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MEMORANDUM

To: Rod Underhill
From: Ryan Lufkin
cc: Don Rees
Date: 3/27/17
Subject: Analysis of Immunity in Compelled Statements of Public Employees

Executive Summary:

Officer involved use of force events where death or serious physical injury occur are tragic events that deeply impact individuals, family members and the community. In Multnomah County when a law enforcement officer is involved in the use of force and either death or serious physical injury occur an immediate criminal investigation of the involved police officer(s) conduct begins.

Across the country, the public sees events surrounding an officers use of force that erode the public's faith in the criminal justice system's ability to conduct a fair and independent investigation. The public questions, now more than ever, the independence of those investigating the conduct of the officers and those conducting the prosecution review of the event. Officer involved use of deadly force investigations are complex and involve the intersection of a number of important concepts including the need for a complete and thorough investigation, a fair and impartial assessment of the law and facts, the public's undeniable interest in ensuring responsible transparency in police work, employment implications to the involved officer(s) and the constitutional rights of the involved officer(s). It is important to understand the law and the process of how investigations into these extremely important situations occur and what appropriate options are available for policy makers concerning the investigation of the use of force.

Whenever an officer involved use of force event occurs that results in death or serious physical injury and the scene has been secured, police will notify the District Attorney's Office. Where a death has occurred, Oregon statutes provide that "[t]he district medical examiner and the district attorney for the county where death occurs... shall be responsible for the investigation of all deaths requiring investigation. ORS 146.095(1). Further, '[d]eath investigations shall be under the direction of the district medical examiner and the district attorney for the county where the death occurs. ORS 146.100(1).

In addition to the notification to the District Attorney's Office the involved officer(s) will have legal counsel and union representative respond to the scene. Homicide unit detectives will be assigned and will begin an investigation of the shooting. Further, the involved agency's internal affairs unit will open an investigation into the agency's practices, policies and orders (non-criminal administrative investigation) to determine, for example, whether the involved officer(s) complied with internal policies and/or orders.

Within hours, the following personnel are frequently present at the scene:

- * Involved officer(s)
- * Witnesses
- * Homicide Unit Detectives
- * District Attorney representative(s)
- * Medical Examiner Personnel
- * Medical Personnel
- * Command staff of the involved Police Agency
- * Union representatives for the involved officer(s)
- * Lawyers for the involved officer(s)
- * Internal Affairs Unit Detectives (Administrative Investigation)
- * Mayor's Office Personnel
- * Media
- * Community members

Separation of the Criminal Investigation from the Administrative Investigation

Recently, and with more frequency, it has been suggested, or indeed has been implemented, that the involved officer(s) should be compelled, induced, ordered or otherwise forced to provide an immediate, or close in time to the event, statement about what occurred surrounding the officer(s) use of force. This "statement" includes not only verbal answers from the involved officer(s) but also other forms of furnishing evidence. This analysis intends to address these concepts and explain the intersection of Oregon law and the legal ramifications of following suggestions or practices of compelling, inducing, ordering or otherwise forcing an involved officer to make a statement.

An involved officer, like any other Oregonian, has inalienable rights under the Oregon and United States Constitution. Oregon law is extremely clear that a public servant, including a police officer, does not forfeit their Constitutional protections when they perform the duties of a law enforcement officer. Central to this discussion is understanding that under Oregon and federal law, as it relates to a criminal investigation, a police officer has a right not to incriminate themselves and not to be forced to provide evidence that may be used against them. Violation of this "right to remain silent" by forcing the police officer to speak with the threat that if they do not they will suffer an adverse consequence to their employment (through the Administrative Investigation), has been the subject of much litigation.

