

By Michael Brave

The standards governing officer use-of-force are often misunderstood or misinterpreted. Clarifying these misperceptions may resolve many instances of standards mistakes currently plaguing law enforcement agency accountability.

# Law Enforcement Use-of-Force “Standards,” Degrees of Certainties, and Scientific Reliabilities

During his first week on patrol, Law Enforcement Officer Smith is emergency dispatched to a naked male acting crazy, who just snapped, attacking cars on the highway. Officer Smith and other law enforcement officers respond

to the call, a violent struggle with several less lethal force options and restraint applications ensues, and while in Emergency Medical Services care, the man suffers unexpected, sudden, cardiac death. In the aftermath, several important pieces of evidence are overlooked and lost forever; no one creates an objective, annotated incident timeline; neutralizes conflicts or myths; identifies and synthesizes all key issues and concepts; or properly applies human factors limitations. The medi-

cal examiner fails to consider numerous potential causes or contributors to the death; fails to identify, support, or cite a specific mechanism of alleged causation; wholly fails to base all findings on the greater weight of current scientifically reliable literature to a reasonable degree of medical and scientific certainty; rules the death a “homicide,” even when the officers’ actions were not causal; and lists the officers’ actions as causal or contributory to the death. Officer Smith is criminally



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prosecuted, civilly sued, and terminated from employment.

The post-incident decision makers—the investigators, the medical examiner, the law enforcement agency executives, the municipal legislative body, the prosecutors—fail to capture and preserve several key pieces of objective evidence; fail to capture and create an accurate objective timeline cited to the evidence; fail to consider human factors; inappropriately apply several different standards of care and degrees of certainty; and fail to apply current scientifically and reliably based general and specific causations. The outcomes are personally devastating to (former) Officer Smith, and extremely costly to the city, community, and society.

The point of this story is the extreme importance of getting the very rare incident “right” before, during, and after the incident, the first time, including properly establishing policy and training standards; collecting objective evidence; and ensuring that autopsy and investigatory conclusions are solidly grounded in the greater weight of current established science, to the correctly applied degrees of certainties and applied to the appropriate standards of care. Sadly, while very rare, there are too many instances where this approach does not occur. Officer Smith does not care about how “very rare” such a scenario is; his new career, his future, his family, perhaps his freedom and his life are over.

In performing their duties, law enforcement officers regularly risk their well-being, lives, careers, families’ futures, and their freedoms. Law enforcement officers’ use-of-force decisions and incident outcomes, as well as detentions, arrests, mental health interventions, vehicle pursuit decisions, and other actions and inactions, are all subject to “standards.” When a law enforcement officer “violates” one or more of these “standards,” it can result in employment discipline, sanction, demotion, or termination; civil lawsuits, including personal punitive damages; state and/or federal criminal prosecutions; and other negative consequences. This article helps explain use-of-force policies, procedures, training, guidelines, incidents, standards, incidents, and consequences to minimize the foreseeable, potential risks

for officers and law enforcement agencies associated with use-of-force incidents.

### Law Enforcement Realities

“Terminal television syndrome” has resulted in many people, including some jurors, believing that law enforcement officers have the training, judgment, ethics, skills, abilities, resilience, and invincibility of Texas Ranger Cordell Walker (played by Chuck Norris, in *Walker, Texas Ranger*, a CBS television series from 1993 to 2001). However, in the United States, the average law enforcement officer has fewer hours of training than the average barber, about one-half the hours of a cosmetologist, less training than a mortician, and in some instances, less training than a manicurist. In some jurisdictions, for a probationary period, a person can be a sworn, armed, law enforcement officer with zero training.

