

THE LOCAL GOVERNMENT LIABILITY BEAT



Presented by Local Government Risk Management Services, Inc.
A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs

Dying by Driving: Understanding Law Enforcement Officer Traffic-Related Fatalities

By Andrew Birozy. Reprinted with permission from Lexipol.

Words can never do justice to describe the heartache every law enforcement officer across the country feels when one of their own is killed while protecting the communities they serve. It is a tragedy any time a peace officer is killed in the line of duty.

But it's even more tragic when the death was preventable. The Officer Down Memorial Page (ODMP) is a sobering reminder of the dangers we face every day as keepers of the peace. One thing that always strikes me when reading the ODMP: the number of fatalities that occur as a direct result of an automobile crash. If you include crashes that began as a vehicle pursuit, the numbers are even higher.

Click to read the stories behind each of these tragedies and you'll learn many of the deaths occurred when the officer was responding to a call for service, and some involved a solo patrol car losing control and crashing.

Could some of these deaths have been prevented? Would it have made a difference if the officer slowed down? Was the officer distracted by their in-car computer or cell phone? The wives, husbands, daughters, sons, brothers and sisters who were left behind probably asked these same questions. In some cases we'll never know the answers, but that doesn't mean there's no benefit in making the inquiry.





I also wonder how many calls for service these heroes were responding to that didn't necessitate a speedy response. In my career, I have seen law enforcement officers driving 90 mph in a residential area while responding to a fistfight between two people. I have seen the same type of response to a burglar alarm call or a vehicle theft.

What's the Rush?

Why are we in such a rush that we are willing to endanger our community and ourselves? There is no chief of police, sheriff, commissioner or director who wants to tell your loved ones you died or were seriously injured in the line of duty – it must be the worst nightmare of any department head. Imagine the anguish they experience walking up to a door knowing the news they are about to deliver. Now think about how much more painful it will be when they know your death was preventable.

As law enforcement officers, we run toward danger while others run away from it. We see things every day that others won't see in a lifetime. There are evil people in this world who will intentionally do us harm. Sadly, it's difficult to prevent all line-of-duty deaths (LODDs). However, preventing tragedies caused by automobile crashes is something we can do. The numbers back us up: Law enforcement traffic-related fatalities have dropped

from 51 in 2010 to 31 in 2017. We must do everything we can to continue this trend. Even one more life saved is worth the effort.

There's another danger associated with unsafe driving, one we don't often think about. Numerous law enforcement professionals across the United States have been prosecuted as a result of unsafe on-duty driving. Some have seen their careers ruined and some have been incarcerated. Do you want to chance your career or your freedom because you killed or injured an innocent person as you barreled toward a call?

What We Can Do

In the September 2012 issue of *Law Officer* magazine, former California

Commission on Peace Officer Standards and Training (POST) Executive Director Paul Cappitelli says, "Almost all line-of-duty traffic fatalities result from poor choices, poor supervision, and/or poor management. Police officers are killing themselves by negligent driving at a greater rate than those being killed at the hands of suspects. There is far too much tolerance for negligent driving in our profession!"

These are tough words to hear, but having spoken with Mr. Cappitelli, I can vouch for his passion for making our profession better. His criticism comes from a deep commitment to preventing LODDs.

So the question we have to ask ourselves is, why are we making these poor choices and how can we do better?

Following are some strategies to consider:

- Stress the importance of safe driving every day in our roll call.
- Train employees on the basics of safe driving. For obvious reasons we consistently train on officer safety. How often do we train on driving?
- Establish policies that emphasize the importance of safe driving and slowing down when possible.

- Hold personnel accountable to following policies and laws.
- Hold each other accountable when we see one of our partners driving too fast for no apparent reason.
- Talk about it. We always talk about mentally preparing for dangerous encounters with violent felons. Why don't we speak about driving? I can only guess it's because most of us are not aware of this problem. We need to bring it to the forefront so it's on every law enforcement professional's mind. We can't ignore it any longer. If we do, needless deaths will continue to happen.

Statistics also provide some clues for simple steps we can take to reduce law enforcement traffic-related fatalities.