Courts (detailed legal analysis below) have analyzed the criminal investigation consequences for violating an officer's right to remain silent and compelling either a statement or the furnishing of evidence include one, or more, of the following:

1) Use immunity

The officer's statements or furnishing of evidence cannot be used against them

2) Use and derivative use immunity

The officer's statements or furnishing of evidence and any evidence discovered tied to those statements or evidence cannot be used against them

3) Transactional immunity

The officer cannot be criminally prosecuted for the use of force

Use immunity alone has been eliminated as an appropriate sanction by the Court for the violation of an individual's right to remain silent. Thus, the minimum realistic sanction the State will incur as a result of violating an officer's right to remain silent is to lose all evidence gathered after the statement, or other furnishing of evidence, was compelled unless the State could prove that the evidence was derived wholly independently from the statement. Finally, the most significant sanction that the Court could impose is that the officer could not be prosecuted for any criminal offense, including a homicide, related to the compelled statement.

This analysis will examine the practical implications of the minimum realistic sanction – use and derivative use immunity.

Most proposals for compelling officers to make a statement or otherwise furnish evidence focus on the understandable desire to have responsible transparency regarding the event and to disseminate information to family members of the deceased and the general public as soon as practicable. That is, the involved officer(s) should be ordered and/or compelled to provide a statement or otherwise furnish evidence about what happened surrounding the officer's use of force to help satisfy that need to know. This statement, in turn, could be provided to the family of the deceased, the public and the media to aid in ensuring responsible police transparency. Proponents also believe that the officer's memory will be most thorough and complete shortly after the event.

Providing this information to the family of the deceased, the community and the media would make any argument that the criminal investigation did not rely on those compelled statements or other forms of furnishing evidence in formulating its criminal investigation absolutely impossible. The only way to prove that every piece of evidence that followed a compelled statement was not tainted by the contents of the compelled statement is to ensure that the investigation team had no contact with, or knowledge of, any of the content of the compelled statements. Obviously if those statements are made public, that would not be the case. Thus, as it relates to the criminal investigation, we can anticipate that all evidence would be suppressed by the Court since all evidence would be collected well after this initial compelled statement is demanded of the officer. With all evidence suppressed by the Court, the practical consequence is that even the use and derivative use immunity sanction would result in a complete inability to successfully prosecute a criminal case. Further, even if the compelled statements are not released to the deceased family members or to the public but, instead, were “walled off,” Oregon case law has determined that that effort is “impossible” to achieve and will be discussed further below.

If the initial statement is compelled and not provided to the public then its utility in providing responsible transparency to police work is greatly diminished. Further, the criminal investigative team must now be segregated from the internal administrative investigation team and no information that the internal administrative investigation team collects must reach any personnel that will have contact with the criminal investigation team. For example, the involved agency’s Police Chief should not know the nature or content of the compelled statements since the Police Chief would have contact with the criminal investigation team. It is important to note that this is already the current practice of police shooting investigations in Multnomah County.

Second, this analysis addresses the more significant consequence that could occur as a result of a violation of the officer’s right to remain silent – transactional immunity

Transactional immunity is the complete immunity from prosecution for criminal offenses related to the compelled statements. Since 1984, the Oregon Supreme Court has endorsed the view that Article I, Section 12 of the Oregon Constitution requires transactional immunity as a substitute for an individual’s right to remain silent. In the absence of providing transactional immunity, the court may impose sanctions as a consequence of violating an individual’s right to remain silent. This was reinforced as recently as 2010.

Thus, the fundamental problem with the desire to force an officer to provide a statement is both a practical and a legal one. Legally, violating an officer's right to remain silent will result in a criminal investigation sanction that, at a minimum, will suppress all evidence that the State cannot prove was obtained wholly independently of the tainted statements. At maximum, the criminal investigation sanction will provide the officer complete immunity from prosecution. Practically, the criminal investigation team cannot erect a wall between the criminal investigation and the internal administrative investigation if, for example, the very first thing that occurs is a compelled statement that is made available for public consumption or otherwise becomes known to criminal investigators. In conclusion, it would be wholly inadvisable to implement a policy or practice that would make the prosecution of a potential homicide committed by a police officer impossible. The nature and degree of just how impossible it would be (eg. use and derivative use immunity vs. transactional immunity) seems to be missing the forest through the trees – either would create an intolerable result in an event where a homicide by a police officer goes unprosecuted.