According to the U.S. Department of Justice’s Bureau of Justice Statistics, as of June 30, 2016, there were 15,322 general purpose law enforcement agencies in the United States, defined as “municipal, county, and regional police departments; most sheriffs’ offices; and primary state and highway patrol agencies.” Shelley Hyland, Full-Time Employees in Law Enforcement Agencies, 1997–2016, NCJ 251762, Bur. Justice Stat. (Aug. 2018). Of those, 3,012 were sheriff’s offices, of which 55 percent employed less than twenty-five full-time sworn officers. Additionally, in 2013, of the 15,322 general purpose law enforcement agencies, 12,000-plus were local police departments, of which 48 percent employed fewer than ten full-time sworn officers, and 71 percent served fewer than 10,000 residents. Also, the sheriff’s departments had 12,356 sworn, part-time officers, and nationwide, there were more than 29,000 local police reserve or auxiliary officers. Hyland, *supra*; Connor Brooks, Sheriffs’ Offices, 2016: Personnel, NCJ 252834, Bur. Justice Statistics (Oct. 2019); Brian A. Reaves, Local Police Departments, 2013: Personnel, Policies, and Practices, NCJ 248677, Bur. Justice Statistics (May 2015); Brian A. Reaves, General Purpose State and Local Law Enforcement Agencies, Local Police Departments, 2013: Personnel, Policies, and Practices, NCJ 248677, at 2, Bur. Justice Statistics (May 2015).

Law enforcement officers’ use of force in the United States, comparable to Canada, the United Kingdom, and Australia, is quite rare; force is used in an estimated one in 110 criminal arrests, and one in 1,000 law enforcement officer–public encounters or calls for service. See Table 1, *Comparative Use-of-Force Frequencies*. One firearm injury is estimated to occur in 149

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use-of-force events, or in 73,623 calls for service, and one firearm death is estimated to happen in 893 use-of-force incidents, or in 1,041,737 calls for service. William P. Bozeman, *Injuries Associated with Police Use of Force*, 3 J. of Trauma & Acute Care Surgery 84, 466–72 (2018). Law enforcement officer-involved subject (non-firearm) temporal arrest-related deaths are very rare, with one temporal death estimated in 1,000 use-of-force incidents (non-conducted energy weapon involved), and one temporal death estimated in 3,000 conducted energy weapon (CEW) use-of-force events. M.W. Kroll, M.A. Brave et al., *Benefits, Risks, and Myths of TASER® Handheld Electrical Weapons*, 7 Human Factors & Mechan. Engineering for Def. & Safety 1, 3 (2019).

For pursuits, there is one estimated pursuit involved in 282 traffic stops, and one temporal death estimated in 194 pursuits, or in 54,714 traffic stops.



Table 1

### Comparative Use-of-Force Frequencies

	Canada				USA		Totals of Studies 2,4-6 (not "1" or "3")	(7) Older Comp. Orange Co. (FL) 2003-2004 <sup>8</sup>
	(1) Hall (2012) <sup>1</sup>	(2) Hall (2015) <sup>2</sup>	(3) Baldwin (2016) <sup>3</sup>	(4) Baldwin (2018) <sup>4</sup>	(5) Ross, (2016) <sup>5</sup> (2018) <sup>6</sup>	(6) Bozeman (2018) <sup>7</sup>		
<b>Contacts/Interactions/Calls/Arrests</b>								
Police-Public Interactions (PPI)	1,566,908	3,250,000	5,400,000	10,900,000			14,150,000	
Calls for Service (CFS)					876,503	1,041,737	1,918,240	1,503,650
<b>Total PPI and CFS (PPI/CFS)</b>							16,068,240	
<b>Criminal Arrests (CA)</b> (part of CFS)					110,173	114,064	224,237	76,877
<b>Force (Use of Force (UOF), Conducted Energy Weapons (CEWs))</b>								
All Uses of Force (UOF) in PPI/CFS	1,269	4,828	4,799	9,009	1,085	893	15,815	1,264
Partial subset of UoF – Uses of CEW (received CEW exposure)	334	671			217	504	1,392	945
<b>Handcuffed</b>		4,056:4,373			1,042			
<b>Number in "Prone Restraint"</b>	537:1,255	2,000:4,373			1,085			
<b>Excited Delirium (ExDS) per UoF</b>				1:58				
<b>Deaths</b> (temporal, not causal)	1	1	2	4	0	1 (gun)	6	
"1" death per x PPI/CFS	1,566,908	3,250,000	2,700,000	2,725,000	No death	1,041,737	2,678,040	
Deaths per UoF encounter	1:1,269	1:4,828	1:2,400	2:2,252	0:1,085	1:893	1:2,636	
<b>UOF, CEW, CA, per PPI/CFS/CA</b>								
UoF per PPI/CFS	1:1,235	1:673	1:1,125	1:1,210	1:807	1:1,167	1:1,016	1:1,189
UoF per CA					1:101	1:128	1:113	1:61
<b>Exposure use of CEW per PPI/CFS</b>	1:4,691	1:4,829			1:5,000	1:2,067	1:3,251	1:1,591
Exposure use of CEW per CA					1:500		1:500	1:78
Deaths caused by CEW	0	0	0	0	0	0	0	
<b>Add'l – CEW presence compliance</b>		199						

