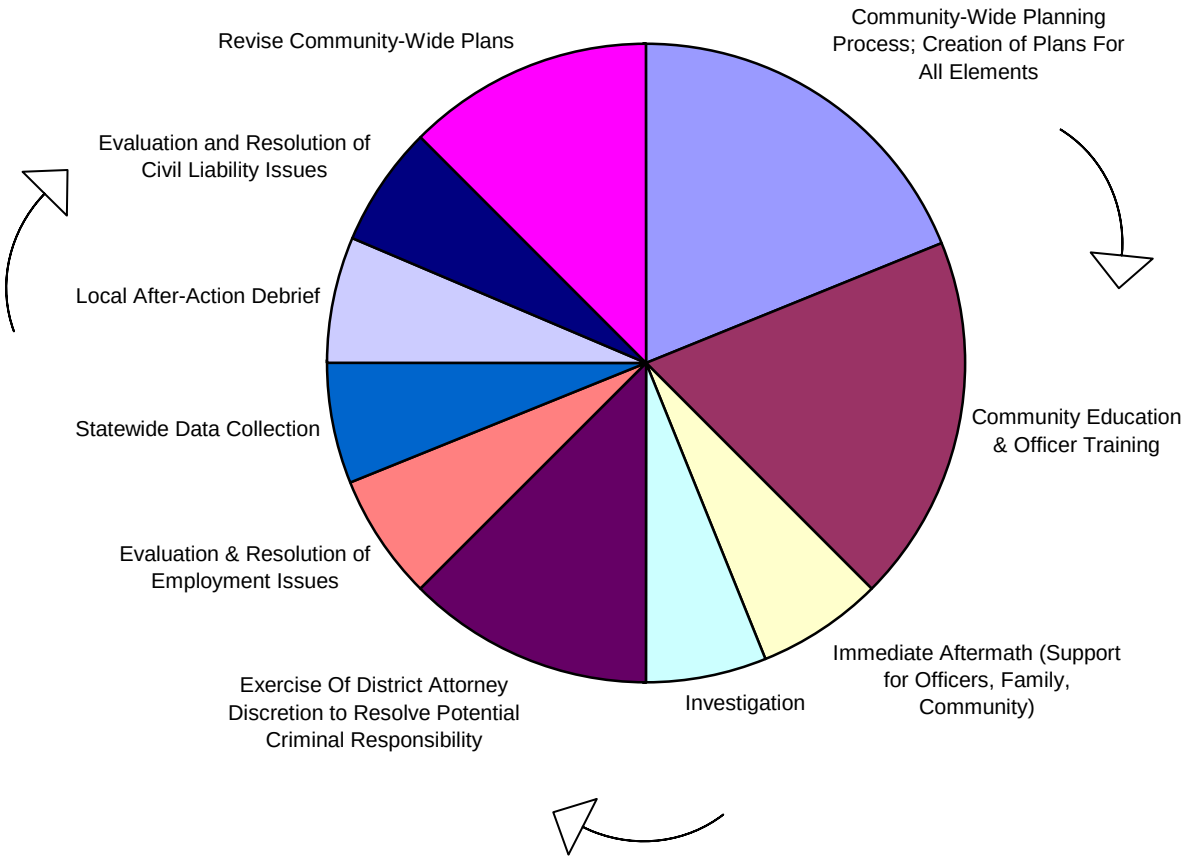
WHEN DUTY AND LIFE COLLIDE: COMPREHENSIVE APPROACHES TO PEACE OFFICER USE OF DEADLY FORCE



Report And Recommendations by Attorney General Hardy Myers

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DEPARTMENT OF JUSTICE

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Peace officers serve and protect their fellow Oregonians. We have equipped them with deadly weapons and have by law granted them the extraordinary authority to take lives if necessary to fulfill the missions that we have assigned to them.

Given the special nature of that authority, and the challenges faced by law enforcement in deciding when and how to use it, law enforcement and the wider community share an interest in proper training in deadly force use; adequate support for officers and civilian members of the community involved in a deadly force incident, and all families affected by a deadly force incident; and the process for investigating a deadly force incident and determining whether the use of deadly force complied with law and policy.

Overlaying all these aspects of law enforcement's use of deadly force is Oregon's increasingly diverse population, and the need to ensure that law enforcement's use of force is free of both the perception and the reality of racial, ethnic, or other impermissible bias.

During the past several months the Attorney General's Task Force on Deadly Force has carefully studied these and other issues related to law enforcement's use of deadly force. The Task Force members are listed in Appendix I. I am very grateful to all these members, and to the many other citizens who took time to meet with me in six community forums or "listening groups" I conducted over the past 45 days. The reports to me from the Task Force subcommittees, and the listening group discussions, have been invaluable in shaping my recommendations in this report. Although I hope that my report and recommendations will find favor with the members of the Task Force, neither the Task Force as a whole nor any individual participant has been asked to endorse the report or any of its recommendations.

Sincerely,

HARDY MYERS
Attorney General

EXECUTIVE SUMMARY

- The use of deadly force by police officers is a matter of statewide concern.

- The most effective responses will grow from a partnership between the state and local communities.

- Events involving the use of deadly force are part of a continuous cycle involving the community and peace officers.

Key Recommendations For Legislation

- A "Planning Authority" in each county co-chaired by the District Attorney and Sheriff will have responsibility for drafting five plans: (1) Education, community outreach and training; (2) Support for officers, their families, and the families of those who may have been killed by an officer; (3) Investigation; (4) Resolution by the District Attorney of the potential criminal liability of the officer; and (5) Data collection and debriefing.

- If each plan is approved by city councils and county governments, and if the Attorney General determines that each plan satisfies specified statutory standards, state general funds will be made available on a matching-grant basis to political subdivisions and law enforcement agencies to facilitate the planning process and to help implement the plans.

- Require every law enforcement agency to adopt a policy describing the circumstances under which peace officers employed by that agency may use deadly force.

- Forbid any agency from taking sole responsibility for investigating one of its own officers who killed an individual.

- Permit District Attorneys to submit to a grand jury evidence about any use of deadly force by a peace officer.

- Require grand jury testimony to be transcribed verbatim, and released to the public under most circumstances, whenever the District Attorney decides to submit to the grand jury the facts about a death resulting from an officer's use of deadly force.

- Forbid law enforcement agencies from returning involved officers to active duty any sooner than 72 hours after the incident occurs.

- Require law enforcement employers to provide at least two mental health counseling sessions for involved officers and require the officer to attend at least one of the sessions.

- Prohibit an inquest jury from convening before the District Attorney has resolved the officer's potential criminal culpability.

- Exclude from evidence in civil cases the conclusions and recommendations of after-action or other debriefing process specified in the local plan.

- Require law enforcement agencies to collect, and the state to compile, data about incidents in which the use of deadly force causes death or injury requiring hospitalization.

- Appropriate sufficient resources to state agencies to support successful implementation of the state-local partnership, including additional training resources for the Department of Public Safety Standards and Training and for the Oregon Department of Justice.

- Make most new elements of law, including the first issuance of grants, effective July 1, 2006.

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I.
Introduction: Three Basic Assumptions.

Three assumptions underlie this report.

A.
Deadly Force Is A Statewide Concern.

The use of deadly physical force by peace officers – and the best approaches to the issues that can arise from such incidents – is legitimately a matter of serious statewide concern.

Oregonians, through law, have assigned to peace officers the responsibility for enforcing laws that have the same meaning in Pendleton as in Portland. The laws governing the investigation, apprehension, and prosecution of burglary suspects are the same in Benton County as in Baker County. The state's interest in a drug deal consummated in Deschutes County is no less significant than the state's interest in the same offense committed in Douglas County. In short, except for the responsibility of officers to enforce local ordinances, the circumstances under which officers must decide whether to use deadly physical force arise from their responsibility to enforce laws applicable equally to all Oregonians.

> *"I don't think any community is immune from [controversy about deadly force]."*
>
> *-- A Participant in a Listening Group*

The authority by which officers may apply force without committing a crime also stems from statutes of statewide applicability. These statutes permit any peace officer – wherever he or she happens to be engaged in official action – to apply deadly force under the conditions specified in law without thereby committing a crime. Although Oregon currently lacks any systematic way of documenting deadly force incidents, the data that are available unquestionably demonstrate that incidents of the use of deadly physical force have arisen in every part of the state. In fact, three recent incidents involving use of deadly force occurred in Malhuer County (an attempted abduction of a 17-year old that ended with the killing of the suspect), Josephine County (an individual seriously wounded by police after he crashed a log skidder into a Jackson County patrol car) and Sherman

County (a report of domestic violence ending in the death of a man who emerged from a home in which he reportedly had barricaded himself).

Finally, the basic training of peace officers is a state function. Through the Department of Public Safety Standards and Training (DPSST) the state seeks to provide all Oregonians with peace officers who have demonstrated uniform minimum professional competencies. By law, local police employers are forbidden to permit an officer whose state certification as a peace officer has been revoked to continue to exercise the powers of a peace officer, including the power to use deadly force.

B.
Statewide Solutions Must Allow For Local Adaptation.

The second critical assumption underlying this report is that the most effective responses will grow from a partnership between the state and local communities.

