



CONDUCTING COVERT INVESTIGATIONS, INTEGRITY TESTS AND FINANCIAL INVESTIGATIONS ON LAW ENFORCEMENT EMPLOYEES (Part II)

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Administrative Financial Disclosures

Several police departments throughout the United States have required detectives who are assigned to gang investigations, narcotics, and money laundering investigations to disclose their personal financial information to the agency as a pre-requisite of being assigned to those types of high profile units.

The disclosures are intended to provide police agencies with data showing whether their detectives have questionable assets. These types of background checks are among the reforms the United States Department of Justice has been recommending, and in some cases requiring, as a condition of their Pattern and Practice Investigations. Detectives who refuse to sign the disclosures typically don't face any further consequences by their agency, but are not eligible to apply or remain in the specialized unit. These types of requirements are not without controversy. In some cases, police unions and bargaining units have filed litigation claiming these rules are a violation of officers' privacy rights and could provide criminals with personal information.¹ In addition, while this may be a valuable tool in preventing police corruption from an administrative standpoint, when those investigators assigned to these units are suspected of engaging in criminal misconduct, it is advisable to obtain financial records via a subpoena.

Random Integrity Testing

Random integrity tests are designed to observe and evaluate an officer's conduct in situations in which a specific set of circumstances has been created that requires police intervention. Several major police departments, including the Los Angeles Police Department (LAPD), the New York City Police Department (NYPD), and the New Orleans Police Department (NOPD), routinely conduct random integrity tests of their officers to determine if their conduct in handling their official duties is appropriate.

There exist two schools of thought on this type of orchestrated integrity test. Many consider such action distasteful and unnecessary. Others argue that this type of testing is necessary to ensure that law enforcement officers do not abuse their powers and that the random testing of officers is a legitimate and necessary safeguard in maintaining integrity in a

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police organization. The purpose of this discussion is not to resolve the tension between these competing points of view, but instead to ensure consideration of the issues surrounding this process.

In the 1970's, ABC News conducted an integrity test in Miami, where 31 wallets containing money and identification were turned over by role players to 31 police officers. Nine of the officers kept the money and were subsequently fired and/or prosecuted. Thirty years later, ABC News replicated the integrity test in Los Angeles and in New York. Twenty wallets containing money and identification were turned in to officers of the LAPD and another twenty were turned in to officers of the NYPD. All forty wallets were recovered by the officers without a single penny missing. It is unclear if the officers have become more ethical over the past three decades, or if they suspected the wallets was simply bait being offered in some type of sting operation.

Random wallet drops or entrapment type set-ups of officers who have never demonstrated a tendency toward misconduct are ill-advised practices and not recommended, unless the involved agency has experienced widespread corruption.

Targeted Stings

Many large departments are beginning to examine their internal affairs process and are considering shifting more resources toward targeted stings. This type of investigation can lead to an in-progress arrest of officers involved in criminal misconduct and produce substantial evidence leading to successful prosecution. They may also produce significant evidence of administrative misconduct. Covert sting investigations can also destroy the morale of an agency if they are not conducted in a dignified and ethical manner.

While the above described integrity tests are considered random in nature, meaning they are not focused on any specific officer, a targeted sting is focused on a specific officer who is suspected of misconduct. For example, if Officer Sticky Fingers has had 6 theft complaints in a year, all not-sustained, he might be a candidate for a targeted sting. The typical reactive investigation of a complaint alleging theft and the officer denying he stole anything usually results in a disposition of not-sustained because the allegation cannot be proved or disproved. The officer may be just unlucky to have many theft complaints lodged against him, or he may be using his position to steal. Since most officers go an entire career without a theft complaint, and Sticky Fingers has had six theft complaints in a year, he would be an ideal candidate for a targeted sting.

