pursued first.
- Don't if mentally incompetent.
- Don't describe as infallible.
- Do take a neutral approach.
- Do point out the effectiveness of the polygraph.
- Do tell how experienced the examiner is.

- Limit to a few selected questions.

- The examiner can only say if the examinee believes what they are saying.

Behavior of Untruthful and Truthful Individuals

- 1 out of 5 untruthful subjects attempted to distort the polygraph test.
- Untruthful subjects:
 - o Attempt to postpone, arrive late, exhibit specific behavior, etc.
 - o Complain of being nervous and then mention a physical defect.
 - o Claim they are religious and would not lie.
 - o Claim the apparatus is causing them pain.
 - o Leave room as soon as possible when test is done.

Polygraph Examiners

- As expert in court:
 - o Accredited training course (American Polygraph Assoc.)
 - o Licensed by state.
 - o Conducted at least 200 polygraph examinations.
 - o Membership in professional societies.

Voice Stress Analyzer (VSA)

1971

Although inaudible, the changes were capable of being graphically displayed.

- Not generally available for use by employers.
- Some states prohibit use entirely.
- In the future, government agencies will be the primary users.

CHAPTER 9 EVIDENCE

Proof or an indication of an assertion.

- oral, documentary, and physical forms.

Direct first hand knowledge, real, material.

Indirect highly informed inference, circumstantial, hearsay.

Materiality quality, substance, and connection.

Hearsay not admissible, except “dying declaration”, OR against self interest, OR

“*Res-gestae*” – “things done” naturally, spontaneously, without deliberation:

1. explain a physical act.
2. So spontaneous as to belie concoction.
3. Evidence as to state of mind.

Oral Evidence – direct or indirect.

Preliminary Investigation:

- maximum amount.
- Separate witnesses and canvass for other witnesses.
- Establish rapport – inquire as to witnesses condition.
- Open-ended then closed-end questions – avoid leading questions.
- Encourage witness to avoid contact with media.
- Information from witnesses can collaborate other evidence.

Conducting the interview

- Social dynamics – rapport, common ground, state expectations.
- Facilitation of Witness’s Memory and Thinking – minimize distractions, tailor questions to witness’s narrative. Open-ended, then closed-ended questions.
- Communication between interviewer and witness – make no promises or offers of reward. Voids the statement and could be witness tampering.

Documentary Evidence

Handwriting and Hand Printing

- can sometimes determine origin or authenticity.
- CANNOT determine age, sex, personality, intent.
- Exemplars:
 - o Separate sheets of paper.
 - o Writer and witness date and initial each page.
 - o Dictate exemplars.
 - o Both hands.
 - o Upper and lower case.
 - o Obtain previous writings (business records, etc.)

Altered or Obliterated Writing – can sometimes be detected and deciphered.

Non-genuine Signatures – false signatures.

1. Traced – template or pattern.
2. Simulated – copying.
3. Freehand – forger's normal handwriting, no attempt at disguise.

Typewriting

- most common = typebar machine can occasionally be matched.
- Ball, printwheel, or thimble less likely.
- Fabric ribbon cannot be read. Remove and put typewriter in stencil position.
- Carbon film can sometimes be read. (Submit ribbon and correction tape).
- Word for word texts = TWO times.
- Make, model, serial number; and service and repair history.

Photocopies

- 10 exemplars in 3 ways = 30. (no document, cover down and up, document with cover down).
- Do NOT ship in plastic envelopes.

Paper – torn edges, watermark, indentations.

Burned or Charred Paper – ship in container in which it was burned.

Age of a Document – can sometimes be determined.

Checkwriter Impressions – can sometimes be associated with the checkwriter.

Embossing and Seals – can sometimes be identified.

Rubber Stamps – submit to laboratory UN-Cleaned.

Plastic bags – roll from which obtained can sometimes be determined.

Anonymous letters – keep a file.

Shipping Documentary Evidence – NO plastic envelopes.

- registered mail or a carrier that provides TRACKING.

Physical Evidence

Tangible – can be touched or sensed physically or technologically.

Corpus delicti – evidence that proves a crime was committed (ie. Body).

Associative Evidence – circumstantial – links a suspect with the scene (prints, DNA).

Identifying Evidence – associative evidence that determines identity of a suspect.

Tracing Evidence – assist in ID and location of a suspect (ie. C/C receipts).

Trace Evidence – examined in lab (fibers, paint, glass).

Impression Evidence – firearms, tool marks, bite impressions, footprints.

Evidence Searches

Visible – cautious search.

Concealed – vigorous search.

Personnel may be assigned 2 or more responsibilities.

Person in charge

Security
Administrative Log
Walkthrough
Narrative
Final decisions
Release of scene

Scene supervisor

Notes (extensive)
reliefs
security of personnel

Secure and Protect the Scene

- record who enters and leaves.

Preliminary Survey – tool for planning a search.

- narrative technique (written, audio, video).
- Preliminary photographs.
- Develop a general theory of the incident.
- Focus first on evidence that could be lost.
- Search easily accessible and progress to out-of-view locations.
- Does the scene appear contrived?
- Photographs and sketches.
- Do not collect evidence during the narrative.