1. C.A. Hall, et al. *Incidence and Outcome of Prone Positioning Following Police Use of Force in a Prospective, Consecutive Cohort of Subjects*, 19 J. Forensic Leg. Med. 2, 83-89 (2012).
2. C.A. Hall, et al. *Restraint in police use of force events: examining sudden in custody death for prone and not-prone positions*. Journal of forensic and legal medicine 31 (2015): 29-35. [This is an updated study that includes Hall's 2012 study.]
3. S. Baldwin, et al. *Distinguishing features of Excited Delirium Syndrome in non-fatal use of force encounters*. Journal of forensic and legal medicine 41 (2016): 21-27.
4. S. Baldwin, et al. *Excited delirium syndrome (ExDS): Situational factors and risks to officer safety in non-fatal use of force encounters*. International journal of law and psychiatry (2018) 60, 26-34. [This is an updated study that includes Baldwin's 2016 study.]
5. D.L. Ross & M.H. Hazlett. *A prospective analysis of the outcomes of violent prone restraint incidents in policing*. Forensic Res Criminol Int J 2, no. 1 (2016): 00040.
6. D.L. Ross & M.H. Hazlett. *Assessing the symptoms associated with excited delirium syndrome and the use of conducted energy weapons*. Forensic Res Criminol Int J. 2018;6(3):187-196.
7. W.P. Bozeman, et al., *Injuries associated with police use of force*. Journal of trauma and acute care surgery 84, no. 3 (2018): 466-472.
8. Ogden, D., Hotaling, C. Orange County (Florida) Sheriff's Office Taser Task Force. Report March 4, 2005.

Thus, on average, these rare, significant events with tragic outcomes occur far less than once per law enforcement officer career. E. Davis, *Contacts Between Police and the Public*, 2015, NCJ 251145, Bur. Justice Statistics (Oct. 2018); B.A. Reaves, *Special Report: Police Vehicle Pursuits, 2012-2013*, NCJ 250545, Bur. Justice Statistics (May 2017).

Additionally, the non-firearm, temporal law enforcement officer-involved deaths, occur, on average, less than once per career for all related law enforcement officer-incident decision makers, often including law enforcement supervisors, investigators, trainers, and executives; coroners, medical examiners, forensic pathologists, and their investigators; prosecutors and their investigators; and employment commissions and political office holders.

### Law Enforcement Standards

In guiding and analyzing law enforcement use of force, one of the constant complications is the significant chasm between the correctly applied legal standards and the many more restrictive inserted “standards” from other sources. Simply ask someone, including law enforcement officers, “What is excessive force?” The responses will be quite broad, often emotionally biased, or conflated with something else, and almost always “incorrect.” Neutralizing, or at least clarifying, standards’ errors from law enforcement agency policy and training, to law enforcement officer guidance, to judge and jury, may clarify understanding and significantly resolve many of the standards misuses in law enforcement officer and law enforcement agency accountability. See Table 2 for examples of law enforcement officer use-of-force legal standards in relation to society’s expectations.

Law enforcement standards are often assumed to be quite simple and easily applied, while our systems often can make them exceedingly complicated. Determining what the applicable standard is can be complicated.

### The U.S. Federal Constitutional Standards

The “legal” standards usually include the appropriately applied, federal constitutional legal standards, and any more restrictive, appropriately applied, state statutory or other standards to which law

enforcement officers are held accountable. As for the appropriately applied federal constitutional standard, this is sometimes misconstrued. Meaning, the Fourth Amendment’s “objective reasonableness” standard, as applied to non-federal law enforcement officers via the incorporation doctrine of the Fourteenth Amendment, is often taught to them, or applied as the “only” federal constitutional force standard, when this is simply incorrect. The Fourth Amendment’s objective reasonableness standard most often applies when a law enforcement officer seizes or searches a “free” person. A “free” person is one who is not an incarcerated detainee or person incarcerated post-conviction. “Free persons” include those in the United States and its territories, legally or illegally, citizens or not.