That partnership has been written into law since statehood. The Oregon Constitution always has stated that District Attorneys are the law enforcement official responsible for evaluating acts that may be crimes, including the killing of one person by another. The District Attorneys' dual roles as state law enforcement officials explicitly charged with the execution of state law *and* as locally-elected officials exemplifies the state-local partnership that undergirds this report. In contrast, the office of Attorney General was not established until 1892. Except as the Governor may direct or with the approval of a District Attorney, the Department of Justice never has had any role in supervising, directing, or reviewing investigative decisions by District Attorneys.

> *"There shall be elected by districts comprised of one, or more counties, a sufficient number of prosecuting Attorneys, who shall be the law officers of the State, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of Law, and general police as the Legislative Assembly may direct."*
>
> -- *Article VII, Original, Oregon Constitution*

During the work of the Task Force, we heard from civilians and peace officers who praised, and others who criticized, the choices made by their District Attorney. In our view, any public official to whom the responsibilities of the District Attorney might be transferred would rapidly

acquire as many accolades and as many criticisms. Instead of engaging in a vain search for illusory perfection, we suggest that the question of "who decides" is best answered by asking "who is most directly accountable to the community for the quality of the decision?" We believe that, in our system, the District Attorney should be held politically accountable to the community for the quality of his or her decision-making about peace officer use of deadly force. Injecting the Attorney General into the investigation of deaths resulting from the use of deadly physical force by peace officers would diffuse the political accountability of District Attorneys.

Similarly, the residents of each of Oregon's 36 counties elect sheriffs whose primary responsibilities include enforcing state law and whose powers include the use of deadly force. State law also recognizes the authority of cities to employ peace officers and extends to each of those officers the authority to use deadly force; each of those cities is politically accountable to the communities served by their peace officers.

Even if long-established law did not, practical reality would require that statewide rules or responses to deadly force allow for adaptation to local conditions. In the preparation of this report, we heard repeatedly that many elements of effective plans prepared in anticipation of deadly force incidents would be most meaningful if those elements arose from the expressed needs and concerns of every interested element of the local community. For example, both the officer and the involved individual bring to bear on an encounter their cultural or historical experience with such interactions. The variable demographics of Oregon's counties suggests that the emphasis of training to help more effectively recognize and bridge those cultural and historical gaps will vary from county to county.

> *"As a young African-American male, I thought about the police every time I got in my car."*
>
> *-- A participant in a listening group.*

Nor is every part of the state equally equipped to meet the demands of making improvements in planning for and responding to deadly force incidents. For example, when considered in light of the overall resources remaining to fulfill the law enforcement agency's mission, placing a single involved officer on extended leave with pay imposes a lesser burden on an agency employing a hundred or a thousand sworn personnel than it does on an agency that has only a handful of officers. In short, the need to adapt

solutions to available resources necessarily implies the necessity of accepting that solutions will vary between counties.

C.

Events Involving The Use of Deadly Force Are Part Of A Continuous Cycle Involving the Community And Peace Officers.

Psychologists report that peace officers threatened by lethal force frequently experience "tunnel vision" or "increased attention to detail" in which the officer's perception may be narrowed to the perceived threat alone, such as the mouth of the barrel of a gun pointed at the officer. Early in the work of the Task Force, we realized that the community and policy makers experience a similar phenomenon when grappling with deadly force issues: both tend to view an incident involving deadly force as having a discrete beginning and a concrete ending. In this report, we reject that view in favor of one that places such incidents in the context of an ongoing and interactive process between the community and the peace officers who serve and protect those communities.

> *"The goal is to have a secure, safe, and free society: you have to have a really good working relationship between the folks in blue and the community."*
>
> -- *A participant in a listening group.*

Deadly force incidents are invariably shaped by hiring, training, and supervision policies of the police agency that employs the involved officer. The behavior of individuals with whom the officer interacts during an incident also has been shaped by their history and by what that those individuals learned about how to behave when contacted or confronted by a peace officer long before they encountered the particular officer. Mental illness and abuse of alcohol or other drugs often strongly influence the course of events during encounters. A comprehensive approach to deadly force cannot be limited to what happens *after* the hammer drops on the officer's gun, the high speed chase ends in a crash, or a baton causes a death.

Nor can a comprehensive approach end once the officer's individual potential criminal responsibility is resolved. Regardless of that resolution, the officer's fellow officers will continue their service to the community. Their relationship to their employer and to their community will be profoundly shaped by the manner in which a particular incident involving deadly force is resolved. The lessons learned by the police and by the

community in one incident involving deadly force will profoundly shape the next, even if the next incident occurs years after the first.

To reflect the assumption that consideration of deadly force issues will yield better results if placed in the context of an ongoing process instead of a line with a distinct beginning and end, this report uses the visual metaphor of a wheel of successive phases, first reproduced on the title page. We begin with the preparation of plans in anticipation of a deadly force event.

II.
Planning.

In the absence of a state mandate, some localities have done more to prepare themselves to reduce and to respond to deadly force incidents than others. We recommend that state law be changed to require communities and the law enforcement agencies that serve them prepare a series of plans. Each plan should address successive phases in the wheel of events involving the use of deadly force by peace officers. The state mandate should specify minimum statewide expectations about the process by which the plans are developed and should establish statewide expectations for the topics to be covered in each plan, but the state should not, with limited exceptions, impose on localities the content of those plans. The state must provide its fair share of the costs of fulfilling these planning requirements and of executing the resulting plans.

A.
Some Advantages Of Advance Planning.

Many communities have planned for some of the phases of a comprehensive approach to deadly force. These "plans" may not be labeled as such, but nonetheless they are detailed methods, formulated beforehand, for phases of the process of dealing with an incident involving deadly force. They may, for example, take the form of police department policies, some of which are attached as exhibits to this report. However labeled, planning and the process of developing the plans can serve many important functions. We have not identified any jurisdiction that has comprehensive plans for all phases of deadly force incidents.

First, the process of planning can improve relations between the police and the communities that they serve. We have no illusion that any amount of police-community interaction will generate perfect or universal understanding of the other's perspective. But evidence does exist that active engagement before an incident occurs can produce better results for the officers involved and for the community.

In Marion County, for example, the Marion County Sheriff's office invited individuals who were representative of various parts of the county's population, including many of the leaders of the Hispanic community, to participate in a series of meetings about the procedures that would be followed in the event of a death caused by an officer. Subsequently, an incident did occur. Marion County Sheriff Raul Ramirez credits the previous planning with contributing to a post-incident environment that permitted a calm and prompt evaluation of the incident.

> *There are a lot of misconceptions about the police in the Latino community."*
>
> *-- Listening Group Participant (Representing a community group providing services to Latinos)*

Second, the self-conscious planning process envisioned in this report will reveal areas of necessary improvement. For example, training is one form of planning. As detailed in the Training section of this report, we can improve outcomes by providing better training; a community-based planning effort addressed to training could help identify the training needs and could help develop a local consensus about how to marshal the resources to provide the necessary training.

> *I remember right afterward. The unknown. Not knowing what's going to happen. That was the worst thing. . . . I watched the blood run from him all the way down the driveway to the street."*
>
> *-- An officer on his experience following an event in which the officer shot and killed an armed man.*

Third, advance planning can provide certainty about the process that will minimize trauma for involved officers and affected non-police community members alike. As detailed in Section V (Immediate Aftermath) section of this report, programs such as Portland's Trauma Intervention Program and Neighborhood Crisis Response Teams are promising models for helping police and communities cope with deadly force incidents. Similarly, some District Attorneys have adopted "protocols" or procedures to be followed in

the investigative phase or in the process of assessing and resolving an involved officer's potential criminal liability.

Finally, advance planning about how an investigation is to be conducted provides essential guidance in the often complex immediate aftermath of an incident involving deadly force. A preconceived investigative plan can form part of the curriculum for training investigators. Even more significantly, the perceived validity of the investigation will depend to a very great extent on the investigative steps taken in the first few hours and days after the incident occurs. For example, in Section VI, we strongly recommend that the investigation be conducted by a team composed of highly-qualified investigators from more than one law enforcement agency with clearly defined rules establishing the lead agency. No such team effectively could be formed on an ad hoc basis. Advance planning and training would be required to make any such team effective.

> *"Literally, they had their policy manual open out there at the scene . . . ."*
>
> *-- Officer involved in a shooting, recalling that investigators initially seemed confused about how to proceed.*

B.

<u>The Planning Mandate: Process, Subjects, And Incentives/Funding.</u>

The benefits of the plans envisioned in this report will not fully be realized unless those plans arise from a process tending to ensure that they will have the support of most of the persons and entities affected by those plans. State statutory mandates will be required to assure a uniformly satisfactory process.

To that end, a Deadly Force Planning Authority should be created in each county to steer the development of the required plans. The District Attorney and Sheriff would co-chair the Planning Authority. The District Attorney and Sheriff jointly would select three additional voting members: a rank-and-file peace officer chosen from candidates nominated by unions representing officers serving that community, a community representative, and a police chief. The Superintendent of the Department of State Police would appoint the final voting member.

