FORCE SCIENCE® NEWS

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In This Edition:

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Veteran attorney cites "10 Ways to Lose Police Lawsuits"

"I wish every cop could get sued in federal court before you hit the street, because you would change the way you do things."

That's police attorney Bruce Praet speaking, a former LEO, a defender of officers and agencies in legal actions for more than three decades, and co-founder of Lexipol, the prominent policy advisory and risk-management consulting organization for law enforcement that's active nationwide.

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In the last year, Praet has defended eight lawsuits against police in federal courtrooms and has won them all, but he's seen plenty of obstacles to victory that agencies and officers throw in their own path because they don't understand important factors in winning civil litigation.

Based on his experience, he recently presented a Lexipol-sponsored webinar on "10 Ways to Lose Police Lawsuits." "I had a tough time narrowing it down to ten," he says, "because there are probably at least a hundred."

The topics he chose range from the pitfalls of failing to record the statements of "non-witnesses" of use-of-force events to the cost of refusing to offer quick, on-scene cash settlements to persons unintentionally victimized by police mistakes.

He also addresses such hot-potato issues as social media posts, pre-report video viewing, properly characterizing the mentally ill in reports, and photographing injured suspects.

You can listen to his presentation in full, free of charge, by **clicking here http://info.lexipol.com/police-lawsuits-on-demand-webinar**.

NOTE:** We're interested in ***YOUR REACTIONS to Praet's observations. Agree? Disagree? Have relevant personal experiences? Advice of your own or shortcomings you see regarding civil suits? Write us at **editor@forcescience.org** and we'll publish a representative sampling of reader responses.

Meanwhile, here's a summation of the "most critical" ways Praet believes officers and agencies sabotage themselves before they walk into the civil courtroom:

1. Failure to know policy. Too often, Praet says, "cops have the attitude, 'Why would I look at the policy manual unless I'm either studying for promotion or about to get disciplined?" But many civil trials involve policy issues, and failure to know specifics can prove at least embarrassing if not disastrous.

He cites this witness-stand exchange from a recent dog-bite case:

PLAINTIFF'S ATTORNEY: Isn't it true, officer, that you can only use that amount of force that's necessary to overcome resistance?

OFFICER: Yes, sir. That's correct.

"Wrong!" Praet declares. That department's policy actually permits only the amount of force "that *reasonably appears* necessary," a significant distinction.

"When some seasoned attorney cross-examines you, unless you're really up to speed on policy, your [imprecise] memory is not going to serve you," Praet says.

(Later the officer quoted above said he's going to get a tattoo: "RAN," for "*R*easonably *A*ppears *N*ecessary.")

2. Failure of officers/agencies to keep training updated. A lot of POST boards require mandated annual training updates, Praet points out, and "mandated training may give you certain immunities" in the legal arena.

"But Murphy's Law says that the one time you are delinquent in your training is the time you're going to get sued. They're going to go back in your records and see that you

were supposed to have training" but didn't, and then you have problems.

He cautions strongly against miserly economies on the part of departments, citing one agency that "cancelled its [Lexipol] Daily Training Bulletins to save a nickel"—and is now involved in "a multi-million dollar lawsuit" with heightened vulnerability to a significant payout.

Issuing and keeping an up-to-date file of training bulletins "can be priceless in court," Praet says.

3. Failure to review video before statements. Praet emphatically favors officers viewing video of their involved incident *before* writing a report or giving a statement. He cites the video-related Supreme Court case of *Scott v. Harris* (550 US 372) from 2007 as supporting his position.

"Don't conform your report or statement to what's in the video but know what exists," he advises. This is important because an officer's memory may include inaccuracies due to stress-related sensory distortions that occurred during the encounter. It makes the strongest case, Praet believes, to see the video and then address any discrepancies in your initial account of what happened.

"Your report," he says, "is going to be the script for the case down the road." You want it to be as accurate and comprehensive as possible. "Ten minutes spent reviewing video can save you thousands of dollars later."

