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Informant Liability Issues

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Introduction

We see the headlines all too often in newspapers throughout the country, headlines about legal actions against federal or state officers, accusing them of conduct which if true, causes embarrassment to all of us in the profession and in some real sense lessens our ability to do our jobs. Recent headlines like "Grand jury hearing fake-drug lawsuits," and "LA Police in Reign of Terror Against Minorities" along with scores of similar articles have a common thread: the abuse of their position by criminal informants or the misuse of criminal informants or sources by law enforcement personnel, resulting in legal action which almost always proves detrimental to the continued effectiveness of the officers involved.

There are roughly 1,000,000 police officers in the United States out of an estimated 312,000,000 United States citizens. Even with the officer to citizen ratio varying from community to community, it appears obvious that informants are an absolute necessity in order for the police to protect society. There are simply not enough officers available to deter and detect criminal activity or to locate and apprehend criminals without assistance from citizens, particularly those associated with illegal activity. This need for extra "eyes and ears" has created a truly unique class of police assistant - the criminal informant.

Basis for Liability

In the recent past, pressure to obtain informants on the federal level began in the training academies and remained constant throughout the careers of the agents. This pressure created an atmosphere in which a steady stream of information became vital to the continued employment of the agent and the temptation existed to "pad" the information just to keep the supervisor happy. Instead of encouraging agents who had demonstrated a knack for developing and managing informants to do so, some federal agencies relentlessly demanded that all agents produce sources, even those employees who were not suited by assignment or temperament to do so. This mindset, which continues somewhat today, has produced some very strange and embarrassing situations.

Most of the situations where informants have committed acts producing injury to third persons have not consistently resulted in liability for the contact officer. There is always the possibility that an officer or agency could be held liable for injury if the informant is shown to be acting within the “scope of employment,” especially with the number of lawsuits we have today and if the informant's employment position with the department is unclear (not clearly defined in writing). Another possibility exists with the claim of a constitutional rights violation by an informant acting under the direction of a contact officer, thereby causing a violation of a protected civil right under Title 42, U.S. Code, Section 1983, or even a criminal violation under the federal Criminal Code, Title 18, U.S. Code, Section 241 (conspiracy).

Necessity for Departmental Policy Provisions

Because of the informant's necessary association with the criminal element, the motives, activities and information of the informant are always suspect and are subject to scrutiny even though they are vital to police operations. These same associations cause informants to be the weak link in any police organization, not only because they frequently are able to use the very organization allegedly controlling them for their own purposes, but also because they are occasionally used by unscrupulous officers as cover for conducting illegal operations, sometimes to set up pretext searches and arrests, but often for the personal gain (financial or promotional) of the officers themselves.

The possibility of a runaway informant is truly a nightmare for most contact officers. Even when great pains are taken to validate the informant and ample documentation exists of the validation, informants often begin to freelance, sometimes engaging in criminal activity themselves or providing false information, a common trait of people who live by their wits. This has destroyed the careers (and often lives) of too many state and federal law enforcement officers. There are few experienced contact officers who do not have at least one horror story regarding their past contact with informants.

Informant Policy Details

To counter the damage that informants can cause to officers and their departments, official policy manuals should contain provisions for informant development as well as for informant management. An effective informant policy provides a comprehensive plan for informant coverage, from initial recruitment to termination of the relationship. The policy will also contain expected conduct for officers in handling informants, including specified prohibited conduct. For example, one typical departmental policy prohibits the following conduct on the part of the officers:

- Socializing with informants and/or their families.
- Becoming romantically involved with informants.
- Buying anything from an informant or selling anything to an informant.
- Borrowing money or receiving gifts from informants.
- Conducting business of any type with informants.
- Contacting informants alone.

- Paying contacts without another officer as a witness.
- Allowing informants to sign anything, such as a receipt for payment, without the entire receipt being completed.

Because officers will never be able to completely control the behavior of their informants, the only possible way to avoid or reduce liability both for the officer and the department is to have a written description of the informant's affiliation, including the following provisions:

- The nature of the department's relationship to the informant.
- The informant is not an employee or agent of the department or contact officer.
- The informant is not required, authorized or encouraged to commit illegal actions.
- The informant agrees to provide all information involving other persons' illegal conduct to the contact officer.

The informant should be required to sign a “contract” with the department setting out the above provisions, including any expectations on the part of the department or the informant, especially where payments and activities are concerned.

Payments to Informants

Payments to informants are particularly dangerous for handling officers and departments, and should always be strictly controlled, with receipts obtained for all monies and expenses obtained. Having a second officer or supervisor witness the payment is one recommended method of insuring some means of control and verification.

Informants frequently are not working for pay, but are attempting to “work off” their criminal acts. Again, officers must be very careful in not providing immunity for the criminal acts of informants, as this is an area in which the officer has no legal authority; therefore, the matter must be referred to the appropriate prosecuting agency for an immunity determination.

Initializing an Informant Program

Following the rules and employing strict internal controls is only half the battle, however. Officers at all levels of command must be thoroughly trained in the process of opening, handling and paying informants, as well as reporting information in a timely and systematic manner in accord with existing legal standards. This involves more than the issuance of policy changes and requires the familiarity of policy provisions by a competent training officer and written verification that periodic training has taken place. It should also include both testing and inspection to insure understanding and compliance with the procedures.

The above suggestions may seem to place an undue burden on the already overworked medium to small department. However, if the burden is weighed against the almost certain and ever increasing monetary liability of the officer and department should an adequate policy not be instituted and enforced, the burden is a small price to pay.

The first step is to provide a clear understanding to both management and the first line officer of the need for such a program. A factual review of the recent successful lawsuits against officers across the country in this area along with the disastrous personal and institutional consequences ought to be sufficient to gain the attention of officers at all levels.

This understanding should be followed by a thorough examination of existing departmental procedures for handling informants, including reporting and safeguarding their information as well as any source payment procedures.

Once necessary policy changes have been drafted, a review by the appropriate prosecutorial and legal staff will complete the policy process, to be followed by operational training and implementation of the program. Periodic (documented) evaluations in the legal, compliance and training areas will help to insure validation of the program as planned.

Conclusion

None of these methods will guarantee a trouble free informant relationship, nor will they prevent the inevitable lawsuit, but requiring strict accountability in the handling of informants does provide some measure of protection from the numerous frivolous suits. Documented compliance in the payment for information and expenses will leave an audit trail, insuring protection of the payment process, the officer and the department.

No system can totally prevent lawsuits from occurring or charges from being brought, but with careful preparation, training and documentation, the number of successful suits and charges can be minimized, with the result being a more professional organization, higher morale, and in the final analysis, better service to our community, state and nation.

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