Throughout the process of preparing this report, law enforcement officials of all ranks willingly invested many hours of their time. We expect that the same commitment to the best policies about deadly force would lead nearly every law enforcement agency to release a rank-and-file officer from his or her usual duties for service on the Planning Authority. We recognize that doing so may impose costs on that officer's employer and thus that some rank-and-file officers otherwise well-qualified to serve on the Planning Authority might be discouraged from participating. For this reason, we recommend the enactment of a statute requiring the release of the rank-and-file member of the Planning Authority from his or her other duties for up to 80 hours during the Authority's most intense period of work (before July 1, 2006) and for 16 hours annually thereafter. The officer's salary would qualify as a credit for his employer against post-July 1, 2006 costs of implementing the plans.

The Planning Authority would operate under rules designed to ensure public involvement. In our view, the Planning Authority will without doubt be a "public body" that generates "public records" for purposes of the Public Records Law, ORS 192.410 to 192.505. We are equally certain that the Planning Authority will be a "governing body" created by the state and subject to Oregon's Public Meetings Law, ORS 192.610 to 192.690.

By July 1, 2006, the Planning Authority would be required to have drafted and conveyed to the governing body of each political subdivision in the county distinct plans covering each of the following topics:

1. Education, Outreach and Training For Officers, Prosecutors, Civil Attorneys, and The Community. (Section IV of this report).

2. Immediate Aftermath (Section V).

3. Investigation (Section VI).

4. Exercise of District Attorney Discretion to Resolve Potential Criminal Responsibility (Section VII).

5. Data Collection, Debriefing, and Plan Revision. (Section VIII).

In many jurisdictions, collective bargaining agreements exist between unions representing officers and their law enforcement employers. These

agreements are enforceable at law; accordingly, the Planning Authority should take care to adapt its plans to the agreements.

We strongly recommend that the Planning Authority consult state and national accreditation standards as appropriate in formulating the required plans. The National District Attorneys Association and American Prosecutors Research Institute publish materials that should be consulted. National standards have been published by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). CALEA was established as an independent accrediting authority in 1979 by four major law enforcement membership associations: International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs Association, and Police Executive Research Forum. Oregon state standards have been established by the Oregon Accreditation Alliance formed in April 2001 under the direction and authority of the Oregon Association of Chiefs of Police, the Oregon State Sheriffs Association and the Association of Public Safety Communications Officials. CALEA and the Oregon Accreditation Alliance have established accreditation standards for law enforcement agencies, and both organizations require independent peer review as a condition of maintaining accredited status. Accreditation standards developed by these organizations may also be useful in the formulation of performance measurements relating to deadly force, as recommended in Section VIII of this report.

Plans proposed by the Planning Authority would be submitted for the approval of the governing bodies of each of the political subdivisions that employ peace officers in the county for which the Planning Authority has responsibility. Each governing body would be required to accept or reject the proposed plans within 60 days of the date on which the Planning Authority submitted the last plan. If a plan were disapproved by the governing bodies representing 75% or more of the population of the county, the Planning Authority would be required to prepare and submit a revised plan.

Incentives may be required to help entities within a given county fully recognize the benefits of working collaboratively toward uniform county-wide plans involving deadly force situations. We recommend that two incentives be created in law.

First, we recommend that a new statute be enacted placing on all law enforcement agencies a duty of good faith cooperation in the planning process. We do not recommend that the state require an agreement by law. Rather, we recommend that the state require every agency to negotiate in good faith towards such an agreement.

Second, we recommend that eligibility for reimbursement from state funds depend upon the existence of plans. Plans developed by the Planning Authority and approved by the requisite number of governing bodies would be submitted to the Attorney General. The Attorney General would review plans to determine whether the plans include elements addressing each statewide statutory minimum. If so, the Attorney General would certify that the plans entitle all law enforcement agencies and political subdivisions covered by those plans to apply for reimbursement from the state. We emphasize that the Attorney General's review would be to determine whether any applicable statutory *minimums* have been provided for in the various plans; the Attorney General would not have authority to require that a community make a different choice about the content of a plan where that choice is not controlled by law. The Attorney General also would be responsible for periodically publishing all of the certified plans. The next section of the report describes the state funding commitment.

III.
Funding: A Shared Responsibility.

To reflect at least two of the fundamental assumptions underlying this report, we recommend the creation of a state-administered matching grant fund that first would be accessible to make cash grants on and after July 1, 2006. During the development of approved plans, law enforcement agencies and political subdivisions could accumulate "credits" for use as the match for a subsequent cash grant. The amount of the accumulated credits would be measured by the dollar value of the resources expended in the initial development of plans. As qualifying expenses were incurred in the execution of approved plans or to fulfill the substantive requirements recommended elsewhere in this report, agencies and political subdivisions incurring those expenses could spend their credits at the rate of one local dollar to three state dollars. The state matching grants for expenses incurred after the local partner had expended all of its accumulated credits would require a cash match.

In no event would a law enforcement entity or political subdivision be eligible for reimbursement for any expense from any state funds unless the Attorney General had certified that the plans for the grant applicant met statewide minimum requirements.

We propose that the Department of Justice be assigned responsibility for administering the state funds. The Criminal Justice Commission or DPSST could be substituted for the Department of Justice. The grant administrator would be given authority to enact administrative rules setting out the priorities for funding and other details of the administration of the grant fund.

On a biennial basis, we estimate that no more than $225,000 would be required for grants from the fund. The amount required for 2005 – 2007 would be less than $225,000 because no expenditures would be allowed until July 1, 2006. Fully funding every recommendation in this report will require funding in addition to that required to provide for grants.

IV.
Education, Outreach and Training For Officers, Prosecutors, Civil Attorneys, and the Community.

In this section, we address recommendations for communities, peace officers and their employers, and for District Attorneys. Consistently with the "wheel" metaphor, we begin with a subsection about the importance of building trustful relationships between communities and the peace officers who serve and protect those communities. In the second subsection, we address training issues, again with recommendations for educating the community as well as for improving training for peace officers. In the third subsection, we recommend steps to ensure that every county has available to it at least one prosecutor who has received specialized training about deadly force incidents. In the final subsection, we describe the functions of a new position to help provide enhanced training.

A.
Community Education & Outreach.

Many peace officers believe that the community and media poorly understand the challenges faced by officers, and therefore that officers who use deadly force may be subjected to unrealistic criticism.

We found no evidence that any officer sets out on his or her duties with the intention of killing or injuring anyone, and a great deal of evidence suggesting that officers, no less than community members, seek to avoid doing so except when the circumstances are very compelling. We also found, however, that some individuals in some communities harbor deep suspicions about the capacity of existing systems to fairly evaluate the conduct of peace officers.

> *"We don't do any training for the community about the responsibilities of peace officers . . . This is a two-way street."*
>
> *-- A Participant in a Listening Group*

We learned of no way for peace officers and skeptical communities to even begin bridging these gaps except by self-consciously engaging one another in a process to promote mutual understanding and knowledge. Peace officers and the communities that they serve and protect can create many opportunities for these interactions to occur. A few examples were suggested by a Task Force workgroup:

> *"Look at our young African-Americans in our community being talked to in a derogatory manner [by police]."*
>
> *-- A participant in a listening group.*

"Citizen academies, local government academies (training your city council or board of commissioners in police tactics and policies), faith community presentations, local civil group presentations and most importantly re-emphasize to your line (peace officer) staff the extreme importance of understanding cultural difference, perceived perceptions about cultures, and a general respect that should be established among all people regardless of a situation."

No statewide mandate requires law enforcement agencies to create opportunities to better inform the community about an officer's responsibilities, and only a few local jurisdictions have formally attempted to create such programs. Where they have been created, as in the previously-mentioned Marion County example, the evidence suggests that they ease communications in a crisis and contribute to a more informed evaluation of events when they do occur.

We recommend that in developing its plan for *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community*

the Planning Authority aggressively seek out and engage the leadership of parts of their communities that might not otherwise feel they have a voice in the formulation of law enforcement policy. We recognize that it is discouraging for peace officers who perceive that they have done their duty to face public criticism, and that no amount of outreach to the community will prevent some of that criticism from being ill-informed. Nevertheless, we found that concerned people from all parts of the community were willing to take time to participate in a sincere discussion of the key issues; these and many other similarly public-spirited individuals represent a reservoir of people who could be critically important conduits for communicating with the community during a crisis. We are confident that what Abraham Lincoln referred to as the "angels of our better nature" can be summoned forth from the community by law enforcement agencies who invite them.

The media plays a critically important role in shaping the community's response to incidents involving the use of deadly physical force. Information conveyed to the community about the police and about an incident inevitably serves an educational function. The burden of providing timely and accurate information to the community falls on the media as well as on police agencies and investigative authorities. Law enforcement agencies have a responsibility to engage the media proactively before incidents involving deadly force occur – both to help inform the public about what to expect *if* a deadly force event occurs and to arm the media with context for responsible reporting *when* such an event does occur. We recommend that the Planning Authority invite editors, producers, and reporters to participate in all aspects of the Planning Authority's work, and further that the Planning Authority's plan for *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community* provide opportunities for ongoing reeducation of the media about the broader context in which coverage of an incident involving deadly force occurs. The appendices include guidelines published by the Oregon State Bar to help media and lawyers understand their respective functions. Guidelines of similar character could be negotiated with local media and incorporated into the plan for *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and The Community.*

> *"The incident wasn't as traumatic as dealing with the press."*
>
> *-- An officer reflecting on a shooting in which he was involved*.