Finally, this entire scenario is predicated on the idea that an officer, who just committed a possible homicide, would choose to speak under threat of their employment. However, the threat to the officer's employment is entirely nonexistent for the specific conduct of refusing to provide a statement. The Oregon Supreme Court has made it abundantly clear that sanctions imposed for refusing to speak, absent a sufficient grant of immunity, are intolerable and will be reversed. Thus, there is no real risk to the officer when presented with the ultimatum to speak or be sanctioned – it should be anticipated that the sanction will not be sustained. A simple outcome chart may help explain these concepts:

Attempting to compel a statement

Event	Result of threat	Info gained?	Info to public?	Punish officer?	Punishment Sustained?	Immunity?	Case still prosecutable ¹ ?
* Officer refuses to speak on scene	Officer still chooses not to speak	No	No	Yes	No	N/A – no statements obtained	Yes
* Officer refuses to speak on scene	Officer chooses to speak	Yes	No	No	N/A	Yes	Yes provided all info stays only with IA team
*Officer refuses to speak on scene	Officer chooses to speak	Yes	Yes	No	N/A	Yes	No
*Officer chooses to speak on scene	N/A – No threat needed	Yes	Yes	N/A	N/A	No	Yes

¹ Prosecutable: Distilling the information from this memo it should be clear that either use and derivative use immunity or transactional immunity would practically result in the near impossibility of prosecuting the officer

Summary of Oregon and Relevant Federal Caselaw

After a review of case law concerning transactional immunity in Oregon and after consultation with the Oregon Attorney General's Office, it is clear that the problem first identified by the US Supreme Court in Garrity v New Jersey, 385 US 493 (1967) remains a significant impediment to threatening discipline of a public employee to compel speech as part of an investigation. In Garrity, the United State Supreme Court held, "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price... We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in a subsequent criminal proceeding of statements obtained under threat of removal from office, and that it extends to all, whether they are the policeman or other members of our body politic." *Id.*

The Oregon Court of Appeals grappled with this question in State v Soriano, 68 Or App 642 (1984) whose opinion was later adopted in whole by the Oregon Supreme Court in State v Soriano, 298 Or 392 (1984). In Soriano, the Court explained that there are three types of immunity that flow from compelled testimony: (1) Use immunity, (2) Use and Derivate use immunity and (3) Transactional immunity. These immunize, in order: (1) only the statements compelled, (2) the statements compelled and evidence discovered as a product of the compelled statements and finally (3) protection from prosecution whatsoever regarding the subject of the compelled statements. The Court in Soriano determined that where the State compelled testimony through the use of contempt of court proceedings, "We hold that Article I, Section 12, of the Oregon Constitution requires transactional immunity as a substitute for the right not to testify against oneself." *Id.* The Court further explained its concern with use immunity was not only concerning the actual production of compelled statements at a later trial but, also, the non-evidentiary use of such statements that a prosecutor or law enforcement officer may make of such statements in investigation or prosecution of the case. Simply knowing the coerced statements may make a prosecutor more or less inclined to charge a particular offense or offer a particular plea bargain. The Court further opined that the State could not realistically erect a wall between the officers who solicit a compelled statement and the prosecution team. "It is unrealistic to give a dog a bone and to expect him not to chew on it... We hold that Article I, Section 12, of the Oregon Constitution forbids giving the dog the bone. Only transactional immunity is constitutional in Oregon."