Photography

- as soon as possible.
- Condition of evidence before recovery.
- Photographic Log.

- Tests shots, overall, medium, and close-up views.
- Taken at eye level to show normal view.
- Include a scale, but also take without.
- 360 degrees of coverage
- important evidence – TWICE.

Sketches

- distance and size relationships.
- Dimensions.
- In relation to 2 UNMOVEABLE objects (doors, windows).

Physical Evidence Collection

- most critical and when most errors occur.
- Most common – Fingerprints (associative evidence).
- Search from general to specific.
- Photographic Log (before collection).
- Evidence Log.
- Chain of custody.
- Obtain known standards (ie. Carpet fiber).
- Person in charge releases the scene after final survey.

Evidence Examination Requests

- separate communications for separate cases.
- Include basic facts, persons involved, if examined by others.

Shipping Evidence

- trained and qualified evidence technician a MUST.
- Each item separately to avoid contamination.
- Custody Form.
- Evidence/Biohazard/Latent on INNER container.
- International Air Transport Assoc.'s *"Dangerous Goods Regulations"*.
- US EPA – Resource Conservation and Recovery Act (RCRA)
 - o "Cradle to grave" – generator's responsibility.
 - o HAZMAT + EVIDENCE = does NOT apply to RCRA.
- US DOT *Regulations for Hazardous Materials*.
- Firearms = "ORM-D, cartridges, small arms".

Handling Physical Evidence

Abrasives	plastic bags, paint cans. (No paper or glass).
Adhesives	submit item to which adhered. Plastic bags, pill bottles.
Bullets	fired bullets = rifling characteristics. Components package separately. Residue on clothing – packaged in paper. "BIOHAZARD"

	Unfired – extraction marks. Wadding – gauge and manufacturer.
Anthropology	bones – air-dry them. Paper bags. No formaldehyde. If tissue present – refrigerate and ship in foam cooler.
Arson	contact FD, PD or Alcohol, Tobacco, Firearms and Explosives.
Audio	“write protect” original recordings. Keep away from magnets or magnetic fields.
Blood	Qualified medical personnel to collect blood from a PERSON. At least two 5 milliliter tubes. Purple top = DNA testing. Grey top = Drug/alcohol testing. Refrigerate (DO NOT freeze). “Biohazard”.
Blood on person	clean cotton cloth, air-dry. No plastic containers.
Blood – snow/water	Freeze it.
Bloodstains	preserve patterns.
Blood Exam Letter	- facts and claims made regarding the case. <ul style="list-style-type: none">• if animal blood present.• Victim’s medical condition (ie. AIDS).
Buccal (Oral) Swabs	cheeks. Air-dry. No plastic. Do not need to be refrigerated.
Building Materials	Lab examiners should remove transferred evidence. <ul style="list-style-type: none">• do NOT process tools for latent prints.
Chemicals	General unknowns. General classification is usually possible. <ul style="list-style-type: none">• full identification may not be possible.
Computers	- can determine type of data files. <ul style="list-style-type: none">• do NOT use loose foam pieces – creates static charges.• Keep away from magnets.
Controlled Substances	plastic bags. Do NOT submit used drug field test kit.
DNA	
Nuclear DNA	- blood, semen, saliva, body tissue, hair with tissue at roots.
Mitochondrial DNA	- naturally shed hairs, hair fragments, bone, teeth.

Liquid bio evidence - absorbed into surfaces.

Solid bio evidence - adheres to surfaces.

Dyes Cut small sample and control sample (packaged separately).

Electronic Devices - keep away from magnets.

- “interception of communication” device = eavesdropping.

Feathers heat-sealed plastic or paper bags.

Fibers submit the entire garment or textile if possible.

- animal (wool).
- Vegetable (cotton).
- Mineral (glass).
- Synthetic (manufactured).

Fractures joined together and subsequently broken apart.

Glass direction, breaking, sequence of shots.

- laminated glass – plywood. Mark “inside” and “outside”.
- Vacuum sweepings – do NOT use tape. No paper/glass.
- Do NOT process for latent prints.

Guns (Firearms) pick up by knurled grips. NOTHING placed in barrel.

- Do NOT mark – TAG IT!

Hair can be submitted for mitochondrial DNA.

- collect at least 25 hair from different parts of head/pubic.

Images - photographic comparisons.

- Photogrammetry – dimensions based on mathematical formulas. Diagram scene to **nearest 1/8 inch**.
- Whether a specific camera created an image.

Automobiles National Automotive Image File.

Videos - write protect. Never use the pause.

Ink usually limited to comparisons of the organic dye components.

- CANNOT determine how long ink has been on a document.

Product Tampering - film canisters or plastic pill bottles.

