



Warning Bells

"Never send to know for whom the bell tolls; it tolls for thee."
— John Donne

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Happy holidays from the Police Commission

Happy holiday wishes from the Police Commission. Under your tree are new rules to make your job harder if you think that you are supposed to engage in proactive policing. New rules will be imposed on all consent searches, so-called pretextual stops will be extremely limited, and (here we go again) new standards for convicting you of biased policing are being discussed. Pretextual stops, based on an IG report and referred to as an "indictment" of pretext stops by LAPD officers by one Police Commissioner, and biased policing have not yet resulted in new orders, but by the time you read this, consent search policy will be out. Consequently, this article will address that order, with future articles reserved to address the other two mentioned issues.

The bottom line is that the Police Commission assumes that verbal consent searches are, as a practical matter, feared to be falsely obtained. All verbal consent searches, including consensual checks for weapons, are now banned by Department policy unless they are on video. Your word is not good enough. It must be on video or contained in a signed waiver form. And there is a verbal script that you must run through when you have video. After all of that, there is a list of "best practices" that the Department would prefer that you follow if you are so fortunate as to ever get verbal consent. Although not mandated to be followed, you can expect some nasty cross-examination on the stand from criminal defense attorneys if you do not comply.

The League met with the Department on this policy and some of the proposed conditions were ameliorated, but not enough that we, in good conscience, could agree with this order because of concerns for officer safety and the complete lack of legal necessity in imposing these burdens. But in the end, LAPD management and the Police Commission have the power to set policy and they did. Happy holidays!

The most egregious part of the new consent order is the requirement that consent searches must either be on video or obtained by a signature on a consent form. If you are an officer who is required to wear body-worn video, it should be on anyway because of BWV policy. You will only have to deal with the script. But what if you are not working an assignment that requires BWV? Say, Detectives. Or Narcotics. Or Vice. Consent can only be obtained if you are carrying around the Department's consent form.

This safety problem looms largest for non-BWV officers who are out on the street doing routine investigations. There are times when an officer would like to pat down a suspect or suspects, for weapons on a consensual basis because the

officer, is uneasy but does not have the reasonable suspicion demanded by case law for a "pat-down."

For review, under case law you cannot do a pat-down for weapons unless during a detention (which requires reasonable suspicion) you are able to articulate **specific facts** that led you to believe that **this particular person** may be armed and dangerous. Generalized officer safety concerns are not enough to support a non-consensual pat-down. Therefore, it is not uncommon for an officer or detective to request a consent search for weapons (which is perfectly legal) depending on the individual officer's perceptions, training or instinct. You do not have legally sufficient cause to satisfy the technical requirements of reasonable suspicion, a judicial concept developed by persons who have never been in a dark alley trying to do police work. You will now be violating Department policy if you obtain verbal consent and you do not have BWV. You must get a consent form signed for a weapons frisk. How does that fit with the reality of street police work? Can you draw your consent form as fast as the suspect can draw his weapon? The collateral damage of this policy is a personnel complaint for trying to obtain verbal consent without video or, in the alternative, foregoing any check for weapons even though most suspects would have given you consent.

But let us say you work Patrol, and you have body-worn video. The BWV rules require you to have the camera activated when you are making a consensual encounter with a citizen. Fine, no problem. Same scenario as above. You are doing a consensual encounter with a possible gang member, or two, standing on the corner. Formerly, you might have said: "Hey guys, do you mind if we check you for weapons just for everyone's safety?" Variations of this are done dozens of times a day across the city, generally with cooperation because it is so common. No more. You must now deliver a scripted statement. Don't worry, you will be issued a plastic card that has the points that "shall" be declared and recorded. They are:

1. A clear request for consent to search the premise, person, personal property (including mobile devices) or vehicle.
2. Advisement that the person can refuse or withdraw consent to the search at any time, even after he or she has consented and the search has begun.
3. Confirmation of the person's understanding of the consent he or she has provided.

Sort of like the Miranda admonition with extra requirements. If you get the consent, then the order suggests that you follow the instructions for "best practices." Although you are not ordered to follow the best practices suggestion, you can imagine the cross-examination from



LAWFUL CONTACTS



CONSENSUAL ENCOUNTERS

A consensual encounter includes only those situations where the conduct of the police would lead a reasonable person to believe they are free to leave or terminate the encounter. The officer must not restrain or exert any authority over the person.