It is our opinion that this type of investigation should be considered extraordinary, or the equivalent of conducting a wiretap, and should only be used when other traditional methods of investigation; i.e., surveillance, eyewitnesses, etc, are not viable options. If conducted properly, this type of investigative practice can and often does result in the arrest of an officer committing a crime in progress. There exist two major benefits when employing a targeted sting:

1. An officer, who is engaging in criminal misconduct and is able to avoid detection through the traditional internal affairs process, can be identified, prosecuted, and removed from the law enforcement profession.
2. When an officer is arrested as a result of a sting, it can have a deterrent effect on other officers who might be contemplating criminal behavior but fear they might be the target of a sting themselves.ⁱⁱ

Entrapment Issues When Engaging in Sting Investigations

The most significant legal obstacle from engaging in both random and targeted stings is the defense often raised by the officer who takes the bait known as entrapment. According to *Black's Law Dictionary*, entrapment is the act of officers or agents of the government by inducing a person to commit a crime not contemplated by him/her for the purpose of instituting a criminal prosecution against him/her. Typically, entrapment only applies to overbearing official conduct seen in the form of flattery, pressure, harassment and fraud. Entrapment is usually not a successful defense when

merely offered an opportunity to participate in criminal activity. The threshold question the courts consider is was the individual pre-disposed to commit the crime? The very nature of a targeted sting against an officer is that the agency conducting the sting has predicate information the suspect officer is engaging in criminal activity.

The issue of entrapment is still unsettled in the United States. The 1992 Supreme Court ruling in *Jacobson v. United States* stipulated that law enforcement “may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute.” The court further indicated in *Jacobson* that, “When the governments’ quest for convictions leads to the apprehension of an otherwise law abiding citizen who, if left to his own devices, likely would never run afoul of the law, the Court should intervene.”ⁱⁱⁱ

Most state courts in the U.S. use the **subjective test**, which looks at the state of mind of the individual. The point of this test is to make sure that innocent persons will not be lured into engaging in criminal activity by government over-involvement. Other state courts such as California, Michigan and Texas use the **objective test**. With this test, the courts scrutinize the level of government involvement in the criminal actions to determine if the officers acted in such a way that they create crime where none would have existed. The state of mind of the defendant is not material in these states.^{iv}

It is strongly recommended that prior to engaging in any type of sting operation, law enforcement officials involve a prosecutor on the front end to provide guidance and ensure that the planned police actions do not violate the entrapment doctrine.

Operational issues in conducting stings: In addition to the ethical and legal considerations, orchestrating a sting of an officer suspected of corruption is a complex, difficult and sometimes dangerous investigative strategy. The utilization of undercover officers as well as confidential informants is often necessary in these types of investigations and, therefore, the potential for problems is enhanced. The old adage of Murphy’s Law “if something can go wrong it probably will” is applicable to these types of investigations. These cases require strong legal and managerial oversight, and investigators who are experienced and skillful in this type of investigative strategy. The Miami-Dade Police Department (MDPD), for example, has a full time Criminal Conspiracy Unit consisting of 15 investigators who work on nothing but these types of cases exclusively full-time.

Sexual Misconduct

Law enforcement agencies throughout the nation have experienced scandals in which their officers are abusing their powers of arrest, search, and control for sexual purposes. While there are many variations on how this form of misconduct can occur, the most prevalent scenario appears to be the traffic stop in which the officer requests a date or sexual favors in exchange for overlooking the violation.

There are many other areas ripe for sexual misconduct. One thing common to these acts of misconduct is that the victims are almost always vulnerable women (there are men who are victims of police sexual misconduct but they are not as common). These women frequently are victims of domestic violence, females stopped for DUI, street prostitutes, undocumented aliens, and drug users.

The following are investigative strategies to consider when conducting an allegation of sexual misconduct:

- Remember that this could be a criminal violation and if so, the rules of engagement for investigating criminal activity should be followed.
- One investigative strategy which has been successful in these type of allegations is to have the complainant conduct a covert, recorded telephone contact with the target officer, in which the traffic stop is discussed with the goal of having the officer repeat his solicitation of a date or sex to avoid the issuance of a citation or arrest of

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the complainant. These must be scripted and closely supervised. When the officer has given the victim his business card with his personal cell phone number, it is a definite indication of potential misconduct.

- Officers who engage in this type of activity typically do not get discovered the first time they become involved in this conduct, therefore it is beneficial to audit the officers' prior traffic stops and calls for service involving females and conduct quality control call-backs to determine if other victims have been solicited by the involved officer.
- If the officer did engage in sexual contact with the complainant, the recovery of forensic evidence including DNA, semen, hair, and fibers is extremely valuable. Sexual predator officers often utilize the same location to engage in sex and they often discard a condom or other valuable evidence which the investigator should attempt to recover.