Finally, no discussion of strategies to build trust with the community is complete without noting the importance of selecting and retaining the right people to serve as peace officers. One participant in the workgroup suggested:

> *"If we want to have officers who understand the cultural aspect of interacting with Latinos, we should train Latinos to become peace officers, [not the other way around]."*
>
> *-- A foreign-born non-Hispanic participant in a listening group.*

"Every law enforcement agency should establish a process for recruiting and selecting officers representing as broadly as possible the economic, ethnic, linguistic, and cultural population they serve. That process should, to the extent possible, include review of each candidate based on educational background, employment history, moral character and fitness, necessary physical abilities, and a professional psychological review of the candidate's suitability for the demands of the profession."

> *"Police say they fear for their lives . . . well, everyday citizens fear for their lives because of <u>them</u>. We've got to change that . . . ."*
>
> *-- A participant in a listening group.*

We concur. We add that to retain and attract officers fitting the description, communities must be prepared to pay fair salaries and benefits.

B.
<u>Improve Officer Training.</u>

During the course of the work of the Task Force, community members often expressed their desire to provide officers with "the right tools" to avoid the use of deadly force. The suggested tools included such diverse elements as "cross-cultural competencies," "critical thinking skills," and skills for dealing with people experiencing a mental health crisis. Many law enforcement officials and individual peace officers whom we consulted also emphasized the importance of improving peace officer training

> *"Training is the key thing."*
>
> *-- A Participant In a Listening Group*

Basic training provided to peace officers by DPSST during their ten-week course currently includes 119.5 hours of instruction on topics related

to use of force. In the following chart, we summarize elements of DPSST's current curriculum in which the use of force forms a part:

Class	Number of Sessions	Hours per Session	Total
Criminal Law (Use of Force)	1	4	4
Criminal Law	1	4	4
Procedural Law	1	11.5	11.5
Defensive Tactics Use of Force Classroom	1	4	4
Civil Liability	1	2	2
Federal Civil Rights	1	2	2
Defensive Tactics Physical Training	8	4	32
Firearms	4	8	32
Firearms	2	4	8
Confrontational Simulations	4	4	16
Range 3000 Computer Simulator	1	4	4
		TOTAL OF HOURS	119.5

In many of the foregoing classes, such as Criminal Law and Procedural Law, use of force is a topic but not the main focus of the class. Further, individual students participating in each Confrontational Simulation or Computer Simulator session physically participate for only a short period of time.

We believe that the state should augment DPSST's budget for 2005 – 2007 with a supplemental appropriation sufficient to enhance deadly force training. Although we believe that the Legislative Assembly should delegate to DPSST the responsibility of establishing the exact contours of the enhanced training, input from the Task Force suggests that DPSST should consider creation of new or enhanced training opportunities on the following:

- Although technology and techniques exist to provide officers with scenario-based use of force decision-making, many law enforcement agencies lack the resources to take advantage of such training. DPSST's resources should be increased to permit many more officers to take advantage of such training. Specifically, we suggest that DPSST consider enhancing its regional training efforts to make it possible for

law enforcement agencies – many of which cannot afford the expense of complex simulation equipment or cannot afford to send peace officers to DPSST's campus – to provide scenario-based training to peace officers everywhere in the state. In addition, we recommend that any community member wishing to do so be given an opportunity to participate in scenario-based training exercises similar to those offered peace officers.

> *"Officers need to be taught that it is OK to retreat."*
>
> *-- A participant in a listening group.*

- Basic academy instruction to help officers understand the dynamics of trauma, appropriate ways to interact with affected peers in a support role, and information about programs that are effective in preventing or minimizing additional psychological trauma to officers involved in a deadly force incident.

- Techniques and strategies related to Critical Incident Stress Management, Critical Incident Stress Debriefings, and principles of peer support. Model curricula for such programs are available from numerous sources including the International Association of Chiefs of Police, Oregon Association of Chiefs of Police, Oregon Department of Justice Crime Victims Assistance Section, National Sheriffs Association, Oregon State Sheriffs Association, Metro Chaplaincy Program, Portland Police Bureau's Critical Incident Response Team, and the Trauma Intervention Program. Finally, several psychologists specializing in work with peace officers could be contacted to help advise DPSST in the construction of appropriate training opportunities. Contact information for man of these programs and individuals is listed in the appendices.

> *"Communication needs to be a tactic . . . [officers] need to be trained in the behavior most likely to promote cooperation."*
>
> *-- Parent of a child killed by police fire directed at a kidnapper.*

Law enforcement agencies typically add many hours of training to the basic training provided at DPSST. Some of this additional training may involve deadly physical force. Many of the key skills needed by peace officers to deal effectively with deadly force incidents are perishable in the sense that they require practice and repetition to maintain competency. In

the remainder of this subsection of the report, we make recommendations aimed at local, ongoing training.

We recommend that the Planning Authority's plan for *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community* include a requirement that every law enforcement agency in the jurisdiction adopt a use of force policy. Legal standards define when an officer may use force without committing a crime, and other legal standards determine when an officer who has not committed a crime may nevertheless have engaged in conduct giving rise to civil liability. But these legal standards necessarily are general. Simply stating the bare legal minimums can provide the police and community with insufficient guidance about when deadly force may be applied. To help fill this gap, many police agencies have adopted use of force policies defining for its officers the circumstances under which that agency authorizes its employees to use deadly force. We believe that state law should require every law enforcement agency to do so.

> *"The police are so often at the point of decision where an understanding of the community is essential."*
>
> *-- A participant in a listening group.*

Models for use of force policies are readily available from many sources. The best of these recognize that the decisions of officers in the field must often be made on incomplete or ambiguous information in a split-second during a rapidly evolving series of events. Because the resources available to law enforcement agencies within a given county could vary in ways that impact the agency's capacity to support different formulations of deadly force policies, we believe that the amount of detail in the Planning Authority's plan for *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community* about the deadly force policies and about training on those policies should be determined locally through the planning process rather than mandated by the state. For example, the *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community* plan could require each agency's deadly force policy to address high speed vehicle pursuits as well as use of firearms. Nothing in our recommendation requires the Planning Authority to impose a single form of deadly force policy on law enforcement agencies within the county.

We recommend that the Planning Authority's *Education, Outreach and Training for Officers, Prosecutors, Civil Attorneys, and the Community* plan include a requirement that every law enforcement agency establish a comprehensive training program. Although we again view the exact content of that plan to be determined as part of the local planning process, we believe the plan should incorporate training to the individual agency and its policies and procedures, a field training and evaluation program as a primary component of the officer's probationary period, structured in-service training, and opportunities for enhanced training and education in specific areas of an officers' assignment. Structured in-service training should include pursuit driving skills, defensive tactics and maintenance of qualification with all weapons which may be assigned to an officer for use. If an agency deploys tools designed to incapacitate rather than kill, such as tasers, the agency's training should address the proper use of those tools. Ongoing training should also include interaction with the mentally ill, cultural awareness, and updates on laws and court decisions affecting officers' duties. Finally, we believe that local or regional training should include ongoing instruction for officers and command staff in the dynamics of trauma, appropriate ways to support resilient recovery from the immediate trauma, recognition of behaviors that may suggest that individual officers are at greater risk of inappropriately using deadly force, and policies that more effectively prevent infliction of additional psychological trauma on officers involved in deadly force incidents.

We recommend that law enforcement agencies provide on-going conflict management and conflict resolution training for their officers. As one participant in a listening group advised, officers should receive more training ("Critical Intervention Training") about how to "de-escalate tense situations." A Task Force member suggested that officers be trained in "tactical communications for highly charged emotional situations." Some agencies already provide training in these skills. We concur with the suggestion that more officers receive such training. Although some situations will develop so rapidly that no realistic opportunity for defusing the situation will exist, communities must provide officers with skills that could be applied to situations permitting more deliberate response.

C.
Training for District Attorneys and Legal Counsel Assigned to Defend Civil Lawsuits.

District Attorneys throughout the state are well qualified to conduct complex homicide investigations. Many of those skills readily transfer to elements of the investigation of deaths resulting from police action. But many factors combine to make some aspects of an officer-involved death unique. For example, complex legal issues uniquely arise when district attorneys advise investigators how to navigate between the officer's Fifth Amendment privilege against self-incrimination and the authority of the officer's employer to direct involved officers to give statements to investigators.

Other factors also contribute to county-to-county variance in the capacity of District Attorneys to take charge of an investigation of an officer-involved death. Chief among these is the differing frequency of such incidents. We believe that District Attorneys with experience and the willingness to help their colleagues will always be available. We recommend that District Attorneys make formal arrangements among themselves to provide this assistance.