He recommends video review "not just of shootings but of nickel-and-dime arrests" as well. He recalls a drunk driving case in which the officer skipped checking the dash-cam recording before filing his report. He wrote that the defendant had told him to "Go fuck yourself" during the arrest, and insisted on the witness stand that this was an accurate quote.

The arrestee's attorney started to play the video and told jurors to raise their hand when they heard those words. Of course they never did because the expletive was not on tape. "What an idiot the cop looked like," Praet says.

4. Failure to record witness interviews. Just writing up what witnesses—and alleged *non*-witnesses—say is no longer enough, Praet insists. "A lot of witnesses change their stories, some inadvertently, some intentionally. All of a sudden what you quoted in your police report turns out not to be what they testify to on the stand.

"I would love to say we're living 50 years ago when people trusted cops and their reports, but now you know your written word carries no weight." If today's "iPad jurors" don't see it or hear it, "it's immediately subject to suspicion. [So] if a witness goes sideways on you, it's a whole lot more persuasive if you have audio or video" of what they told you initially.

Use your body cam or dash cam to capture their words, he suggests. And make certain to include non-witnesses—people who insist they "didn't see what happened"—in this documentation.

"Non-witnesses can be more important than eye-witnesses," Praet says. "Six months later when a plaintiff's attorney gets out there and finds [non-witnesses], it could be a different story when they suddenly become eye-witnesses with some b.s. story," Praet

explains. "You can do nothing to refute them unless you have them on tape."

5. Failure to voluntarily share "state-of-mind" information. Officers sometimes think they're protecting themselves after an OIS by providing only a compelled statement for administrative review and not cooperating with criminal investigators who want to document the officer's state of mind at the time of the incident. Praet's "strong advice": "Unless you've murdered somebody outright—and know you did—by all means give a voluntary statement to share your critical state of mind with criminal investigators."

If a suspect was wielding a cell phone that you mistook for a weapon and you don't explain your perspective of the encounter, investigators "are going to go with the prima facie evidence—and the prima facie evidence is that you shot an unarmed man and there's no evidence why you did it," Praet explains.

Waiting 24-48 hours "to come down from the adrenalin high" is fine, he says, but ultimately not cooperating is high-risk.

In recent months, "more than a dozen cops in California have been criminally prosecuted for on-duty uses of force," Praet says. "The one common denominator was a refusal to give a voluntary statement to criminal investigators. DAs under political pressure punt to the grand jury, and cops are getting indicted for that one reason."

6. Failure to "clean up" injured suspects before photography. Bloody pictures of suspects injured by police don't help your civil case in court, Praet says. If the suspect looks "all bloodied up," be ready to add "a couple of zeros to the amount" you'll pay.

For one thing, "When a person gets injured as a result of contact with you, your primary concern is first aid." Taking photos while the subject is drenched in blood looks as if his injuries are not being tended to—"cold and callous."

Also, blood can exaggerate wounds. Scalp injuries can bleed profusely, for example, so what's really a small cut may look like major damage because of blood flow.

When possible, "let EMS treat him and clean him up, then take your pictures," Praet advises. Focus closely on the actual injury. "Get him to smile for the camera, if you can." And don't include piles of bloody gauze.

On the other hand, "If a cop gets injured," Praet adds facetiously, "throw a bucket of blood on him!"

7. Failure to avoid posting social-media comments. "Plaintiffs' attorneys are profiling cops on social media," Praet says, and any lawyer suing you is going to check out what you're posting.

Praet is currently working on a case that involves a suspect's death that occurred proximate to use of a CEW. The plaintiff's attorney checked the involved officer's Facebook and found a post in which the officer described himself as "the only cop on my department who's ever killed somebody with a Taser."

"That's what the plaintiff's attorney got, courtesy of our cop," Praet laments.

