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TRAINING BULLETIN

TEN RULES OF ENGAGEMENT IN THE INTERNAL INVESTIGATORY AND DISCIPLINARY PROCESS IN 2016

By Michael P. Stone, Esq.

The rights you have as a California peace officer were established after years of effort by many who wanted to see that law enforcement officers in this State would be free from abusive, arbitrary and unfair treatment by untrained, overzealous or politically motivated officials in internal discipline matters. You will not benefit from these protections unless you exercise the rights provided for you. Many of the Rights in the Bill of Rights Act pertain to "interrogations" which "could lead to punitive action". Anytime you find yourself in this predicament, immediately demand to consult with a knowledgeable representative, before you answer any questions. Always take the time to contact your association or legal counsel for assistance and information. You owe it to yourself.

I wrote these rules 36 years ago and they have been modified over time as changes in law have occurred. The advice herein comes from my own 49 years with law enforcement, and 36 years devoted exclusively to defending men and women in our profession. Please take them seriously.

Michael P. Stone, Esq.
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LOOKING OUT FOR YOURSELF

If you assume that you should approach an internal affairs interview with your guard down and appear at the appointed time without a competent representative, you are embarking upon a perilous journey full of unseen and unappreciated risks and hazards. Let's all be clear on one point: *any*

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internal affairs interrogation is an *adversary*¹ procedure. Internal affairs interrogators are conducting an investigation which is designed to determine what acts or omissions occurred, and whether that conduct deserves discipline, or in some cases, criminal prosecution consideration. You need to understand that any statement you make will likely be tested against the statements of others or evidence developed by investigators, and that additional charges will result if your statement is determined to be false or misleading. Perceived dishonesty is fatal to your career and, standing alone, can result in discharge, due to your

¹Some of our readers are uncomfortable with the characterization of the process as adversary or adversarial. They say this approach unnecessarily injects elements of hostility and distrust into the relationship of supervisor or investigator to subordinate or subject. I don't believe so. We rightly expect supervisors and investigators to treat members who are under investigation with respect and courtesy, and otherwise to act civilly and professionally, with all the dignity that the process deserves, just as we expect the members to be respectful of the process and of the investigators, and responsive, truthful and cooperative. However, the dynamics of the interrogation process make it naturally adversarial, even when everyone acts as we expect them to. Among those facets that tend naturally to cast the players in the roles of adversaries are the compelled or compulsory nature of the interrogation procedure, the rule of insubordination, the strict administrative liability for perceived untruthfulness, and the plain fact that any admissions of misconduct will inevitably lead to some form of official censure, perhaps removal. Still, the interrogation process need not be accompanied by the wringing of hands and gnashing of teeth. Civility must prevail at all times.

"unfitness for further police employment" resulting from "loss of credibility", arising from your perceived "lack of candor" in an official setting or capacity.²

Rule No. 1: Speak only the truth. A member with a poor character for truth, honesty and veracity is unfit. He or she cannot be rehabilitated once records reflect a specific instance of dishonesty or deception in an official matter.

Surely if you are the accused, you will recognize that you are in jeopardy and that the preliminary I.A. interrogation is a "critical stage" of the proceedings, warranting appropriate preparation, vigorous representation, and the utmost caution. What if you are "deemed to be only a witness" and you are being interviewed from that perspective? Have you anything to worry about? Absolutely you do, and the same precautions should be applied as though you are the accused. Remember, although you might not be a "principal" in the act of misconduct, you will likely be subject to discipline if you might be said to have "acquiesced" in another's misconduct, or if you "failed to take appropriate action" (including reporting) upon learning of or "witnessing" the probable misconduct of another.

² How many times have we seen or read these quoted words, woven into a rationale for the discharge of an officer or deputy?

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Rule No. 2: Do not try to predict the course of the interrogation nor the scope of the investigation. Obtain the aid of a competent representative or lawyer in advance. If you cannot locate one, call your association.