Lawsuits in state or federal court are one of the most predictable consequences of use of deadly force resulting in death. The public has important interests in how such cases are handled and resolved. Some evidence from psychologists suggests that depositions and trial of claims for monetary damages can exacerbate the long-term traumatic effects on involved peace officers. A civil lawsuit may be the vehicle for the family of an individual killed by a peace officer to express their disapproval of an officer's conduct. The deliberations of civil juries express a measure of community judgment about a deadly force incident. Inadequately trained or inexperienced civil counsel can frustrate effective investigation of the event and unnecessarily cloud the transparency of the investigation. Finally, public entities have legitimate fiscal interests in protecting themselves against financial liabilities that exceed their actual liability under the facts and applicable law.

The challenge of ensuring highly-skilled civil defense counsel is exacerbated by the uneven distribution of experience in deadly force cases.

We are aware that a few jurisdictions employ counsel who have handled many such cases, while other jurisdictions may have no experience at all.

D.
A Statewide Catalyst For Enhanced Training.

As described in the preceding subsections, Oregon should enhance training for peace officers, and prosecutors, and for attorneys responsible for defending civil lawsuits. The curriculum for such training depends heavily on a sophisticated and continuously refreshed understanding of the legal principles applicable to the use of force of any level by peace officers.

We believe that these needs could most effectively be met by creating a Senior Assistant Attorney General position whose duties would be equally divided between assisting the DPSST in the development of curriculum for basic and on-going instruction of officers and in creating and facilitating training for district attorneys, city attorneys, and county counsel.

We recommend that, through the new position, the Oregon Department of Justice and the Oregon District Attorneys Association collaborate on a curriculum for a biennial training course sufficient to familiarize at least one prosecutor in each jurisdiction with the unique features of supervising the investigation of officer-involved deadly force incidents. We also recommend that "graduates" of the training be listed in a directory distributed to all District Attorneys for the purpose of creating a peer group of similarly-qualified prosecutors. State matching grants should be made available to facilitate this training.

We recommend that if the new position is created, the Oregon Department of Justice place a high priority on facilitating mutual aid agreements between District Attorneys.

The Oregon District Attorneys Association already conducts some training for government attorneys engaged in civil practice. We recommend that, again through the new position, the Oregon Department of Justice, Oregon District Attorneys Association, Association of Oregon Counties, and League of Oregon Cities collaborate on a curriculum for a biennial training course for government attorneys who may be assigned deadly force cases. We also recommend that "graduates" of the training be listed in a directory distributed to all city, county, and state civil defense attorneys for the

purpose of creating and maintaining a peer group of similarly-qualified attorneys. Finally, we suggest that these lawyers consider creating a mechanism, such as a web site, list serve, or paper publication, by which they can communicate and exchange model pleadings or procedures.

V.
Immediate Aftermath.

In this section we address the needs of the families of individuals killed by the use of deadly force as well as the parallel need to address the trauma experienced by officers involved in the incident. Families of individuals killed by the use of deadly force are thrust into a confusing and emotional environment. Their grief and need for information about the incident is complicated by the trauma, the investigation, concerns about liability, and influences of the media and interested community organizations. Similarly, even the most resilient officer who uses force or kills in the line of duty will experience it as a life changing event. Even officers who do not themselves directly apply deadly force but who are on the scene during the incident have needs that should be recognized. The Planning Authority should address all these needs in an *Immediate Aftermath* plan.

We learned that several organizations originally created for other purposes nevertheless have both the capacity and willingness to provide immediate crisis support services for the family of an individual killed in a deadly force incident, for the family of an officer involved, or for both. For example, Parents of Murdered Children, The Dougy Center for Grieving Children & Families, and Crime Victims United may be able to provide services.

> *[I needed] someone who could have told me the process, the photos of [my husband], taking his gun, the whispering in the halls, etc. I had to ask over and over to find these things out. If I wouldn't have been assertive, I would have been lost in a corner."*
>
> *-- Wife of an officer who had shot and killed a person.*

Law enforcement agencies should assign a well trained, volunteer civilian support person to serve as liaison with the family of the deceased and with the family of the peace officer. This role may be minimal or expanded, depending on the wishes of the family, but at a minimum, the liaison should agree to share facts as they are able to do so, particularly after formal proceedings such as a grand jury, and to inform the family either

simultaneously or in advance of any public release of information by the law enforcement agency. The liaison should ensure that appropriate community referrals and follow up have been made available to the family. At the one year anniversary of the incident, many families will appreciate an acknowledgment by law enforcement. This should be discussed with the family by the liaison beforehand.

Poorly trained or inexperienced liaisons could exacerbate tense situations by passing misinformation to interested persons. We recommend that the Planning Authority's *Immediate Aftermath* plan, if it includes a liaison function, also specify how the persons forming that function are to be trained.

Every officer who has been closely involved in an incident in which deadly physical force resulted in the death of an individual should have the opportunity to visit a psychologist or psychiatrist at least twice without expense to the officer within the first six months of the incident. Some agencies already provide such services; we believe that state law should require that at least two visits be made available by police agencies to their employees. Under the proposed law, the officer's employer would be responsible for the cost, but would be eligible for partial reimbursement from the state grant fund.

> *"This shooting had more effect on me than the 14 continuous hours of combat that I experienced in the army."*
>
> -- *A peace officer, reflecting on an incident in which he shot and killed a person.*

Some mental health professionals have more experience helping officers than others. We recommend that police agencies and unions representing their employees collaborate to develop a list of experienced mental health practitioners.

For two reasons, we are now persuaded that state law should require the officer to participate in at least one of the two sessions. First, the interpersonal dynamics of a law enforcement workplace may make it very difficult for officers voluntarily to visit a mental health professional. Second, we heard from nearly every perspective – including that of many officers who had been involved in such events – that at least one mental health consultation with a skilled practitioner was a critically important element in the involved officer's long-term response to the incident.

Whether required or permitted, the employer-provided counseling should be sheltered by the counselor-client evidentiary privilege and should not function as a return-to-duty examination. We emphasize however, that nothing in our recommendations is intended to prohibit law enforcement employers from adopting policies or negotiating collective bargaining agreements requiring separate return-to-duty examinations.

A few police agencies have established crisis intervention models offering services to the families of individuals – peace officers and community members alike – involved in traumatic incidents such as deaths arising from police action. Crisis response teams are trained to act as the liaison between family and investigators. The Portland Police Bureau has one such program; we recommend that the Planning Authority consider the creation of crisis response teams as part of the *Immediate Aftermath* plan.

> *"For me, my church had a powerful impact."*
>
> *-- An former officer's assessment of one of the elements that helped him through the aftermath of a deadly force incident.*

In formulating its *Immediate Aftermath* plan, the Planning Authority should be aware of the possibility that poorly constituted crisis response teams or ill-timed interventions could undermine the perceived independence and integrity of investigations. For example, if an officer who witnessed key elements of the event were to be a participant in the crisis intervention team convened to assist an officer involved in the same incident, an unnecessary cloud might be raised over the integrity of statements subsequently obtained by investigators from the involved officer. In short, the *Immediate Aftermath* plan should be consistent with the *Investigation* plan.

Despite the existence of a few programs for the support of officers, family members of individuals killed in the incident, and other individuals affected by the incident, we found that support services are not available in all parts of the state and that what is available tends to dwindle after the immediate response. We recommend that, if adequate resources are available in the state grant fund, the grant-administering agency request proposals to establish a "statewide trauma referral program" to, among other functions, create and nurture connections between programs that do provide these services and parts of the state in which services now are unavailable.

We envision the possibility that a state agency, local law enforcement agency, or a city or county might seek a grant to pay part or all of the cost of contracting with a person to create and maintain:

- A referral system for psychologists, chaplains, and volunteers specifically trained in police trauma.

- A related referral system for in-person immediate aftermath trauma support for all individuals impacted by the incident.

- Information and referrals for on-going support services for officers, their families, and all others impacted by the incident.

- Information about training resources to assist law enforcement with development of officer support services such as peer support programs (proceedings of which are confidential under current law), behavioral risk assessment, and traumatic incident debriefings.

Finally, we learned through the work of the Task Force that that even the most resilient officer may continue to exhibit physical and mental symptoms of the stress of the event for many days afterwards. Some agencies place involved officers on paid administrative leave following an incident in which the officer used deadly physical force and caused the death of an individual. We believe that no involved officer, including those who were closely involved but did not themselves apply the deadly force, should be required to return to active duty any sooner than 72 hours after the incident and, in many cases, should not be required to return to active duty for longer than that. We recommend that state law be enacted prohibiting any police agency from returning such officers to active duty any sooner than 72 hours after the incident occurs. Because this statute would carry a fiscal impact on local law enforcement agencies, the cost of the officer's salary during the mandatory minimum "administrative leave" would be eligible for a state reimbursement grant.

VI.
Investigation.

The Planning Authority would be responsible for the preparation of a proposed *Investigative Plan.* Because police agencies vary greatly in a

number of ways, including size, resources, organizational structure and the distinctive features of the areas that they serve, most elements of the *Investigative Plan* should be locally defined.

Deadly force incidents are the subject of at least three types of investigation: (1) a "criminal" or "incident" investigation, (2) an "administrative" or "personnel" investigation, and (3) a civil liability investigation. Through these investigations the community and public officials learn what happened and how the events progressed. These results, in turn, can inform communities about what improvements can be made in the future.