- Slow down. Driving too fast for conditions or driving in excess of the posted speed limit was one of the top two driver-related factors cited in a study on fatalities that occurred in police vehicles.
- Take extra caution at night. In the same study, crashes resulting in law enforcement officer fatalities occurred more frequently during dark hours (8 p.m. to 4:59 a.m.).
- Wear your seat belt. In a study of 167 fatal automobile crashes between 2011 and 2015, officers were not wearing seat belts in at least 38 percent of crashes.
- Be aware of the impact of fatigue. According to the Centers for Disease Control and Prevention, up to 6,000 fatal crashes each year may be caused by fatigued drivers. The CDC also lists shift workers as being at higher risk for drowsy driving. But

you don't need these statistics to tell you what you already know: Many, many cops are tired on the job and if you've been a patrol officer for even a few months, you probably found yourself fighting off sleep behind the wheel. Know the signs of drowsy driving and commit to pulling over when you're dangerously tired.

In Our Hands

We must never forget those who have laid down their lives while unselfishly protecting others. May they always be remembered and honored as true American heroes.

At the same time, we need to take individual responsibility to reduce our risk behind the wheel as much as possible. Please slow down. Don't be in such a hurry. I understand there are times you are going to drive faster than you normally would; however, make this the exception rather than the rule. If you find the need to drive faster, do so safely. Follow your department policy and the laws of your state.

If you don't do it for yourself, please do it for your loved ones. They are counting on you to come home after every shift.

ANDREW BIROZY is a 24-year law enforcement veteran currently serving as a detective sergeant in a police department in Southern California. Andrew has also worked for Lexipol for the past 10 years as a Training Developer. He holds a master of science degree in law enforcement executive leadership and a bachelor of arts degree in leadership. Andrew is a California Commission on Peace Officer Standards and Training Master Instructor and teaches a variety of law enforcement classes throughout the state. He's committed himself to being a lifelong learner, and teaching helps him further his passion for learning. Andrew can be reached at abirozy@lexipol.com.

Officers Beware: First Amendment Auditors

by James R. Westbury, Jr., JD, MBA, GMA Property and Liability Claims Manager

The Problem

A recent phenomenon in law enforcement is the First Amendment "auditor." The auditor engages in lawful, but suspicious, activity; such as walking around a neighborhood, a police parking lot, or a public building while videotaping. Often, there are at least two people, so that one person records and interacts with the officer while the other records that interaction. When the officer asks questions, the auditor becomes combative and refuses to answer or provide identification. As

the episode unfolds, the officer backs himself into a proverbial corner. Typically, the officer will insist on identification and arrest the auditor for loitering or obstruction. Afterward, the video is posted to YouTube by the auditor and creates a departmental public relations nightmare. More importantly, the officer and department are potentially subject to a civil action under 42 U.S.C. § 1983 for violating the auditor's First and Fourth Amendment rights. What was at first the natural response to suspicious behavior has become a very expensive problem.



An auditor group has recently emerged in Georgia that calls itself “Georgia Community Watch” and can be easily found on YouTube attempting to harass Georgia peace officers.

Legal Standards

A bedrock principle in street law enforcement is the Terry stop. Under *Terry v. Ohio*,ⁱ officers may engage in a very limited Fourth Amendment seizure based on less than probable cause. The “officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion.”ⁱⁱ Terry stops must be limited to the justification for the intrusion and are evaluated based on an objective standard.

Under *Terry*, a police officer may not require identification unless there is a reasonable suspicion to believe that the person was engaged in or had engaged in criminal activity.ⁱⁱⁱ Persons temporarily detained for purposes of a traffic stop are not “in custody” for purposes of Miranda. Thus, Miranda warnings do not apply.^{iv} While police may request identification, the suspect may refuse to answer.^v Whether a Fourth Amendment seizure is implicated turns on whether “the police officer’s conduct would have communicated to a reasonable person that the person was not free to decline the officer’s requests or otherwise terminate the encounter.”^{vi}

With respect to videotaping, in the Eleventh Circuit (which encompasses Georgia), persons have a First