It is recommended that investigators never conduct a sting on agency personnel without the approval of the chief, sheriff, or agency head.

The recent economic downturn has seriously hurt local communities. This loss of revenue to local governmental bodies has direct consequences for local law enforcement agencies. One of the unexpected consequences is the potential for some police employees to find themselves in financial difficulty. This is most pronounced when the employee has been counting on income other than normal salary. Some of these problems also seem to stem from employees who have gambling addiction. Police agencies should assess their policies, look for ways to assist employees who experience severe difficulty, and be alert to possible misconduct.

Alarming, some areas of economic misconduct seem to have become more common in recent years. Much of this misconduct has ended with direct involvement by chiefs and sheriffs. Some of these are:

- Selling police equipment or property/evidence on EBay and Craig's List
- Misappropriations for personal use of funds for officer survivors, employee unions, community action grants, and youth athletics
- Taking funds designated for confidential investigations and informants

Some of the more common types of income compensation that appears to be coming to a halt or is being significantly curtailed and often lead to economic misconduct include:

- Loss of overtime for staffing to compensate for minimum manning
- Elimination of overtime special details such as DWI taskforces
- A drop-off of off-duty paid enforcement details including special events, highway construction and security
- Elimination of take-home vehicle privileges
- Curtailment of rent subsidy for living in an apartment complex
- Closer scrutiny of court appearances on off-duty time
- Elimination of stand-by overtime for selected units
- Furloughs intended to cut a percentage salary
- Private business income restriction or failure based on the local economic downturn

There are some examples of police employees earning double their salary due to these other sources of income. Turning a blind eye to it and saying they simply shouldn't have allowed this to occur isn't a realistic response. These employees need our attention to avoid possible adverse consequences including family and personal stress, financial failure, or misconduct. These are obvious failures of management to conduct reasonable audits.

Some potential problems all supervisors and fellow employees should be alert for include:

- Abuse of scheduled duty shifts or court appearances when it conflicts with an off-duty paid detail
- Conflict of interests when the pressure by outside employers intersects with agency goals
- Double, or in some cases triple, dipping
- Manipulation of arrests to ensure overtime or court appearance
- Fitness for duty issues from sleep deprivation
- Inequality of paid detail assignments
- Domestic misconduct
- Excessive use of alcohol
- Insurance fraud
- Increased gambling
- Theft
- Accepting money for compromising testimony, not appearing in court, or manipulation of evidence
- Being paid to overlook or protect illegal activities

Action steps for economic misconduct potential:

1. Revisit your agency's written policy on outside employment. This should require an annual written approval; delineation of acceptable paid enforcement detail assignments; restricting off-duty employment to a specified number of hours per week and on any given agency workday; a description of when or if the employee reverts to on-duty status when taking enforcement action; and identification of the burden of costs for court, injury or civil action.
2. Ensure that your agency has a scheduled audit/inspection process.
3. Mandate that all funds designated for police support, community action programs, and other funds are annually audited by qualified accountants.
4. Reexamine the services available through your jurisdiction's Employee Assistance Program. This might be the time when you should consider adding a financial counseling aspect. This could be accomplished using a community volunteer group of financial professionals.
5. Examine your position on Workers' Compensation when employees are working for outside employers and give reasonable notice to your employees what implications that might entail.
6. Provide closer and timelier scrutiny to overtime use.
7. Consider the use of annual financial disclosure forms for employees assigned to certain positions such as vice, narcotics, organized crime, intelligence groups and command personnel.
8. Develop a reasonable approach to the use of credit search options.

As mentioned earlier, many major city departments have begun to shift a larger portion of their internal affairs resources into proactive investigations. These investigations are extremely sensitive and require highly skilled and deeply committed personnel. Specialized training using role-playing scenarios is essential in building the skills of a proactive investigative unit capable of successfully assembling these types of cases.

The investigators handling reactive cases are a good back-up resource; however, ideally, a proactive unit should be established that is exclusively focused on development of cases involving criminal misconduct committed by officers that requires a covert investigative approach. This type of unit is able to develop a higher level of expertise in this area and devote all of their energy to the proactive process. One possibility would be for agencies to establish an ad-hoc, multi-agency task force to conduct these types of investigations when the need arises. Many state and federal agencies, including the Federal Bureau of Investigation (FBI), have the experience and access to the manpower, equipment, and other resources required to successfully conduct investigations of this nature.