> *"As long as you have the local agency doing the investigation of itself, there are going to be people who don't [trust the integrity of the outcome].*
>
> *-- A participant in a listening group.*

We recommend that the criminal investigation begin immediately after the incident, be as thorough as possible, and take priority over any other investigation.

The criminal investigation should come first for several reasons. First and foremost, no more serious challenge to the integrity of the criminal justice system can be imagined than to conclude that an officer sworn to protect life has instead taken a life in a criminal homicide. Resolving that allegation should be the highest priority. Second, resolution of the question of the officer's potential criminal liability can help clear away barriers to subsequent investigative steps. For example, an officer whose conduct definitively has been determined to have been non-criminal is less likely to assert his or her privilege against self-incrimination in a deposition subsequently given in connection with a civil lawsuit. Third, interview statements and other evidence obtained in the administrative investigation by ordering agency employees to cooperate with the investigation cannot be used in a criminal prosecution and, therefore, should not be disclosed to the criminal investigators. Investigators can avoid such contamination by completing the criminal investigation first. Finally, officers involved in deadly force incidents reported to us that the resolution of criminal liability was a significant milestone in their readiness to return to duty. The police agency and community alike benefit when officers whose conduct was not criminal are able to return to duty.

The *Investigative Plan* should provide for either the rapid or automatic designation of an investigative team, including designation of which agency or investigator will lead the investigation. The police agency that employs the involved officer should not be the only agency involved in the investigation. The community's perception of the integrity of the investigation will shape its subsequent interactions with the involved agency. Whether actually biased or not, an investigation conducted exclusively by the involved agency is very likely to be perceived as being less than objective. We recommend that a new statute be enacted forbidding an involved agency from maintaining within the involved agency exclusive responsibility for the investigation of one of its own peace officers. We understand that this recommendation and others may strain the investigative resources available locally in some parts of Oregon. We strongly recommend that local law enforcement agencies, including District Attorneys, enter into mutual aid agreements spelling out the details of how jurisdictions and agencies will help one another provide the resources to assure an objective, fair, and credible process should an incident involving deadly force occur. Although the plans are to be adopted county-by-county, we anticipate that many of them may provide for inter-county mutual aid.

> *"My suggestion is that you have other agencies do the investigation . . . I would hope that the agency involved would not be the lead agency, but rather turned over the investigation to another."*
>
> *-- A participant in a listening group.*

We also recommend that the Planning Authority's *Investigative Plan* adopt one of three models for involving officers from outside agencies:

- Designating an outside agency as the investigative agency and specifically excluding the involved agency from the investigation;

- Assigning the investigation to a multi-agency team that includes the involved agency; and

- Inviting officers of another agency to join officers from the involved agency in conducting the investigation cooperatively.

Regardless of the model, investigators should include at least one officer with significant major crimes investigative experience and preferably would include at least one investigator with experience in the investigation

of officer-involved fatalities. We also recommend that investigative teams include at least one *inexperienced* investigator. This recommendation would, over time, allow a gradual increase in the number of experienced investigators. Once again, mutual aid agreements may be necessary to provide the optimum experience on the investigative team.

The *Investigative Plan* should clearly assign specific responsibilities to officers and agencies.

The involved agency must perform tasks even before the investigative team or other investigating agency assumes responsibility. These include:

- Promptly providing necessary medical treatment for all injured persons, including any individuals wounded by police action.

- Securing the scene to protect evidence and prevent contamination.

- Identifying and separating witnesses.

- Designating an Incident Commander. The Incident Commander should be responsible for initially securing the scene, notifying the District Attorney, and calling out the investigative team or other investigating agency to assumes responsibility for the investigation.

The *Investigative Plan* should provide for designation of an Investigative Supervisor. In consultation with the District Attorney, the Investigative Supervisor would coordinate and manage the investigation. The Investigative Plan should be flexible enough to allow these officials the flexibility they will need to adjust to the exigencies of particular cases. For example, although we recommend below that officers who witnessed elements of the incident be interviewed before they go off duty, the District Attorney and Investigative Supervisor may determine that the number of civilian witnesses, their vantage points, or their likelihood of subsequent availability for interview makes it prudent to allocate available investigative resources first to such civilian witnesses.

The *Investigative Plan* should contain definitive rules to guide investigators and involved officers. Through the Task Force, we learned that investigative practices are highly variable even within a given county. For example, weapons used by officers in deadly force situations sometimes are

secured by investigators, and sometimes are not. Blood or urine samples sometimes are taken (to negate or substantiate later allegations that the involved officers were under the influence of drugs or alcohol), and sometimes are not. Sometimes investigators photograph the involved officer, and sometimes do not. Sometimes investigators obtain the officer's uniform for examination, and sometimes do not. Uncertainty about these and other features of the investigation compound the trauma for officers, and variable practices may unnecessarily raise questions in the community about the integrity of the investigation. For these reasons, we recommend that the *Investigative Plan* contain as many specific and invariable rules for as many of the investigative variables as it is possible to anticipate. For example, because we cannot conceive of a deadly force investigation in which the weapon by which a death was inflicted – whether it be a firearm, a baton, or a vehicle – is *not* an important piece of evidence, we strongly encourage the investigative agency invariably to take the weapon into custody in a discrete manner and handle it as evidence. The *Investigative Plan* also should provide for the immediate issuance of a replacement weapon to the officer except when the officer's conduct or emotional state clearly make this inadvisable.

The speed with which the investigation can be completed may depend in part on how quickly physical evidence can be analyzed by the Oregon State Police Forensics Laboratory. We urge the laboratory to give analysis of evidence critically important to resolving questions about an officer's potential criminal culpability a very high priority.

Subject to the discretion of the District Attorney and Investigative Supervisors, the *Investigative Plan* should provide that officers who have used deadly force or ordered the use of that force remain on duty and accessible to investigators until released by the Investigative Supervisor. As soon as practicable, involved officers should be separated from other involved officers and from witnesses. We recommend that the *Investigative Plan* discourage or forbid communications that could undermine the investigation. However, the *Investigative Plan* should expressly permit communications between the officer and his or her attorney, with his union as may be required by a collective bargaining agreement, with the officer's spouse or other family members, and with any support programs provided for in the *Immediate Aftermath* plan.

Officers who have caused the death of a person are entitled to assert privileges against self-incrimination as well as rights that may arise from collective bargaining agreements. They are entitled to consult privately with legal counsel. Nevertheless, we find that officers and their legal representatives almost invariably share the public's interest in a rapid and thorough investigation.

An on-scene briefing is a brief overview of the incident given to investigators, or through counsel to investigators if necessary, to provide a basis for accurately and thoroughly processing the scene and developing an investigative plan. The on-scene briefing may include, but need not be limited to, identification of the scene, identification of officers and other witnesses, and identification of evidence or potential evidence. Factual overview and orientation to the scene forms an important element of all investigations of major incidents. Incidents involving officers should be treated the same. The *Investigative Plan* should describe and encourage at least a limited on-scene briefing.

The *Investigative Plan* should provide also that investigators will seek a voluntary statement from the involved officer. The entire statement should be recorded. We believe the timing of that statement depends on so many variables that no recommendation can be made about when investigators should seek it.

An effective *Investigative Plan* should provide that each officer who made a direct, personal observation of any of the relevant events should provide a statement at the direction of the Investigative Supervisor or other member of the investigative team. We recommend that these statements be secured before witness-officers go off duty and that such officers be available for on-scene briefing as may be requested by the Investigative Supervisor.

The *Investigative Plan* should include explicit directions for releasing information about the incident or about the investigation to the public. No information about the incident or about the investigation should be released by any investigator without the prior approval of the District Attorney.

We recommend that involved officers or their legal representatives be notified in advance of the release of information about the incident or about the investigation. We also recommend that the *Investigative Plan* contain a

commitment that factual information about the investigation and about the incident be released as promptly as the exigencies of the investigation permit. We believe that prompt release of such information can help reassure the community that a prompt, fair, and thorough investigation is underway.

The results of the criminal investigation will be used in multiple forums. We recommend that the *Investigative Plan* specifically provide for the creation and maintenance of a central investigative file. This file should include not only the written reports of the officers but all other documents generated by the investigation, and also all information acquired in other formats, such as physical evidence and recordings of statements. The policy should provide a procedure for making information within the file available for use in a variety of proceedings, while still maintaining the file itself as a complete and accurate record of the investigation. The *Investigative Plan* should also provide a lengthy period of file retention.

VII.
Exercise Of District Attorney Discretion to Resolve Potential Criminal Responsibility.

As noted at the outset of this report, Article VII, Section 17 of our state constitution states that District Attorneys "shall be the law officers of the State, and of the counties within their respective districts. . . ." As these duties concern the potential application of criminal law to peace officers who apply deadly force, District Attorneys perform both investigative and evaluative functions.

> *" The district medical examiner and the district attorney for the county where death occurs . . . shall be responsible for the investigation of all deaths requiring investigation."*
>
> *-- ORS 146.095 (1)*

Before turning to those functions in detail, we observe that at least two other sources of law create forums for after-the-fact examinations of the decisions made by peace officers. First, officers will be evaluated by their employers. Second, as we already have observed, civil litigation in state court or federal court very often ensues not long after an incident occurs. We focus here, however, on the District Attorney's criminal-law related investigative and evaluative functions.