### Civil Liability via 42 U.S.C. §1983, and Its Criminal Counterpart, 18 U.S.C. §242

The primary vehicle for law enforcement officer or law enforcement agency civil liability is 42 U.S.C. §1983, and its related statutes, including 42 U.S.C. §1988 (Civil

Rights Attorney’s Fees Award Act of 1976). While the civil violation of 42 U.S.C. §1983 for a law enforcement officer’s use of force requires the officer to have violated the law “knowingly,” the criminal counterpart for “willful” violations is primarily 18 U.S.C. §242. Recently, there was an instance during the criminal prosecution of a law enforcement officer for a use of force where a prosecution “expert” cited the civil (“knowing”) standard and then inappropriately equated it with the criminal “willful” standard. The expert also apparently confused the civil standard of proof (by a preponderance of the evidence), with the criminal standard of proof (beyond a reasonable doubt).

### Clearly Established Law: Qualified Immunity

The Fourth Amendment “addresses [the] ‘misuse of power,’ not the accidental effects of otherwise lawful conduct.” *Brower v. Cty. of Inyo*, 489 U.S. 593, 596 (1989). Law enforcement officers are immune from suit under 42 U.S.C. §1983, unless they have “violated a statutory or constitutional right

Table 2

## Law Enforcement Use of Force and Society’s Expectations

Legal Standards
<ul style="list-style-type: none"> <li>• <b>Federal Constitutional Standards:</b> Law enforcement officers will not knowingly violate the law or misuse their government endowed authority. For criminal prosecution, the “knowingly” is elevated to “willfully.”</li> <li>• <b>More Restrictive State Standards:</b> a more restrictive state standard may or may not exist.</li> </ul>
Society’s Law Enforcement Officer Use-of-Force Expectations (far more restrictive than appropriately applied legal standards):
<ul style="list-style-type: none"> <li>• <b>Minimum Force Necessary:</b> Use only the minimum force necessary to accomplish lawful objectives (United Nations standard.)</li> <li>• <b>Force Mitigation:</b> Use, e.g., verbal de-escalation, distance, time, and backup as force mitigation opportunities.</li> <li>• <b>Immediate Threat:</b> Use force only to neutralize an “immediate” threat.</li> <li>• <b>Proportionate Force:</b> Force must be proportionate to the threat.</li> <li>• <b>Necessary Force:</b> Use no more force than “necessary.”</li> <li>• <b>Last Resort:</b> Use force only as a last resort.</li> <li>• <b>Physical Presence De-escalation:</b> Avoid use of force by physical presence intimidation.</li> <li>• <b>Immediately Cease Force upon Neutralizing Its Need:</b> Instantly, upon need for force ending, cease any use of force.</li> <li>• <b>Avoid Using Force on Special Populations</b> (especially if not an “immediate threat” situation).</li> <li>• <b>Avoid Using Force on Restrained Subjects</b> (especially if not an “immediate threat” situation).</li> <li>• <b>Minimize Restraint Force.</b></li> <li>• <b>Maximize Post-Force Care.</b></li> </ul>

that was clearly established at the time of the challenged conduct.” *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.” *Id.* That means that “existing precedent... [has] placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). When properly applied, this exacting standard “gives government officials breathing room to make reasonable but mistaken judgments” by “protect[ing] all but the plainly incompetent or those who knowingly violate the law.” *Id.* at 743.

**Other “Standards”**

In addition to the appropriately applied “legal” standards, law enforcement officers are often held accountable to other, almost always more restrictive, or prohibiting, standards, such as so-called “best practices”; “preferred practices”; generally accepted law enforcement practices; law enforcement agency policies, proce-

dures, and guidelines; training standards; manufacturers’ warnings for force-option products; standards published by law enforcement associations, special interest groups, advocacy groups, professional organizations, and government entities; and numerous others.