Everything you post "is out there in the public domain," he warns. And courts have held that anything you post even on your

personal devices that is work-related "is all on the table" in a lawsuit.

One officer took a photo of a 16-year-old girl who'd been decapitated in an auto accident. He sent it to his "closest friends on his agency." Inevitably, it got forwarded around—and ended up landing in the in-box of the dead girl's parents. "For the first time, they saw their daughter without a head." Cost for that indiscretion: $2.4 million.

As an LEO, if you're participating in social media, in Praet's opinion, "you're out of your mind."

8. Failure to appreciate unique stresses of civil court. No matter how many times you've testified against suspects in your local criminal court, stepping into federal court in a civil case is a whole different experience.

"There is nothing more stressful in your career than having the word 'Defendant' in front of your name," Praet says. "When some experienced civil-rights attorney starts cross-examining you on every minute detail of something that happened three years ago, you are a fish out of water. You're not getting cross-examined by the public defender who couldn't get hired by the DA's office.

"And when the jury goes into the jury room to determine your fate, that is the definition of stress."

To survive and thrive in that atmosphere, "you need to know your case inside and out—and *practice*" testifying and being ruthlessly cross-examined with your attorneys, Praet says.

9. Failure to frame mental-health encounters to your advantage. With an ever-increasing possibility of officers landing in a civil suit involving a mentally ill subject, Praet suggests modifying the language typically used to describe encounters with bizarre human behavior.

"The naked guy jumping on the hood of a car might be mentally ill," but he might also be drugged up or intoxicated, Praet says. He believes that somebody acting "crazy" should be referenced in dispatches and reports not just as a "possible mental-health subject" but also "possibly under the influence of drugs."

Adding the drug potential "allows your attorney to bring in toxicological results" at trial, Praet explains. Jurors tend to look less sympathetically on illegal drug users and more favorably on officers trying to deal with them, he says. But the possibility of drug involvement "has to be [recorded as] part of your state of mind at the time. If not, it doesn't get admitted as evidence."

Likewise, including in your report any negative past experience or knowledge you had of the suspect as part of your state of mind may allow your attorney to introduce information that otherwise would likely be suppressed, such as a long rap sheet, Praet says.

10. Failure to pay cash on the spot for inadvertently causing harm. Occasionally, police make mistakes—a K-9 bites the wrong person, SWAT raids the wrong house, you crash into a civilian's car as you race to a call without lights and siren. "One-hundred percent liability!" Praet declares.

His solution: 24/7 there should be someone in your agency or the DA's office who's authorized to make a prompt cash payment of $500 to $2,500 to the wronged individual.

These signed settlements are being "consistently upheld in state and federal courts," he says. "They are *so* successful." Clients following this approach "are saving millions of dollars, plus they're making friends for law enforcement." People who've been mistakenly injured generally "don't want to sue you if you step up to the plate and take care of their damages," ideally within the first 24 hours.

Otherwise, he believes the risk is well-illustrated by a case in which a K-9 during an area search bit a nonthreatening homeless man sleeping behind a Dumpster. The officer involved apologized and had the victim happily locked in to accepting an on-scene cash settlement.

But when the officer contacted the prosecutor to get $500 for the victim, the DA refused, saying the man had to follow procedures by filing a formal claim and waiting for it to be evaluated. "Six months later," Praet recalls, "the guy had an attorney. The city ended up settling for $50,000."

Could an unsuccessful attempt at reaching an impromptu settlement be used against you in court?

No, Praet says. "Settlement offers and negotiations are one-hundred percent inadmissible in court in any subsequent civil proceedings. It doesn't hurt you at all to try."

REMINDER: WE WANT *YOUR* FEEDBACK!

No doubt you've had your own experiences and professional opinions regarding preventing, winning—or, sadly, losing—civil litigation. Please share your thoughts so that others can learn more about this important topic. Write us at: **editor@forcescience.org**. We'll publish a representative sampling of reader responses.

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Written by Force Science Institute
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