Under current law, District Attorneys share with the District Medical Examiner joint responsibility for the investigation of deaths. In many counties, District Attorneys are part of multi-agency investigative teams called out for the investigation of major crimes including homicides and officer-involved deaths. In such investigations, District Attorneys typically strive to clarify the roles of different agencies involved in the investigation, seek to promptly and accurately report facts to meet the needs of the public, the justice system and involved agency, and work to standardize the investigation of officer involved incidents involving the use of deadly physical force by peace officers. We endorse the importance of all of these investigative functions and endorse also the wisdom of maintaining the District Attorneys' responsibility to lead the investigation. We expect that the *Investigative Plan* described in Section VI of this report would set out the District Attorney's primary role in managing and directing the investigation.

In this section of the report, we focus on what we describe as the evaluative functions performed by District Attorneys. Specifically, we focus on the requirement that the Planning Authority create a plan for the *Exercise of District Attorney Discretion to Resolve Potential Criminal Responsibility*. The purpose of the plan would be to describe, in as much detail as the Planning Authority may recommend, the process by which the District Attorney will fulfill his or her responsibility to determine whether an officer involved in the use of deadly physical force committed any crime.

Under the recommendations set out in this report, District Attorneys will continue to be solely responsible for choosing the process by which the potential criminal liability of peace officers is to be evaluated. Under current law, District Attorneys have three choices about how to resolve the potential criminal liability of an officer who has taken a life by deadly force. We recommend that all three options, with some modifications, continue to be available to District Attorneys.

> *"The district attorney may submit an indictment to the grand jury in any case when the district attorney has good reason to believe that a crime has been committed which is triable within the county."*
>
> *-- ORS 132.330*

A. <u>Submit facts to a grand jury.</u> After receiving evidence a grand jury may either indict the officer or decline to indict the officer. Current law authorizes District Attorneys to seek an order authorizing that the testimony

taken by a grand jury be recorded. Current law also states that grand jury proceedings are not to be publicly disclosed.

During the course of preparing this report, we found that some peace officers and some community members believe that grand juries are not the optimum forums for evaluating the potential criminal liability of officers involved in a deadly force incident, though these parties identified different problems. First, as noted in the text-box above, current law may limit a District Attorney's authority to submit a peace officer's conduct to grand jury unless the District Attorney has "good reason to believe" that the officer committed a crime. Some jurisdictions currently submit every officer-involved infliction of death to the grand jury. Similarly, some District Attorneys have submitted to grand jury facts about instances in which officers used deadly force but did not kill or even wound anyone. In these jurisdictions, tension can arise between the text of the statute and the local practice. Because the grand jury process is intended under law to be an inquiry into potential criminal conduct, officers who perceive their conduct to have been unquestionably lawful predictably are concerned when a District Attorney elects to submit that officer's conduct to the scrutiny of a grand jury. Second, the fact that grand jury proceedings are secret and rarely recorded can fuel pre-existing distrust of the capability of criminal justice authorities to make an unbiased evaluation and assessment of the criminal liability, if any, of the involved officers. Because little or no information about the testimony received by the grand jury is ever publicly released, the public has no foundation upon which to make a well-reasoned assessment of the quality of the decision-making exercised by the District Attorney or the grand jury. Finally, in contrast to matters involving non-officer suspects, the submission of an officer-involved death to a grand jury invariably is attended by publicity about the submission. Consequently, in officer-involved shootings, the secrecy of the grand jury proceedings does little to protect the reputation of an officer whose conduct ultimately is found not to have been a crime.

"The only time you feel like a suspect . . . is when they tell you they are taking it to grand jury."

-- An officer reflecting on his experience after an incident in which he shot and killed a suspect.

Although the grand jury process may be flawed for the reasons described above, elements of the grand jury process do deliver public benefits when used to evaluate the conduct of officers involved in a deadly

force incident. First, grand jurors are themselves representative of their communities. The grand jury's assessment of the officer's culpability is entitled to be respected by all of us. Second, experienced grand jurors have, by dint of their service, become better informed about the context in which peace officers carry out their duties on our behalf than civilians who have not had the opportunity for similar service. Finally, the secrecy of the forum may provide incentives for otherwise recalcitrant witnesses to reveal relevant information.

We believe that in the unique context of peace officers who have caused the death of an individual, the grand jury option can be improved in two important ways.

First, current law should be changed to permit a district attorney to submit to a grand jury facts about any incident in which an officer used deadly force regardless of whether the District Attorney had reason to believe the officer had committed a crime. This should eliminate any inference that simply submitting facts to the grand jury implies a judgment by the District Attorney that the officer acted with criminal culpability.

> *"District Attorneys work with police on a daily basis. The District Attorney may be afraid to indict [an officer who has committed a crime].*
>
> *-- Participant in a listening group*

Second, state law should be changed to require that all testimony received by the grand jury about officers who caused a death by the use of deadly force should be transcribed verbatim and, unless the officer is indicted or some other compelling reason is shown, promptly publicly released. We accept the fact that this could, in comparison to secret grand jury proceedings, tend to deter recalcitrant witnesses from revealing relevant information; indeed, this effect causes us to urge the Assembly not to broaden the transcription requirement beyond the unique circumstances of officer-involved deaths. Nevertheless, given the importance of ensuring that the public make a well-reasoned assessment of the quality of the decision-making exercised by the District Attorney and the grand jury, we believe that a transcript should be compiled and released.

Certified court reporters would be retained by the District Attorney to compile the transcripts. Grand juries are creations of state law, drawn by the judicial branch from the same jury pools from which trial jurors are selected, and instructed about the law by the court. Thus, although the District

Attorney marshals the evidence and schedules meetings, the expenses of conducting grand jury proceedings are properly assumed directly by the state. To the extent that a new state law requires the transcription of testimony received by the grand jury about a death caused by an officer's use of deadly force, those expenses should be payable in full from the matching grant fund.

Some people commenting on the first draft of this report suggested that requiring grand jury proceedings about the use of deadly force resulting in a death to be transcribed does not go far enough to assure transparency because the recommendation leaves the District Attorney in charge of determining the evidence to present to the grand jury.

B. Convene an inquest jury. The district attorney "may order an inquest to obtain a jury finding of the cause and manner of death in any case requiring investigation." ORS 146.135(1). The procedure differs from a grand jury in important respects. The inquest statutes themselves contain no express authority to take testimony secretly, and we believe that testimony of witnesses was publicly received in each of the small number of inquests ordered by District Attorneys in the past several decades in Oregon. Unlike grand juries, inquest juries cannot charge anyone with a crime. Instead, their charge is to "(a) Inquire into who the deceased person was, when and where the deceased person came to death, the cause of death and the manner of death" and "(b) Give a true verdict thereof according to the evidence produced during the inquest." The inquest jury's verdict neither requires nor precludes a subsequent indictment.

Like the grand jury, inquests often are imperfect forums. To the extent that one goal of the exercise of the District Attorney's discretion is to create a window on the evaluative process through which the community may independently evaluate both the peace officers and the District Attorney's performance, publicly-conducted inquests have the advantage over unrecorded grand jury proceedings. At the same time, the inquest can be extremely difficult for officers (and for their families) who have performed their duty according to law. Psychological studies of peace officers suggest that many are highly resilient and typically are not impaired long term by the immediate trauma of their involvement in a deadly force incident. The evidence also suggests that the public confrontations inhering in inquest proceedings can interfere with the officer's return to normal. Finally, everyone involved in recent inquests – including representatives of

involved officers and community members alike -- expressed frustration to us about the nearly complete lack of rules of procedure for such basic elements as who may question witnesses, what rules of evidence apply, what findings an inquest jury should make, and what specific questions are to be submitted to the inquest jury.

During the work of the Task Force, some participants urged that District Attorneys be forbidden to use inquest juries to examine the facts of an incident involving deadly force. We also are aware of the view that an inquest could provided an important means of educating the public. In the end, we conclude that the variability of procedures from county-to-county makes it unwise to eliminate the option of inquest juries. Therefore, we do not recommend the elimination of inquest juries. Instead, we believe that the Planning Authority should explicitly consider the circumstances under which inquest juries would be convened, if at all, in drafting its plan for *Exercise of District Attorney Discretion to Resolve Potential Criminal Responsibility*.

We do recommend changes in inquest procedure. First, state law should prohibit an inquest involving an officer-involved death from convening until after the District Attorney has determined that the officer did not commit a crime (and therefore that the matter will not be submitted to grand jury) or a grand jury has received testimony and declined to indict the officer. If the inquest occurs before one of those steps occurs, then the involved officer is very likely to assert privileges against self-incrimination and thus make the record compiled at the inquest incomplete. In addition, the transcription of the testimony of witnesses from the inquest inevitably would complicate, and perhaps undermine, any subsequent criminal prosecution of the officer. Second, we recommend that the Legislative Assembly direct its staff to work during the 2005-2007 interim to develop recommendations for statutory or other rules of procedure to govern inquests in general. Because we see no need for those rules to be unique to inquests involving peace officers, we do not purport in this report to make any recommendations about the content of rules of procedure for inquests.

