Spoliation:
Why Even the Worst Training Records Are Better than No Records at All

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Abstract

While training records may be an afterthought in budget crises, recent litigation highlights the important role that these records serve in our justice system. Failure to manage this evidence correctly cannot only upend a department's ability to defend itself from criminal and civil claims, but can subject it to claims of spoliation. As the definition and consequences of spoliation continue to broaden, departments must ensure that their records management policies and systems are capable of providing them with the necessary layer of legal defensibility.

Reducing Training Budgets Can Increase Costs

Following the collapse of the housing market and the ensuing recession, law enforcement agencies' budgets were cut by an average of 7% in fiscal year 2010.[1] Challenged to meet the needs of the community with tight finances, public safety administrators were forced to cut hours, freeze hiring, eliminate overtime expenses, or some combination of the above. However, as much as the recession impacted personnel policies, training budgets were dealt even larger blows.[2] While training undoubtedly plays a positive role in officer and public safety, the benefits of any single in-service course are seldom realized immediately. Therefore, training becomes easier to discount and dismiss in financial crises.

1. These cuts were in addition to those already made in 2008 and 2009 (Police Executive Research Forum, 2010).

2. Training (68%) was the second most common cut, trailing only out-of-town travel (72%) (Police Executive Research Forum, 2010).

Notwithstanding these tendencies, as illustrated by the criminal cases of the Baltimore officers charged in the death of Freddie Gray, training often moves from the background and into the spotlight during litigation.[3] Further, as evidenced by the complaints against the supervisor and employing agency of 73-year-old Reserve Deputy Robert Bates, training is also the focus of many civil lawsuits.[4] Thus, while inadequate training may save agencies money in the short term, there may be substantial costs they incur by doing so. When society comes to collect this proverbial debt, agencies invariably find that their training records are on trial as much as their officers.

Because training records are thoroughly scrutinized, can make the difference between innocence and guilt, or can determine liability in a civil suit, it bears questioning what would happen if records never existed in the first place, or were routinely destroyed at some point before legal action. After all, if law enforcement agencies are losing cases based on the content of their training records, it seems that the financially prudent thing to do would be to avoid their creation altogether. In 2014 alone, the ten largest police departments in the United States paid out more than $248.7 million in settlements and judgements stemming from law enforcement conduct,[5] which is nearly equal to the $280 million awarded by the Department of Justice for all Justice Assistance Grants in the nation that year.[6] However, tempting as this rationale may be, it contains several dangerous and faulty assumptions. Under the ever-expanding legal doctrine of spoliation, not only can departments be penalized for the intentional destruction of records, but also for less-egregious records management policies.

Training Records Reflect Departmental Policies

It may not be altogether obvious why training records so often come to the forefront of litigation involving police officers. If an officer causes physical harm to a plaintiff, it seems reasonable to believe that a trial would focus primarily on the facts surrounding that event, yet that is seldom the case. While such an intense focus on seemingly tangential facts rather than the underlying incident itself may leave the impression that lawyers are simply quibbling over minor details, the battle over training records is a necessity borne out of common and

3. Among other things, the testimony focused on whether officers were instructed to put seat belts on prisoners in vans, officer attendance at roll call, and missing initials on training forms covering the transportation of prisoners (Cooper, 2016).

4. In this case from 2015, a Tulsa County Sheriff's Office Reserve Deputy shot Eric Harris in the back at close range while the suspect lay on the ground. One major issue concerned whether the reserve officer had the training and certifications to engage in field operations (Lawyer Herald, 2016). Bates also received a four-year prison sentence after jurors found him guilty of second-degree manslaughter (Ortiz, 2016).

5. Judgments in police-misconduct cases in these jurisdictions were up 48% from $168.3 million in 2010 (Elinson and Frosch, 2015).

6. (Bureau of Justice Statistics, 2014).

statutory law in the United States. While under the common law doctrine of respondeat superior, private sector employers can be held liable when their employees commit acts of negligence within the scope of their employment, government agencies are typically not subject to these same requirements.[7]

For this and other reasons, claims against law enforcement agencies are typically filed under statutory authority, such as 42 U.S.C. § 1983. The relevant portion of § 1983 provides that "[e]very person who, under color of [law]…subjects… any…person within the jurisdiction [of the United States]… the deprivation of any rights…secured by the Constitution and laws, shall be liable to the party injured[.]" The phrase "color of law" is a term of art here, with its definition crafted by nearly 150 years of judicial interpretation. As opposed to the common law standard for private sector employers, federal courts have repeatedly held that a single instance of misconduct by an officer does not inherently mean that the action is compensable by his or her department.[8]

Rather, for liability to attach to law enforcement agencies, there must be some policy or custom of the agency that led to the plaintiff's harm.[9] The reason that training becomes the focus of so many lawsuits against law enforcement agencies is because the way that an officer is trained is itself a policy or custom that can be attacked under § 1983. Stated otherwise, the fact that an officer uses excessive force is not in and of itself a guarantee of departmental liability. However, if that same officer was inadequately or improperly trained on use of force, and that deficiency led to a plaintiff's harm, then their employing agency will become liable for whatever transgressions result.