You should remember that an interview (interrogation) is always recorded. Any utterance you might make in the course of the interrogation will be difficult to change or retreat from later. Any statement of fact you might make could form the basis of a charge of "false and misleading" if sufficient contrary evidence is developed by the investigators. Moreover, you may be subjected to orders or other directives to do this or that, or refrain from doing this or that. Do not take this on alone, and do not assume that internal affairs procedures and orders are proper or appropriate just because the investigators are from Internal Affairs or are your divisional supervisors. Record all conversations between you and investigators, with a plainly visible recorder. Discuss your interview in advance with your legal representative and listen carefully to his or her instructions.

Rule No. 3: Record all investigative interrogations. Obtain and consult with a competent representative in advance of the scheduled interview.

Government Code §3303 specifies the minimal protections which must be afforded you when you are subjected to an administrative interrogation. The Public Safety Officers'

Procedural Bill of Rights Act (§§3300-3311) is your primary source of statutory legal protection. Remember that the protections apply whenever you are subjected to interrogation *which could lead to punitive action*. The interrogation must be reasonable as to scheduling and length. If you are off-duty at the time, you are entitled to compensation. *You are entitled to an explanation of the nature of the investigation before any questioning*. If you don't understand what it is all about, do not proceed with the questioning until you do understand. The Department is not allowed to question you through more than two investigators at a given time. You have the right to reasonable breaks for consultation and physical needs. You may not be threatened, although you may be told, in appropriate cases, that failure to cooperate may result in punitive action.

Rule No. 4: Make sure you understand what the focus and scope of the investigation are and whether you are suspected of any misconduct, and finally, whether whatever you are going to say in response to questioning will disclose misconduct. Discuss all of this thoroughly with your representative beforehand.

If you are interrogated at a second or subsequent time, you have the right to review your prior statements (recordings) made by investigators before further questioning. Review these with your representative. Section 3303(g) states that you may be entitled to disclosure (beforehand) of non-confidential investigative materials (notes,

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reports, statements and complaints) prior to interrogation and the opportunity to familiarize yourself with such things, but you have to ask for them. You should demand all of these materials up front, on the record. Only those materials which are "truly confidential" should be withheld from you. When an item is declared confidential and therefore withheld, it should be because disclosure will endanger someone, lead to the destruction of evidence, frustrate successful completion of the investigation, or identify a truly confidential informant. We do not believe that a mere desire of investigators to be "one up" on you during the interrogation is an appropriate reason to withhold documents. Put simply, investigators must be able to articulate some reasonable, good-faith premise for withholding materials other than an abstract desire to keep you in the dark or limit your maneuvering room.

Rule No. 5: Demand all notes, reports, statements and complaints made by any person. If the investigators insist on withholding anything, have them describe what is being withheld with sufficient particularity that it may be identified at a later time. Have them state the specific reason or basis for the claim of confidentiality. Also, demand on the record that all investigators' notes be retained until final disposition of the case. In appropriate cases, inquire if you have been recorded, photographed or filmed without your knowledge, or whether you

have been subjected to surveillance. Put this on the record.

Section 3303(h) entitles you to an advisement of constitutional rights if it is deemed that you may be charged with a criminal offense. If you are so advised, invoke your rights. You may still be required to answer, but your answers deserve protection from introduction into any potential criminal action against you. Never proceed with an interrogation under such circumstances until you have had an adequate opportunity to discuss your case fully with your representative. It is prudent for you to talk to a lawyer, if your interview pertains to potential criminal misconduct.

Rule No. 6: If there is a potential for a criminal accusation, invoke your constitutional rights at once and follow the advice of your representative. Remember that you cannot disclose CRIMINAL misconduct to a representative who is also an employee, and expect that it will remain confidential between you. He or she is arguably under a duty to report such things. In this situation, it may be advisable to at least discuss your matter with a lawyer, where you have absolute confidentiality. Do not complete any reports or statements or answer any questions without being ordered or compelled to do so.