State-of-the-art equipment is critical to successfully building proactive cases and should be provided to this unit whenever possible. Targeting police officers who are engaging in criminal misconduct and have been trained in investigative techniques is a difficult process from the onset. The target officers under surveillance often use counter surveillance techniques and are looking for internal affairs activity. Recently, advanced electronic surveillance equipment has become available that allows for computer-based off-site tracking of targets, providing a major breakthrough in surveillance technology.

Technological developments in equipment, such as advanced night vision video devices and electronic eavesdropping machinery, continue to improve the odds in conducting successful proactive cases. While all elements of a police department compete for advanced equipment and resources, a powerful message is sent throughout the ranks when the chief of the agency provides the internal affairs unit with the highest priority.

These cases are very labor intensive and expensive, often requiring lengthy surveillances and the use of significant amounts of overtime. These cases also typically require the utilization of sophisticated and highly technical equipment, such as electronic monitoring devices, GPS locator systems, video surveillance equipment and rental vehicles. It is also often necessary to have access to narcotics, large amounts of cash, jewelry, and other items that may be necessary as bait required in setting up the sting.

It is strongly recommended that during the planning stages of an investigation of this nature, investigators plan for and expect the worst case scenario.

Corruption Prevention

While it may not be possible to totally eliminate corruption from law enforcement, police agencies can establish a comprehensive strategy to minimize and insulate their personnel from engaging in corrupt activities. This chapter has focused on investigating corruption utilizing covert and financial investigative techniques. The following are elements of an overall process, which can help prevent the cancer of corruption from invading a law enforcement agency:

- Recruiting individuals with high integrity and a solid value system.
- Conducting comprehensive background investigations using polygraphs and psychological examinations to screen candidates.
- Establishing a functional internal affairs process, which sanctions misconduct.
- Holding management and supervisors accountable for corruption.
- Providing leadership, which promotes integrity and value driven decision making.
- Establishing policies and procedures in high liability areas, such as use of informants and evidence handling, which minimize the opportunity for corruption.
- Managing the agency culture emphasizing a high ethical standard.
- Ethics training at all levels.
- Covert integrity checks when the need arises.
- Specifically define prohibited acts.

Conclusion

It cannot be overemphasized that covert sting investigations are a double-edged sword that can destroy a department's morale if conducted in a reckless and unethical manner. As previously mentioned, sting or staged scenarios should be conducted only with the full authorization of the agency head.

While there are no established ethical standards that apply to every potential proactive case, the decision of when to proceed should be reflective of the department's philosophy toward corruption issues. Staging random set-ups to

determine if misconduct is occurring absent prior specific information, can be devastating when exposed to the honest rank-and-file officers who were targeted.

While proactive targeting of police officers may be distasteful, it is arguably very often the most effective method of building a strong case against a corrupt officer. The chief of the agency must determine under what circumstances this action would be appropriate and ensure that his/her philosophy is strictly being adhered to.

When a pattern of misconduct is identified, it is better to test the officer's integrity than to ignore the existence of potential corruption. The question each agency head has to resolve is how strong the corruption indicators must be before he/she is willing to authorize a covert sting investigation. This is clearly an extraordinary investigative technique and its utilization should be limited to the most extreme circumstances.

This issue is only raised to provoke discussion and thought by the chief and his/her command staff so that some guidelines become established and ethical considerations take place. Absent a history of misconduct in an agency, subjecting the honest majority of police officers to random entrapment situations is not only distasteful, but unprofessional and should be avoided.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*

ⁱ MN. Statute 626.89 Peace Officer Discipline Procedures Act (2013), subd. 11. Disclosure of financial records. No employer may require an officer to produce or disclose the officer's personal financial records except pursuant to a valid warrant or subpoena.

ⁱⁱ *Sting Operations, Undercover Agents and Entrapment*, Bruce Hay, Harvard Law School, 2003.

ⁱⁱⁱ *Jacobson v. United States*, 503 U.S. 540, 553-554 (1992).

^{iv} <http://law.jrank.org/pages/1091/Entrapment-two-approaches-entrapment.html>>Entrapment-The Two Approaches To Entrapment