In State v Graf, 316 Or 544 (1993) the Court examined whether a State agency could complete a termination of an employee where the termination procedures afforded the employee an opportunity to speak and present evidence at a termination hearing. The employee, who was subject to a criminal investigation, claimed that he could not be forced to choose between attempting to maintain his employment by fully participating in the termination hearing and his right to remain silent. The Supreme Court disagreed and found such a circumstance not compelling, “Contrary to the assertion of defendant’s lawyer in his letter to the department...neither the department’s letter nor the rule put any burden on the defendant ‘to refute the charges or face dismissal’. Saying that a rule is coercive does not make the rule coercive; saying ‘I feel coerced’ when the rule is not coercive does not create coercion...The Court of Appeals erred in concluding the defendant ‘was forced to relinquish his constitutional right to remain silent in order to gain his right to a full due process hearing.’ Because we conclude that OAR 105-80-003(3) exerted no compulsion on defendant to testify at the pre-termination hearing, we do not reach the transactional immunity question.” *Id.*

Even though the Oregon Supreme Court explicitly did not reach the transactional immunity question in Graf, the Court of Appeals in Beugli nonetheless found that Graf created room in Oregon law for use immunity despite the language in Soriano. In State v Beugli, 126 Or App 290 (1994) the Court said, “The right to transactional immunity arises only when the legislature has granted it as a substitute right against self-incrimination guaranteed by Article I, Section 12 of the Oregon Constitution. State v Soriano, *supra* n1, 68 Or App at 662. In the absence of a legislative decision to grant immunity, the remedy for unconstitutionally compelled testimony is suppression of that testimony and any evidence derived from it. State v Graf, 114 Or App 275 (1992). Thus with Graf so interpreted, the Court of Appeals held that the collective bargaining agreement for a police officer did not expressly grant the officer transactional immunity from prosecution in a circumstance involving admittedly coerced statements and therefore the State was not precluded from prosecution by virtue of transactional immunity but, rather, simply precluded from use of the compelled testimony and derivative evidence pursuant to use immunity.

In State v Vondehm, 348 Or 462 (2010) the Supreme Court issued its most thoughtful analysis on these immunity questions since Graf. The Court in Vondehm repeated its admonishment in Soriano that “the Oregon Constitution prohibits the State from requiring a witness to relinquish their Article I, Section 12, right against self-incrimination unless it provides the witness with an alternative that affords the same basic protection as the constitution...The Court held that the State could not compel the statements of a witness without granting transactional immunity because, without protecting the witness from all evidentiary and nonevidentiary use of compelled statements, the State would not afford the witness the same protection the Constitution confers – the right to remain silent.” Vondehm also clearly stated that there was no Constitutional difference between compelling testimony in court or compelling a statement in an investigation. “Thus, the court has long interpreted Article I, Section 12, to impose no distinction between compelled statements and physical evidence derived from such statements or between the use of compelled statements to obtain evidence and as testimony in trial.”

In Oatney v Premo, 75 Or App 185 (2015) the Court discusses in more detail whether Article I, Section 12 itself confers transactional immunity and a defendant's right to challenge punitive consequences for invoking their right to remain silent. "We have subsequently explained, however, that Article I, Section 12, protects only the right not to be compelled to testify against oneself; it does not, in itself, confer transactional immunity whenever that testimony is given... We explained [in Graf] that where 'there is no statute authorizing [a] grant of immunity to the defendant – the defendant's decision to testify, even under compulsion, does not automatically confer transactional immunity on him... Thus, Article I, Section 12, does not, in itself, *provide* transactional immunity. Instead, Article I, Section 12 protects a defendant from *any adverse consequence* of refusing to testify in the absence of transactional immunity."

Analysis

It should be clear from the above recitation that there is significant tension between the apparent wholesale rejection of use/derivative use immunity in Soriano, a Court of Appeals decision that was adopted as the opinion of the Oregon Supreme Court in 1984, and the implementation of use and derivative use immunity as a sanction in subsequent cases. The most cogent reconciliation of these opinions occurs in Oatney v Premo which is not a Supreme Court opinion but explains that the Constitution requires transactional immunity to legally compel speech from an individual. The Oatney court then explains that the sanction for illegally and unconstitutionally compelling speech is use and derivative use immunity and protection from any adverse consequence of refusing to testify in the absence of transactional immunity. Thus, even under this explanation a public employer would be prohibited from lawfully compelling speech from a police officer and if the public employer attempted to sanction the officer for refusing to speak – those sanctions would be overturned. Further, if the officer spoke under compulsion the evidence derived from that speech would be suppressed.