But if training records are so prized by plaintiffs, why should departments invest the resources and effort to maintain them? The reason is that having any training records, regardless of how incriminating or incomplete, is still far better than not having any records at all. When these records are regularly maintained and monitored for compliance and completeness, they can become an almost impervious shield to liability.

7. The Supreme Court stated that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees agents. Instead, it is when execution of a government's policy or custom…inflicts the injury that the government…is responsible[.]" (Monell, 1978).

8. Citing its holding in Powe v. City of Chicago, 664 F.2d 639 (1981), the Seventh Circuit reiterated that "a single act of unconstitutional conduct by a municipal employee will not support the inference that such conduct was pursuant to official policies" (Cosby, 1988). As recently as 2010, they recognized that "there is no clear consensus as to how frequently such conduct must occur…except that it must be more than one instance" (Thomas, 2010).

9. (Monell, 1978).

The Consequences of Spoliation are as Varied as they are Severe

According to *Black's Law Dictionary*, spoliation is the "intentional destruction, mutilation, alteration or concealment of evidence," and "may be used to establish that the evidence was unfavorable to the party responsible." Thus, if a party requests training records during discovery, through subpoena, or otherwise in relation to litigation, and the other party fails to produce such records because they do not exist, spoliation may come into play. Historically, consequences for spoliation applied only to the intentional destruction of evidence during litigation, or once a party had actual notice that the evidence would be required at trial, such as through a demand or preservation letter.[10] Gradually, however, its scope has widened. The current rule in substantially all jurisdictions requires the preservation of evidence when litigation is reasonably foreseeable, even if they are unsure that a lawsuit will occur.[11]

Moreover, courts began to differ on what state of mind should be required by the party destroying the evidence to constitute spoliation.[12] Rather than requiring a malicious, intentional act designed to thwart the judicial process, courts in many jurisdictions will consider grossly negligent or even ordinarily negligent behavior as spoliation. While most public safety professionals can appreciate and understand that destroying evidence during a lawsuit is improper and deserving of sanctions, fewer appreciate that misplacing a folder, accidentally hitting "Delete," or spilling their coffee on a computer or filing cabinet may have equally damaging consequences for their agency.

If records are not produced when requested, and the court determines that spoliation has occurred, there is a variety of remedies available to plaintiffs. The oldest and most popular among these is to instruct the jury to make an adverse inference.[13] Essentially, because parties are usually keen to preserve evidence that is favorable to them, the jury is told to assume that the evidence would have been unfavorable to the side that failed to maintain or produce the records.

The exact degree of the inference varies by jurisdiction, and by the jury making the inference. In Indiana, for instance, the

10. Already in 1921, it was "well settled that the deliberate destruction of written evidence gives rise to [an unfavorable] inference" (In re Eno's Will, 1921).

11. Specifically, Federal Rules of Civil Procedure § 37(e) provides sanctions "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost."

12. In United States v. Vaughn (2015), an officer lost or replaced cell phones with pertinent text messages on them, and allowed text messages to be automatically deleted from such devices. Even without being able to demonstrate intent, the defendant was still able to prevent the government from producing any text messages as evidence.

13. This results from as many as 57% of lawsuits in which digital evidence is destroyed prior to trial.

pattern jury instruction in civil cases is that "[i]f a party fails to produce documents under the party's exclusive control, you may conclude that the documents the party could have produced would have been unfavorable to the party's case."[14] However, in California, the jury is told, "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party."[15]

Because the threshold for liability under § 1983 merely requires any blameworthy policy or custom, a jury's negative inference need not necessarily entail a leap of judgment for it to prove disastrous for departments. Whether the jury assumes that the officer was not trained at all, that he was trained using an improper technique, or merely that his certification had lapsed by a few days when the incident occurred, this inference can effectively decide the question of liability and turn it instead into a calculation of damages.