Amendment right to videotape the police, subject to valid time, place, and manner restrictions.^{vii}

“The First Amendment ‘affords the broadest protection . . . to political expression . . . and protects the rights of speech and to petition for redress . . . and to photograph police activities.’”^{viii}

Finally, Georgia’s loitering and prowling statute^{ix} would appear to make it a crime for a suspect to refuse to provide identification to an officer. If so, the statute would violate the U.S. Constitution. Instead, the Georgia Court of Appeals has construed the statute in a manner that is not unconstitutional by not making it a crime to fail to

provide identification to a police officer. Instead, it provides the officer the right to request identification, but the suspect is not required to comply. The suspect may produce identification to explain his conduct.^x This statute is very confusing in its application, and officers are strongly cautioned not to arrest someone engaged in otherwise legal activity – such as videotaping – without evidence that the suspect is engaging in an independent violation of the law.

Thus, First Amendment auditors are engaging in constitutionally-protected conduct, and an officer who arrests an auditor without probable cause of a crime is likely violating clearly established law and will lose qualified immunity from liability.

Appropriate Responses

Agencies are encouraged to arm their officers with the best weapon available: information. An officer who quickly understands the situation is in complete control. Appropriate responses might include:

Turning the situation around. The officer might say, “I love to have my picture taken. Can we make it a selfie? Make sure you include my friend. And by the way, take my email address so you can send me a copy. Thanks.”

Taking no actions to intimidate or coerce the person.

Capturing the auditors’ image or images photographically with a bodycam or cell phone.

Not insisting on identification to change the consensual nature of the encounter.

Not arresting the person unless they are engaging in a bona fide, separate crime. For example, walking around an open police parking lot and taping is not a crime, as compared to jumping over a locked gate which may be trespassing on public property.

Not obstructing, interfering, or hindering the person's ability to videotape in any way, unless such actions put the officer's safety or the safety of another person at risk, the person has entered a clearly marked crime scene, the person enters an area closed to the public due to an ongoing emergency, or the person enters property not generally available to the public. In the last instance, trespasser warnings should first be given.

Where the person is bordering on unlawful obstruction, respectfully and politely informing them that their actions are interfering with the officer's performance of duties and asking them to move to a less intrusive position.

Before considering enforcement action, such as arrest, calling a supervisor.

Departments are encouraged to review their policies on recording law enforcement activity and provide supplemental training to officers as needed. Because the actions of auditors are intended to provoke an emotional reaction from law enforcement, officers are best prepared to deescalate the situation with training and professionalism. The auditor who realizes the jig is up will go someplace else to cause trouble.

Endnotes

- i. *Terry v. Ohio*, 392 U.S. 1 (1968).
- ii. *Id.* at 21.
- iii. *Brown v. Texas*, 443 U.S. 47, 53 (1979).
- iv. *Berkemer v. McCarty*, 468 U.S. 420 (1984).
- v. *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984).
- vi. *Florida v. Bostick*, 501 U.S. 429 (1991).
- vii. *Smith v. Curry*, 212 F.3d 1332 (11th Cir. 2000).
- viii. *Abella v. Simon*, 522 Fed. Appx. 872 (2013); accord *Bowens v. Superintendent of Miami South Beach Pol. Dept.*, 557 Fed. Appx. 857 (2014).
- ix. O.C.G.A. § 16-11-36.
- x. *Bell v. State*, 252 Ga. 267 (1984).

Upcoming Course Announcement: First Amendment Auditors

GMA and ACCG through their Loss Control Arm LGRMS, will be bringing a half day class given by attorney Scott MacLatchie in September. This half day program will be well worthwhile for command staff, supervisors, and first line law enforcement officers who want to learn what these groups are doing, how they are doing it, and the training your agency needs to do to protect itself from these aggressive groups.

Keep an eye out for a future announcement on the specifics of where and when this program will be available.





LGRMS
RISK CONTROL
ACCG | GMA

Local Government
Risk Management Services
3500 Parkway Lane . Suite 110
Norcross, Georgia 30092

A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Issue . . .

Traffic Safety for Officers

First Amendment Auditors