DETENTIONS

A detention occurs when an officer restrains or asserts authority over an individual to such an extent that the person reasonably feels as though they cannot terminate the contact. An officer may restrain or assert authority over an individual when they have "**reasonable suspicion**" to believe the person has or is about to commit a crime. The officer must possess **specific and articulable facts** that lead an officer to reasonably believe that:

- Unusual activity has occurred, is occurring, or is about to occur;
- The unusual activity is related to a crime;
- The person to be detained is associated with the criminal activity.

The person detained is **not** free to leave during a detention, which may last as long as reasonably necessary to investigate the reason for the detention. Reasonable force can be used to complete the investigation.

LOS ANGELES POLICE PROTECTIVE LEAGUE

PATDOWN/FRISK SEARCHES

A **Patdown/Frisk Search** is not permitted during a lawful detention unless the officer ALSO believes the person may be **Armed or Dangerous**. Generalized "officer safety" concerns are not enough to support routine **Patdown/Frisk Searches** of detained persons.

Officers must be able to articulate specific facts that lead them to believe that this *particular person* may be armed and dangerous. **Patdown/ Frisk Searches are permitted of a person's outer clothing for Weapons only.**

ARRESTS

A lawful arrest must be based upon **Probable Cause**. PC to arrest is defined as a set of facts that would cause a reasonable person to form an **Honest and Strong Belief** that the person to be arrested has committed a crime. A lawful arrest requires only a **Fair Probability** that the person committed the crime.

Both an arrest and a detention should be evaluated based upon the **Totality of the Circumstance**, including the officer's training and experience.

For more information or for additional cards, please contact the LAPD Legal Training Unit at (310) 342-3075.



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the criminal defense attorney when you are on the stand during the criminal trial if your suspect is going to be prosecuted. "Officer, as a competent and professional officer, you want to follow the best practices as recommended by your Department, don't you?" This, followed by questions on all the things listed in the order that you did not do.

So, what are the best practices in the order? Well, you should use the BWV or DICVS as an audio recording device to narrate your actions and indicate:

1. Why you are searching the premise, vehicle, item or person.
2. What you are searching for.
3. Where you are searching.
4. What you discover or recover.
5. Where the item was located.
6. If nothing is recovered, explain to the individual the reason they were asked for consent and how you performed the search.

This may be good advice if you are able to follow it without error. But what was a good subject for training is now written in a policy document. Maybe it can be followed, cumbersome as it is, for easy searches like a vehicle search (although you will probably leave at least one of them out). It might be a little more problematic when you have an entire narcotics squad searching a house, each officer narrating their own search script into a video. Better not have any private conversations or discuss informant information with a half dozen live videos circulating throughout the house. Hopefully all the searching officers have the same reason for searching and are looking for the same thing. Any deviations between videos or variations from "best practices" will be loudly pounded on by defense attorneys in court.

Consent searches are a basic function of officers engaged in proactive policing. This order does not make your job easier. In fact, it may discourage proactive

policing. But given the other things listed above that are coming down the road, maybe that is the idea. This new policy will only reduce consent encounters, reduce officer safety and increase personnel complaints for failure to follow this unnatural policy.

People are being murdered in increasing numbers. Street shootings are up. What is the Police Commission's plan to reduce violent crime? They do not have one. They are the head of the Department. Shouldn't crime prevention be one of their primary concerns? It is seldom mentioned during the Police Commission hearings by the Commissioners.

When was the last time the Police Commission did something that made your job easier, not harder? Again, they are the head of the Department. Maybe they should think of something to help you do your difficult job, not always pile on more rules that make things harder. Maybe they should occasionally publicly support you when you are publicly attacked. Maybe they should publicly point out to the activists that LAPD officers are the most progressive in the nation. Maybe they should actually be leaders of the Department and jump off the anti-police bandwagon and tell you what they want done to protect the public, not just what they want undone.

In the League's survey printed last month, 86.33% of the officers answered "no" when asked if they felt supported by the Chief of Police. When asked if they felt supported by the Mayor, 99.1% said "no." Comments received during the survey would indicate that the Police Commission would rank closer to the Mayor in officer-perceived support than the Chief. If this lack of support problem and its impact on morale are not addressed, LAPD could turn into the fire department by staying at the station until someone calls in a fire. But, again, maybe that is the idea.

Be legally careful out there. ❖