While many courts find that the “legal” standards are the appropriate ones to rely on to adjudicate law enforcement officers’ conduct properly, some courts also find relevant, but not dispositive, the fact that an officer’s alleged conduct appears to have violated agency policies. While certainly not suggesting that a violation of agency policies is sufficient to make out a constitutional violation, some courts have found agency policy and corresponding notice to law enforcement officers relevant in analyzing the reasonableness of a particular use-of-force incident under the totality of the circumstances. Some courts have described a factual dispute as important because it may be difficult to conclude that officers acted reasonably if they performed an action that had been banned by their agency or of whose dangers in the circumstances they had been

warned. *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 732, n.8 (5th Cir. 2018), *cert. denied sub nom. City of Fort Worth, Tex. v. Darden*, 139 S. Ct. 69 (2018), *see also Darden v. City of Fort Worth, Texas*, No. 18-11624, \_\_\_ Fed.Appx. \_\_\_, 2020 WL 1983192 (5th Cir. Apr. 24, 2020).

Additionally, some courts admonish an expert for opining on issues of law or drawing legal conclusions; however, the expert may opine on matters that touch on whether an officer violated the law, or complied, or did not comply, with other standards, such as Peace Officer Standards and Training (POST) guidelines. For example, although an expert may not come out and say, “Officer X used excessive force,” the expert may be allowed to testify that the officer did not comply with applicable law enforcement guidelines and procedures that provide a framework on the use of “excessive force,” such as POST guidelines. Further, the expert may not use “judicially defined” or “legally specialized” terms in expressing opinions. The expert also may not state what the law is, or state that the POST guidelines are the law (because

Figure 1

**Criminal Justice Probability Approximation Illustration Graphic**

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Descriptive Approximation (%)	Levels of Certainty	Notes/Comments
100%	100% 100% Perfection Outcome 100% Perfection Decisions (20/20 hindsight) 100% Perfection Evaluation 100% Perfection Observations/Knowledge	Some Plaintiffs, Critics, Negative Law Enforcement Activists Elevated or Conflated Standard
95–99%	Beyond a Reasonable Doubt Substantial Likelihood	Criminal Proof Standard
75–85%	Clear and Convincing	Punitive Damages
50.1%	Preponderance of the Evidence – (more likely than not) Arrest – Probable Cause (Fair Probability) Arrest – “Arguable” Probable Cause Frisk – Reasonable Suspicion Brief Detention – Reasonable Suspicion	Civil Proof Standard 4th Amendment Arrest Standard 4th Amendment Civil Liability Standard 4th Amendment Frisk Standard 4th Amendment Brief Detention
<b>4th Amendment Objective Reasonableness Standard Threshold</b>		
	Mere Hunch	
	Plausible It Could Happen	
	Potentially It Could Happen	
	Possible It Could Happen	

they are not). Opposing counsel can cross-examine the expert about the relevance of the POST guidelines and present to the jury that the POST guidelines are not binding law. See, e.g., *Garcia v. Cty. of Riverside*, No. CV 5:18-00839 SJO (ASx), 2019 WL 4282903 (C.D. Cal. June 7, 2019).

**The “Eggshell-Skull Rule” in 42 U.S.C. §1983 Excessive Force Cases**

Some courts have found the “eggshell-skull rule” applicable in 42 U.S.C. §1983 excessive force cases. *Darden*, 880 F.3d at 728. According to the eggshell-skull rule, a tortfeasor takes his or her victim as he or

she finds the victim. And when a subject’s preexisting medical conditions increases that person’s risk of death during a struggle, in that way, the law enforcement officer contributed to the subject’s death, and thus, the plaintiff can show that the officer’s use of force was the direct and only cause of the subject’s death.

**Degrees of Certainty**

Sometimes, law enforcement officers, medical examiners, decision makers, and others may misapply the degree of certainty standard. In one recent deposition, a plaintiff’s attorney aggressively challenged a

law officer defendant that the officer did *not* have one hundred percent certainty in identification of the subject. In such a case, an officer may benefit from understanding what the relevant degrees of certainty are, and why the attorney’s attack was incorrect and unwarranted.