- Ropes and Cords if a tracer is present, the manufacturer can be determined.
▪ submit entire rope or cord.
- Safe Insulation - Do NOT submit for latent prints.
- Saliva/Urine - Cigarette butts – do NOT submit ashes.
▪ Ashtray only if latent prints.
▪ - Chewing gum, envelopes and stamps.
▪ Should not be packed in plastic.
- Semen - air-dry cloth or swab. Clean paper, NO plastic
- Serial Numbers Obliterated are often restorable.
▪ naval jelly to remove rust.
▪ Warm area.

Shoe Prints and Tire Tread Impressions

- Close and long-range photographs – 400 ISO film.
- Scale in every photograph (Linear scale = ruler).
- Tripod.
- f/16 or f/22 for depth of field.
- Flash at low angle:
 - o 10-15 degrees
 - o 5-7 feet away.
- Wet footprints = oblique lighting. (Angled to prevent glare).
- Snow – snow print wax or spray paint.
- Colored dental stone – let it flow into the impression.
- Allow to air-dry for 48 hours.
- Package in paper, not plastic.

Electrostatic Lifts

- device that lifts footwear impressions from porous and non-porous surfaces without damaging the impressions.

Gelatin and Adhesive Lifts

- Gelatin - porous and non-porous.
- Adhesive - smooth, non-porous.

Soil

- collect ASAP.
- Collect where noticeable changes in color.
- From ALIBI LOCATIONS too.
- From access or escape routes.
- Debris – leak-proof plastic pill bottles.

- Tape Cellulose acetate tape (ie. Scotch) CANNOT be examined.

Blood-Borne Pathogen Safety – treat all as infected (“Universal Precautions”).

- barrier protection (ie. PPE).
- Bleach diluted **1:10 Ratio**.
- Alcohol **70%**.

Chemical Safety

- flammable – ignites easily.
- Pyrophoric – can ignite WITHOUT an external ignition source in:
 - o Air temperatures less than 130 degrees F, 54 degrees C.
- Corrosive – can cause destruction of living material.
- Material Safety Data Sheets – guidance on handling hazardous materials.

Light-Source Safety – eyes protection. ANSI – American Nat’l Standards Institute.

- Confined-Space Safety -
1. Confined-space permit required.
 2. Certified personnel only.
 3. Designated rescue team only.
 4. appropriate PPE (ie. SCBA, harness, etc.)

X-ray safety - exposure monitoring device.

Hand Protection

Nitrile

- acids, alkaline, hydrologic, photographic, fuels, lubricants, aromatics, petroleum, chlorinated solvents.

Neoprene

- oil, grease, acids, solvents, alkaline, bases, and most refrigerants.

Polyvinyl Chloride (PVC)

- alkaline, oils, limited nitric and chromic acids.

Latex (Natural rubber)

- can be **degraded by excessive heat or sunlight**.

Powder-free gloves

- for latex allergies.

Foot Protection

OSHA – American National Standard for Personal Protection – Protection Footwear.

Hand Protection

OSHA – Requirements for Industrial Hand Protection.

Head OSHA

Respiratory - Comply with 29 CFR 1910.134

Forensic Science - application of **science** to the **LAW**.

COMPUTER EVIDENCE

- Photograph.
- Latex gloves.
- **NO fingerprint powder.**
- If found OFF, leave OFF.
- If **ON**: unplug from the **BACK**, then the power **SOURCE**.
- If **laptop ON**: pull **battery** first.
- Photograph the back to record cable connections.
- Label cables.
- Remove disks and process as evidence.
- EVIDENCE TAPE over entrances to drives.
- Seize all other devices: monitor, keyboard, mouse, printers, modems, camera, power cords, etc.
- Check area for passwords.
- **NO packing peanuts** – creates static electricity.
- **NO Plastic** – creates static electricity.
- **DO NOT place in truck near radio transmitter.**

CHAPTER 10 TESTIMONY

- Testimonial evidence is **80% of the evidence presented in court**.
- Hearsay Exception – “Dying Declaration”.
- **Security testimonial** evidence = “**PAROLE**” or “**SPOKEN WORD**”.
- **Judges** decide questions of law. (Bench trial = decide outcome).
- **Jurors render a decision based on facts, but ARE NOT professional arbiters of fact.**
- *Voir Dire* – questions to determine juror suitability.
- Black jurors are less likely than white jurors to convict, especially if defendant is black.

Neuro-Linguistic Programming:

Neurological (senses)
Linguistic (spoken-word)
Program (organize information)

- If witnesses detect a negative response, they can alter their delivery to improve communication.

Physical Evidence should be examined by the security professional during the pre-trial conference.

Avoid discussing cases in public areas.

Expert witnesses - allowed to provide his/her **opinion**.

Daubert v. Merrell Dow Pharmaceuticals (1993)

Requires judges to determine whether expert scientific testimony is **based on sound science** before allowing it into evidence.

General Electric Co. v. Joiner

Found that judges can specify the **kind of scientific testimony** that jurors can hear.

Kumho Tire v. Carmichael Co.

Expanded the scope of *Daubert*, requiring that any **expert**, scientific or otherwise, be **scrutinized** before testifying. (ie. Qualified)

Fact Witnesses	- requested or compelled to testify.
Expert Witnesses	- hired (\$) to provide opinion.