While a negative inference is the most common remedy prescribed by judges for spoliation, and a potent one at that, it is not the only sanction imposed. At the lenient end of the spectrum, a judge may, at his discretion, determine that the missing evidence is not prejudicial to the other party, or that the information is reasonably accessible through other means, and impose no sanctions whatsoever.[16] In tougher cases, a more appropriate recourse may be preventing the offending party from introducing any other favorable evidence on the subject in its possession.[17] Also on the continuum, courts are free to impose monetary sanctions commensurate with the potential value of the missing evidence.[18]

In the same vein, many jurisdictions have made spoliation into a tort – among the likes of assault, defamation, or fraud – which will support a lawsuit independently.[19] Thus, even if your officers are trained by the best in the world using the most up-to-date techniques, or did not actually commit the harm that the plaintiff alleges, your department may still be financially liable if you do not properly maintain your records. While an adverse inference may seem a harsh result, it pales in comparison to the default judgment, in which the judge declares the plaintiff the winner without the formality or uncertainty of a jury's negative inference.

14. (Indiana Judges Association, 2015).

15. Despite the standard instruction, trial courts are free to adapt the instructions to fit the circumstances of the case (Judicial Council of California, 2015).

16. Yet, even where the court has found no prejudice from inadvertent destruction of data, they have still awarded attorneys' fees and costs in pursuing spoliation claims (Carr, 2010).

17. This is similar to Federal Rule of Evidence § 106, which requires that if a party introduces part of a writing or recorded statement, the other party should be able to introduce any other part that ought to be considered at the same time. If a party destroys evidence that would have given context to another statement, it likely loses admissibility.

18. In a case against Philip Morris, the court imposed a sanction of $2,750,000, in addition to $250,000 for each corporate manager who failed to comply with record retention requirements (Carr, 2010).

19. A Florida court astutely noted that spoliation has all the essential elements of a tort, in that there is a recognized duty to conform with a certain standard of conduct, a failure of that duty, and an injury or damage caused by that failure (Peltz, 2002).

Undocumented Training Records are Less Legally Defensible

While this may impress upon you the importance of maintaining the training records you already have, it may not adequately persuade you to create the training records to begin with. At least as defined in *Black's Law Dictionary*, spoliation requires "destruction" of evidence, and there can seemingly be no destruction without creation.

If a department intends to rely solely on oral testimony regarding its training policies, procedures, and complete in-service records of its officers – whether in an attempt to subvert this process or not – be forewarned: for substantially all training activity, a record exists at some point even if the results are not aggregated into a common system. If an officer takes a written examination, his grade on that test is a type of training record regardless of whether you store it in a filing cabinet, add it to a class roster, upload the result to a records management system, or simply forget it exists. The wholesale failure to maintain a training record is no more a legal defense than pleading ignorance of the law.

While written examinations leave an easily identifiable paper trail ripe for spoliation claims in the plaintiff's interminable search for training records, it is not suggested that written records be avoided altogether. Even if all exams were administered orally and its results were somehow maintained without the aid of paper or computer, some courts and legal scholars have recently suggested that spoliation is not just about the destruction of records or the failure to maintain them. Rather, sanctions could[20] or should[21] apply when a party fails to create records that it reasonably knows may be needed in litigation.

Though unrelated to spoliation, another underappreciated risk of relying on oral testimony is that it may be deemed hearsay – an out of court statement relied on in court to prove the truth of a matter. Hearsay is inadmissible unless it falls under one of several narrow exceptions.[22] With the average tenure of public safety professionals falling somewhere around six years,[23] depending on jurisdiction and job duties, there is no guarantee that witnesses with firsthand knowledge of training content will be available when a trial takes place years thereafter. However, if records of training activities are regularly recorded

20 A Missouri court analyzed the failure to create evidence as spoliation, but still required a showing of bad faith. (State v. Pike, 2005).

21. One scholar has suggested that the "failure to create evidence should be actionable because society would expect those materials, such as an autopsy report, to be produced." Such rationale would apply equally to law enforcement training records, as they are produced in the normal course of business (Borel, 2014).

22. Federal Rules of Evidence 803-804 spell out these exceptions, such as recorded recollections, records of regularly conducted activity, and public records.

23. As recently as January 2010, the average tenure was only five years, suggesting even greater risk to departments relying solely on oral testimony (Bureau of Labor Statistics, 2014).

and properly maintained, they may be admitted to evidence regardless of hearsay rules or departmental turnover rates.[24]

Thus, the best protection a department can have against litigation is to ensure that its officers are equipped with the best training, and that all related training records are properly maintained in accordance with applicable state and federal requirements. Doing so not only allows departments to save on litigation costs in the long run, but more importantly, promotes the safety of both law enforcement and the citizenry they serve and protect. Not doing so promotes inefficiencies while exposing departments to expensive judgments and claims of spoliation. You be the judge of which is the better choice so that a real judge does not have to be.

24. Rule 803(6) provides that the records should be made during or soon after the event, be recorded consistently for all such events, and be maintained in a secure and reliable manner.

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