To take another example, in some medical examiner autopsy reports, the medical examiner will not state the degree of certainty with which the examiner holds the report’s critical statements, opinions, findings, and conclusions. Obviously, this can result in significant, and very costly, foreseeable negative consequences. Figure 1 is a

**Table 3**

**Proof Level Requirements**

**Law Enforcement Officer, Expert, and Medical Examiner’s Comparisons**

Law Enforcement Officer (actions must be based upon “Objectively Reasonable”)	“Experts” in Federal Court Federal Rules of Evidence Federal Rules of Civil Procedure	Forensic Pathologist, Medical Examiner, or Coroner’s Report, Findings and Conclusions
<p>Facts</p> <p>Bases</p> <p>Justifications</p>	<p>FRE 702, FRCP 26(a)(2)(B), <i>Daubert</i></p> <p>FRE 702</p> <ul style="list-style-type: none"> <li>• Qualifications               <ul style="list-style-type: none"> <li>– knowledge,</li> <li>– skill,</li> <li>– experience, and</li> <li>– training, or education.</li> </ul> </li> <li>• Methodologically reliable               <ul style="list-style-type: none"> <li>– based on sufficient facts or data,</li> <li>– the product of reliable principles and methods, and</li> <li>– applied the principles and methods reliably to the facts.</li> </ul> </li> <li>• Scientifically reliable foundations</li> <li>• Reasonable degree of certainty</li> <li>• <i>Daubert</i> trilogy, and progeny</li> </ul> <p>FRCP 26(a)(2)(B) requirements</p>	<p>None required</p> <p>One required</p> <p>Often <b>ASSUMED</b></p> <ul style="list-style-type: none"> <li>• based on sufficient facts/data</li> <li>• methodologically reliable</li> <li>• objective mechanism of injury</li> <li>• greater weight of knowledge</li> <li>• based on science</li> <li>• FRE 702, FRCP 26 compliant</li> <li>• <i>Daubert</i> trilogy compliant</li> <li>• in most states</li> <li>• by most courts</li> <li>• by most decision makers</li> </ul> <p>NOT held accountable – in most states cannot be challenged</p> <p>Often inappropriately based on</p> <ul style="list-style-type: none"> <li>• failure to consider all causes</li> <li>• failure to specify “but for”</li> <li>• inaccuracies</li> <li>• possibilities</li> <li>• false equivalencies</li> <li>• <i>ipse dixit</i></li> </ul>
<p><b>Definitive degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• Reasonable suspicion (detention)</li> <li>• Reasonable suspicion (frisk)</li> <li>• Probable cause (arrest)</li> <li>• Probable cause (search)</li> </ul>	<p><b>Definitive degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• Reasonable degree of medical or scientific certainty based on reliable foundation, evidence, and scientific support</li> </ul>	<p><b>Definitive degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• ASSUMED to reasonable degree of medical and scientific certainty—even when it is not</li> </ul>
<p><b>Insufficient degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• Possibility</li> <li>• Hunch</li> </ul>	<p><b>Definitive degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• Anything less than reasonable</li> </ul>	<p><b>Insufficient degrees of certainty</b></p> <ul style="list-style-type: none"> <li>• Sometimes none</li> </ul>



teaching example of using an illustration to compare levels of certainty visually.

**Medical Examiner Errors**

Law enforcement officer non-firearm temporal arrest-related deaths, as mentioned, are very rare and occur less than once (on average) per career, for all involved, including medical examiners, and their investigators. Medical examiners are responsible for determining cause, contributors, and manner of death. However, the myriad issues, concepts, and foundations of non-firearm temporal arrest-related deaths are often quite overwhelming and may require an encyclopedic knowledge of the key issues and concepts to find correctly. When the typical medical examiner states that he or she is an expert in all deaths, it is like a podiatrist stating that the podiatrist is an expert in all medicine. We would not ask the podiatrist to perform an infant heart transplant, nor would we ask an experienced marital dissolution attorney to defend an international, multi-country, maritime treasure allocation distribution litigation. Remember, not all medical examiners have expertise in all of the intricacies of use-of-force scenarios.

One way to illustrate this to officers, which they can instantly visualize, is to ask them what justification they must have to detain, frisk, arrest, use force, or search a person legally? Then, compare that to the levels of proof that a medical examiner is required to have, or usually does have.