In disciplinary investigations, the initial interrogation is positively a critical stage of the

proceedings. You should never walk into such a setting without representation. Obviously, there are fact situations too numerous to cover here which may present themselves in a given investigation. Your representative or lawyer will likely have faced them before and you owe it to yourself to get some help. If you need representation, call for it promptly.

We all recognize that a smooth functioning department depends in large measure on fair discipline and vigorous personnel investigation. On the other hand, state law, constitutional principles and your MOU contain many protections for you in the disciplinary process. Failure to take advantage of these and the assistance that is available is inviting trouble.

At times, you may be contacted by internal affairs investigators when you are off-duty, at home, without any prior warning. There are very few interviews which must go forward immediately. If you are taken by surprise, do not proceed without representation. If you are contacted by investigators at your home, and they want to take you from your home, you should immediately call a representative or a lawyer. You should make it clear that if you do leave your home and accompany investigators to a police facility or elsewhere, you are cooperating only because you fear discipline for insubordination. In other words, make sure it is clear that you are being compelled to leave your home. You must take the initiative to get legal help. If you do not ask for a

representative, they will not give you the opportunity to obtain one.

Rule No. 7: If investigators desire to remove you from your home, demand to talk to a representative before you are required to leave, and demand to know the basis for such an exigency. Do not proceed with an interview until you are adequately represented.

The willful refusal to obey an order from a supervisor is insubordination. It is generally a firing offense. If you are given an order, even one which seems wrong, ill-advised or even patently illegal, you should still obey if you safely can do so, being careful to make a record as soon as possible of your circumstances. Insubordination is very difficult to cure. On the other hand, there are remedies for a supervisor's illegal order.

Rule No. 8: Obey all orders that are even only arguably legal -- do not invite a charge of insubordination, if it can be avoided in any reasonable way.

Investigators have the right, in investigations which are specifically, narrowly and directly related to an official interest, to give you an order to answer questions. If the answers may, in any way incriminate you, you have the right to object to answering on Fifth Amendment grounds. When you do, they will normally tell you (1) you are ordered to answer -- failure to do so is insubordination; (2) anything you say in answer cannot be used against you in a criminal

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proceeding. Once this occurs, you have use immunity for your statements.

Rule No. 9: If your answers to questions may tend to incriminate you, assert your Fifth Amendment rights (silence and counsel) and get a lawyer immediately.

Sometimes when you are involved in an on-duty incident, and you have bonafide self-incrimination concerns, because your account may constitute admissions or statements against your criminal interests, you may be directed to write a report or a memo regarding your actions. These pose the same dangers present when you are questioned about your involvement, because written reports and memos may be used against you in a criminal prosecution unless they are the product of compulsion.

In any case where you are under threat or apprehension of criminal investigation or prosecution and you are told to write an account of your relevant activities, you need to invoke your right against self-incrimination, and secure an order under pain of insubordination to complete the required document. Do not be insubordinate, but, document the circumstances, your invocation of the right to silence, and the direct order, in a side memo to your supervisor, so it is clear that your completion of the required report or memo was preceded by your assertion of the right to silence, but that your invocation of your rights was overridden by a direct order. If these facts are made

clear in a record, you will be in a position to claim immunity from the use of your written statement if there is a criminal prosecution taken against you. **If you are permitted opportunity to do it, seek legal counsel before completing any reports in these circumstances. However, do not invoke this procedure lightly, or frivolously.**

Rule No. 10: In proper circumstances, invoke your right to silence if you are directed to complete any written accounts of your actions. Secure a direct order to complete the report or memo and then document the facts in a separate memo to your supervisor. Get legal advice if you can, but remember you must ask for the opportunity to speak to a lawyer before you write any statement or report, or answer any questions.

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney. He is an "A-V Preeminent" rated trial lawyer, by the National Martindale-Hubbell Law Directory, which is the highest lawyer rating attainable in the Directory, reflecting the confidential opinions of lawyers and judges collected by the Law Directory.