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Rising to Meet the Challenge: Is Your Agency's Response to Crowd Control Events Up to Snuff?

By **Daigle Law Group**

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Law enforcement agencies in the United States know all too well the importance of protecting individuals' First Amendment rights during mass demonstrations.

But what happens when officers find themselves in the crosshairs of the demonstrators' rage? This is the challenge faced by officers more and more, particularly after the in-custody death of George Floyd on May 26, 2020. Faced with the dichotomy between protecting their community members and neighborhoods and protecting themselves and the profession they hold dear, officers have been thrust into highly emotionally charged events where their actions become the topic of every dinner table conversation.

Among the myriad reasons why agencies should review their response to crowd control events is the ever looming specter of liability under 42 U.S.C. § 1983. Liability in this realm is frequently premised upon defects in agency policies, training, and supervision. If one considers that the catalyst of a lawsuit is frequently the event itself, the resolution of that suit, in many instances, depends upon what occurs moments, days, weeks, months, or even years before the action. To that extent, a quote famously attributed to Sun Tzu is particularly appropriate, "Every battle is won before it is ever fought." As a result, to proactively win by mitigating liability, agencies should engage in continual self-audits of their responses to crowd control events considering the recent independent reviews, reports, and guidance available.

While this article cannot address all of the liability issues posed by crowd control events, agencies may consider the following areas that are receiving more recent national attention.

Declaring an unlawful assembly: Not all crowd control events involved unlawful behavior, and the First Amendment specifically guarantees individuals the right of freedom of assembly. But where is the line? When does a lawful assembly become an unlawful assembly or even a riot? In many instances, state law will provide the appropriate definitions for each. It is essential for those in command to be able to articulate the differences between each of those terms to determine when the necessary preconditions for each have been met.

Agencies should also examine their policies and operations plans to address the protocols utilized in declaring an unlawful assembly and ensure compliance with necessary legal requirements. If an

unlawful assembly is declared, how will the crowd be dispersed? If dispersal orders are issued, they should be clear and loud and given multiple times, and the crowd should be given clear pathways and points of egress to leave the area. Agencies should audio and video record the dispersal orders, as well as completely document the dispersal process.¹

Clear policies and objectives: Agency policies should provide clear definitions and include procedures for preparation and planning, management and organization, general crowd response, response to spontaneous civil disturbances, use of force and approved weapons, crowd dispersal, mass arrests, deactivation, and training.² Agencies should develop clear guidelines to address each phase of the event, including the pre-event, operational, and post-event stages.³ Furthermore, the on-the-ground field commander or operations chief must provide clear guidance to personnel regarding the tactical and strategic objectives.⁴

Mutual aid: Many agencies depend upon mutual aid resources in responding to crowd control events. However, those agencies must consider a variety of issues prior to utilizing mutual aid. Depending upon the jurisdiction, there may be certain legal preconditions that need to be met before any mutual aid is activated. Furthermore, agencies should have clear agreements in place to identify how certain conditions will be dealt with. Mutual aid agreements should adhere to best practices and address crowd control assistance; identify how assistance may be requested and provided; delineate the processes for granting and withdrawing assistance; identify the command-and-control structure; and require that sending agency personnel adhere to the requesting agency's use-of-force policy and utilize only those weapons and munitions approved by the requesting agency.⁵ Member agencies should also conduct joint trainings to prepare for crowd control events.⁶

Training personnel: With many agencies continuing to suffer from budget cuts, the continuing point of contention is that training is the first to get cut from an agency's budget. The problem is that many agencies need to substantially increase their investments in training—particularly crowd control training—to give officers the tools they need to succeed in the field.⁷ In fact, training in this realm is particularly important to provide officers clear guidance on the First Amendment and how their actions may result in a constitutional violation.

Use of force: When it comes to a use-of-force review, some agencies have encountered the issue of identifying the officers present, the officers who used force, and what force was used. As a result, agencies should create rosters of all officers assigned to the event; require that all officers—regardless of rank—wear a body-worn camera; and require that officers' badges and badge numbers be prominently displayed and easily visible, even when wearing protective gear. Officers should also be provided with the specific requirements for use-of-force reporting and review during crowd control

operations, and supervisors should complete prompt reviews of those reports to ensure compliance.⁸

Additionally, there are always issues to consider with respect to force options and less-lethal munitions. Agencies should create a tracking system to log the distribution and deployment of all less-lethal munitions. Agencies should identify which munitions are authorized, define when those munitions may be used during crowd control events, and require that only trained personnel be permitted to deploy them.⁹

Remember, there is no time like the present. The time to act is now. Agencies waiting to plan until they receive the call that a crowd has gathered will clearly leave their officers exposed to potential danger and the agencies themselves to liability.

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Notes:

1Nicholas E. Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review (Denver, CO: Denver Office of the Independent Monitor, 2020).

2See, IACP Law Enforcement Policy Center, *Model Policy on Crowd Management* (updated April 2019).

3U.S. Department of Justice and Department of Homeland Security, *Law Enforcement Guidelines for First Amendment-Protected Events* (Washington, DC: Bureau of Justice Assistance, 2011).

4Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review.

5See IACP Law Enforcement Policy Center, *Mutual Aid Model Policy* (updated April 2005) and *Mutual Aid Concepts and Issues Paper* (revised May 2007).

6Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review.

7Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review.

8Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review.

9Mitchell, *The Police Response to the 2020 George Floyd Protests in Denver*, an Independent Review; see also *United States v. City of Portland*, 3:12-cv-02265-SI, Requested Police Review Board Written Critique (March 23, 2021).

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