Then, compare that to the Federal Rules of Evidence and Federal Rules of Civil Procedure as they would apply to law enforcement experts. The analysis is often striking. Table 3, Proof Level Requirements, graphically illustrates this comparison.

**Rely on the Greater Weight of Current Scientific Knowledge and Literature**

The law sometimes lags science by more than a decade. What was scientifically believed or known a decade ago may not reflect the current state of scientific knowledge that adheres to the greater weight of known and published science. When medical examiners, law enforcement experts, and others are not current on the incident-relevant science, the results can be quite costly. In this context, this is currently true in numerous alleged positional asphyxiation scenarios, restraint asphyxia, conducted energy weapon electrocution, and other related use-of-force incidents.

**To Sum Up: Considerations**

When considering use of force by law enforcement officers, broadly evaluate policies, procedures, training, guidelines, incidents, standards, and the aftermath and consequences while working to minimize the potential associated risks by doing the following:

- Approach officer policy and training from the perspective that these materials will be shown to a judge and jury, and they may not immediately understand the standard and how it is to be applied

properly to conduct, free of myths, outdated science, vagaries, ambiguities, and connotations.

- In officer policies and training, clearly explain the differences among standards, especially those that are more restrictive than the legal standards, and the differences among them pertaining to the potential violation consequences, as though such information and justification is being explained to a jury.
- Clearly distinguish “legal” standards from guidelines and other “standards.”
- Carefully avoid unintentionally conflating a policy, training, best or preferred practice, or some other standard, with the appropriately applied legal standards, including levels of culpability, and make these clearly understandable to the trier of fact.
- Be clear on the realities of use-of-force frequency, human factors, and societal expectations, among other expectations.
- Cautiously avoid “conflating” two items to draw a broader unsupported conclusion, including avoiding “false equivalencies.”
- Correctly apply proper levels of professional, medical, or scientific certainty.
- Only use current, appropriately scientifically reliable findings, statements, and conclusions that adhere to the greater weight of the established science.
- Finally, consider a use-of-force event from multiple perspectives and time frames. See Table 4, Use-of-Force Event Evaluation Continuum.



Table 4

**Use-of-Force/ARD Incident Timeline Considerations**

Pre-Event	During Event	Immediate Aftermath	Investigation	Actions
Policies <ul style="list-style-type: none"> <li>• “Legal” standard</li> <li>• Need to know</li> <li>• Can reference</li> <li>• Definitions</li> <li>• Special purpose</li> </ul> Procedures <ul style="list-style-type: none"> <li>• Temporal outcomes:</li> </ul> Training <ul style="list-style-type: none"> <li>• “Motorola Memory”</li> </ul> Custom <ul style="list-style-type: none"> <li>• Reporting</li> </ul> FTO <ul style="list-style-type: none"> <li>• Reporting</li> </ul> Guidance <ul style="list-style-type: none"> <li>• Reporting</li> </ul> Study/memory aids	What LEO <ul style="list-style-type: none"> <li>• Records</li> <li>• Remembers</li> <li>• Can apply</li> <li>• Procedures</li> <li>• Outcomes</li> <li>• Temporal outcomes:</li> <li>• “Motorola Memory”</li> <li>• Reporting</li> </ul>	Contacts <ul style="list-style-type: none"> <li>• Supervisor response</li> <li>• Executive response</li> <li>• LEOs’ statements</li> <li>• Objective timeline</li> <li>• Objective evidence</li> <li>• Recordings synced</li> </ul>	Investigations <ul style="list-style-type: none"> <li>• Incident</li> <li>• Medical examiner</li> <li>• Criminal:               <ul style="list-style-type: none"> <li>– local</li> <li>– task force</li> <li>– state</li> <li>– federal</li> </ul> </li> <li>• Special interest</li> <li>• Outside investigators</li> <li>• Other</li> </ul>	Criminal (federal) <ul style="list-style-type: none"> <li>• Criminal (state)</li> <li>• Criminal (other)</li> <li>• Inquest</li> <li>• Civil</li> <li>• Internal discipline</li> <li>• Special interests</li> <li>• Media</li> <li>• Community</li> </ul>

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