C. <u>Exonerate the officer from criminal liability on the basis of the investigation.</u> A solicitor general of the United States once observed that a prosecutor's duty is not merely to prevail in the instant case, but to see that justice is done. District Attorneys are no less burdened by this standard when they confront an officer-involved deadly force incident than when they

evaluate criminal allegations against a civilian. District Attorneys whose review of the investigative reports convinces them that the officer committed no crime have the authority – and do exercise it – to decline to present the matter to a grand jury or to convene an inquest. In such cases, the District Attorney typically makes a public announcement of his or her decision.

VIII.
Data Collection, Debriefing, and Plan Revision.

As the wheel metaphor emphasizes, each incident in which deadly force is applied inevitably is shaped by what has been learned from previous incidents. Such learning will take place whether or not it is anticipated or planned. We believe that improvement in every part of society's approach to deadly force is more likely to occur when formal mechanisms exist by which lessons learned can be captured and fed back into the planning process. The final plan that we would require the Planning Authority to create and jurisdictions to approve would be entitled *Data Collection, Debriefing, and Plan Revision*. This section of the report describes new statewide requirements and makes recommendations for possible inclusion in the local plan for *Data Collection, Debriefing, and Plan Revision*.

A.
Statewide Data Collection.

Throughout our work on this report we have been handicapped by the absence of any dependable mechanism for collecting data about the characteristics of individuals involved in deadly force incidents, about the nature of the incidents themselves, or about the number of such incidents. We consider the absence of reliable data to be a serious barrier to further improvement in public policy about deadly force.

> *"It is about gathering data so that we're in a continuously improving path."*
>
> -- *A participant in a listening group*

Federal law conditions eligibility for certain grants on the collection of data about deadly force incidents. The Death in Custody Reporting Act of 2000, 42 USC Sec. 13704 (a)(2), requires states to follow guidelines established by the United States Attorney General "in reporting, on a quarterly basis, information regarding the death of any person *who is in the process of arrest . . . .*" (Emphasis added). The instructions accompanying

the current federal guidelines direct state officials to "INCLUDE deaths of ALL persons in process of arrest . . . Killed by any use of force by law enforcement officers . . . . " (Capitalization in original).*

The federal government has designated a reporting coordinator in each state. In Oregon, the designated office is the Office of Homeland Security, Criminal Justice Services Division. Oregon first began collecting data about deaths "in the process of arrest" in 2003. In this category, Oregon reported 12 total deaths in 2003 (including two suicides) and ten total deaths in 2004 (including one suicide).

We found that many law enforcement officials were surprised to learn of the Death in Custody Reporting Act of 2000 or of the existence of any central data-collection point in Oregon. We believe it to be very likely that data reported from Oregon are incomplete. In any event, the federal reports account only for those incidents in which a death occurs. No broader image of the use of deadly force emerges from the federal data because that data does not account for incidents in which no one dies.

Some law enforcement agencies have created systems for collecting data about the use of force. The Hillsboro Police Department created a "Use of Force Report" form and used it between April 1999 and June 2003 to collect data about 153 cases in which officers used or threatened the use of deadly force. Hillsboro created its report in part on the model of similar reports used by other agencies. The detail collected in Hillsboro's report format permits communities to examine the frequency, level, and consequences of the use of force by peace officers in that jurisdiction. The report also captures information about the reasons force was believed to be necessary and data about the characteristics of the peace officers and other involved persons.

Detailed data collection holds the promise of many benefits for law enforcement employers, and communities alike. For example, it could help employers identify individual officers who may benefit from individualized training or coaching in skills to reduce the frequency of incidents in which the officers find force to be necessary. Data could help communities see the

* For specific authority for these citations, and links to sources for information about the Death in Custody Reporting Act of 2000, see www.ojp.usdoj.gov/bjs/homicide/justify.htm (visited March 12, 2005).

frequency of use of force incidents in light of the vastly greater number of calls for service in which no force of any kind is used by peace officers.

We are aware that data collection can be expensive, and thus that Oregon should carefully evaluate any new statewide mandate requiring that data about deadly force incidents be collected. Mindful of the potential expense, yet aware also of our current inability reliably to answer such basic questions as "how many of these incidents occur annually?" and "where do they occur?", we recommend that a state law be enacted requiring the collection of data about incidents in which peace officers cause the death of an individual or inflict injury significant enough to cause hospitalization. We believe that by limiting data collection to the relatively small number of cases in which death or hospitalization is required, and by piggybacking on existing federal data collection procedures and forms, the fiscal and administrative impact of complying with the statewide mandate can be minimized. The statewide mandate would not include all of the elements that local communities or employers might find helpful; the Planning Authority could include supplemental data collection efforts to apply to law enforcement agencies covered by the plan for *Data Collection, Debriefing, and Plan Revision*.

Data collected locally under the statewide mandate would be compiled and periodically published by a state agency. We recommend that the Legislative Assembly assign this responsibility – and the resources necessary to meet the new burden – to the Office of Homeland Security, Criminal Justice Services Division. We also recommend that the assignment be accompanied by rulemaking authority to permit that office to specify the form and manner of reporting the required data.

B.
<u>After-Action Debrief.</u>

The Planning Authority's plan for *Data Collection, Debriefing, and Plan Revision* should include two distinct procedures for deriving lessons from deadly force incidents that result in the death. First, law enforcement agencies should conduct a evaluation of the incident to determine whether changes to the agency's use of deadly force policy or other procedures are advisable. Second, the Planning Authority itself should conduct an assessment of existing plans in light of experience. Based on that assessment, the Planning Authority could propose changes to the plans.

Revised plans would require approval by the governing bodies in same manner that those bodies approved or disapproved of the original plans.

We know that some jurisdictions have created boards or commissions to examine police practices. These "civilian review boards" may be empowered to subpoena witnesses or documents. Some contend that civilian review boards are necessary to provide an "independent" or "external" check against abuse of police discretion to use deadly physical force. Others assert that the incidents involving the use of deadly force already are subjected to multiple administrative, legal, and political checks that hold peace officers within the boundaries of law and policy. In the course of preparing this report, we considered the possibility of recommending that state law require the creation of such entities in every community. We conclude that there is no reason to believe that such boards are necessary or desirable equally in every part of the state. We make no recommendation, however, that would in any way tend to prevent or impede any political subdivision from choosing to create a citizen review board. We simply expect that the Planning Authority would take the existence of such a board into account in developing the plan for *Data Collection, Debriefing, and Plan Revision*.

C.
An After-Action Evaluation Evidentiary Privilege.

The civil liability of an agency for an incident in which one of its peace officers used deadly physical force will be assessed by civil juries against a legal standard that is constant from case-to-case but produces different outcomes according to the variance in facts between one case and the next. Here is how one federal judge recently instructed a jury in a case in which an Oregon peace officer killed a relative of the plaintiffs:

> A police officer's use of force is reasonable, and, therefore, does not violate the Fourth Amendment, when the officer has probable cause to believe a suspect poses a threat of serious physical harm to the officer.
>
> "Probable cause" exists when an objectively reasonable police officer would conclude there is a fair probability that such a threat exists under the totality of the circumstances known to the officer on the scene.

> In determining whether Defendant's conduct was unreasonable under the Fourth Amendment, you must allow for the fact that police officers often are required to make split-second judgments under circumstances that are tense, uncertain, and rapidly evolving, and not with the "20/20" vision of hindsight.
>
> In addition, a police officer is not required to use the least amount of force possible.

In the trial of a case to be submitted on instructions like those set out above, plaintiffs understandably will seek to introduce all evidence tending to suggest in any way that the officer failed to follow his or her agency's deadly force police. Similarly, we expect that plaintiffs might characterize recommendations for improvement published as the result of an after-action review by the law enforcement agency or Planning Authority as a type of evidence supporting the contention that the officer involved did not act reasonably under all the circumstances. This possibility may deter communities and the law enforcement agencies that serve and protect them from conducting frank self-assessments of lessons learned from a death resulting from the use of deadly force.

To avoid this problem, we recommend the enactment of a statute preventing the introduction into evidence in a civil case the conclusions and recommendations – but not the evidence – that emerge from any after-action debriefing or systematic review process that has been included in the plan for *Data Collection, Debriefing, and Plan Revision*. For example, the plan may provide for a citizen review board to review incidents by collecting information and then disseminating a report containing its conclusions about the evidence and recommendations for the future. Under our proposed statute, the board's conclusions and recommendations would be inadmissible in subsequent civil proceedings. By distinguishing between conclusions and recommendations on the one hand and the raw evidence from which those conclusions and recommendations are drawn on the other does not impinge on the fact-finding and accountability-assigning functions of civil proceedings.

D.
Performance Measurements.

As described above, comprehensive approaches to the use of deadly force necessarily require the state to invest resources in the partnership with local law enforcement and communities. We recommend that the state create performance standards by which year-to-year progress might be measured. Any such performance measure should be crafted to measure key elements of the system recommended in this report. Such measurements could be created in collaboration between state agencies (such as the Criminal Justice Commission, Oregon Department of Justice, and possibly the Oregon Progress Board) and the Planning Authorities established for each county. We do not believe that new law would be required to provide a foundation for such measurements.