However, there are several other possible explanations that explain the tension between Soriano and other cases. For example, the Court of Appeals opinions affirming use and derivative use immunity could be held wrongly decided in light of Soriano and Vondehm. Under this construction, the Oregon Supreme Court has reserved the sanction of transactional immunity for at least some forms of compelled statements. In assessing this possibility it is notable that the flagrant and wholesale adoption of a systemic policy that purposefully violates an individual's right to remain silent would be significant factor in assessing the appropriate sanction. After thoughtful review, I cannot conclude that there is a clear answer to this tension based on current caselaw. Further, given the Court's extremely strong language in Soriano against even passive knowledge of coerced statements reaching the prosecutor's ear, I do not believe a prosecutor should accept the risk of transactional immunity on the hope that a coerced statement would "only" result in use and derivative use immunity.

Finally, a cursory review of Federal law since Garrity shows over 1200 citations in the ensuing 47 years including 151 cases that distinguished the rule of Garrity into different factual circumstances. However, the narrow question of whether use/derivate use immunity is sufficient over transactional immunity appears settled. In Kastigar v US, 406 US 441 (1972) the United States Supreme Court held, “The statute’s explicit proscription of the use in any criminal case of ‘testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)’ is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.” *Id.*

Conclusions

The state of the law in Oregon regarding the extent of the remedy available to a public employee who has been compelled to speak despite an invocation of their right to remain silent is unsettled. However, what is completely clear is that that such compulsion, absent a sufficient grant of immunity, is unlawful and violates Article I, Section 12 of the Oregon Constitution. Soriano explains that the only form of immunity that may lawfully be substituted for a person’s right to remain silent is a promise of full transactional immunity. The breadth of consequences for not providing full transactional immunity is what remains unclear. Certainly, the consequence is use and derivative use immunity. However, it is also possible transactional immunity may be required in certain circumstances. No prosecutor should risk immunity of any sort on a significant case given that the bedrock of cases on this topic were written over twenty years ago and, even then, were obviously in tension. I would advise law enforcement to assume the rule expressed by the Supreme Court in Soriano and reaffirmed in Vondehm is still good law until and unless it is overturned by the Oregon Supreme Court. Thus, I would advise law enforcement that compelling a public employee to speak despite an invocation of his right to remain silent by threat of discipline, and without the lawful substitute of transactional immunity being promised, will result in a certain risk of suppression of all such statements and derivative evidence, a certain risk that sanctions imposed on an officer who refused to speak would fail and a high risk that such institutionalized compulsion would result in an sanction of transactional immunity.



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

March 27, 2017

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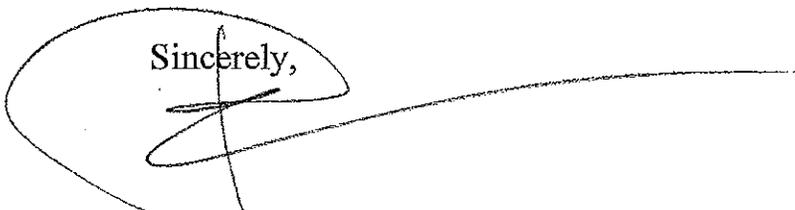
Re: Current status of immunity law

Dear Mr. Underhill:

At the request of DDA Ryan Lufkin, we have reviewed his memorandum dated March 14, 2017, summarizing the current status of the law in Oregon on immunity and compelled speech, as it pertains to public employees. From our perspective, it is correct, albeit with the caveat that, as the memo notes, certain issues are not quite settled yet.

Please let me know if you have any questions.

Sincerely,



Timothy A. Sylwester
Assistant Attorney General