De-escalation in Contemporary Policing: A Primer for Defending Claims

(Session: De-Escalation - We Got Your De-Escalation and the Consent Decree It Rode in On)

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Ken Wallentine is the Chief of Police for the City of West Jordan, Utah, one of the busier cities in the valley metropolitan area. An attorney for 31 years and police officer for 40, he is the former Chief of Law Enforcement for the Utah Attorney General. Chief Wallentine formerly served as Bureau Chief of the POST Investigations Bureau and as Administrative Counsel for Utah Department of Public Safety. He is the President of the Utah Chiefs of Police Association and the Chair of the Salt Lake County Officer-Involved Critical Incident Investigation Board.

Chief Wallentine consults on use of force issues nationally and has served as an expert witness in various state and federal courts. As Senior Legal Advisor for Lexipol, he has helped craft police operational policies for thousands of agencies in the United States. He has served as an expert witness in numerous use of force cases involving claims of officers’ alleged failure to de-escalate and an agency’s alleged de-escalation training deficiencies.

Utah Governor, Gary Herbert, selected Chief Wallentine for the Governor’s Leadership in Public Service award for his work in public safety leadership. He was named America’s Police Chief of the Year by DARE International in 2021. Chief Wallentine is a member of the Advisory Board of the Association of Force Investigators and a member of the Board of Directors of the Institute for Prevention of In-Custody Death. In 2017 he completed post-graduate studies to achieve certification as an Advanced Force Science Analyst®.

Chief Wallentine is the editor of Xiphos, a nationally distributed digital monthly newsletter updating officers on criminal procedure and liability developments, now in its 23rd year. His desk book on criminal procedure, Street Legal: A Guide for Police, Prosecutors & Defenders, 2nd Edition, was published by the American Bar Association Publishing Company and is widely used in law schools and criminal justice programs. His most recent book, Preparing for an Active Shooter Threat, was published by Blue360 Publishing in 2020.

Chief Wallentine is part of a historic and colorful line of law enforcement officers including sheriffs, deputy sheriffs, city police officers and deputy U.S. Marshals stretching back to 1869. He is the father of a deputy sheriff and a federal special agent. He can often be found riding his Harley-Davidson motorcycle throughout the West.
Introduction

The landscape of policing in America has shifted cataclysmically over the last few years. We have all been impacted in some way by what happened to George Floyd and the fallout will continue indefinitely. Right now the courts are very attuned to current police use of force practices and starting to ask whether officers attempted to de-escalate a conflict.

Police leaders can have a tremendous influence in shifting the culture of force, in some part by strengthening our training and policies of de-escalation. Police leaders, scholars, public attorneys and those who defend civil rights litigation also have a duty to speak truth and remind society about the truly rare use of deadly force. Police use physical force (beyond mere handcuffing) in only 0.3% of all police-citizen contacts. And deadly force results in only 0.003% of all contacts, nearly always in situations where the officer’s life is at immediate peril. The Washington Post reports that approximately 87% of the 5,134 persons fatally shot by police since 2015 possessed a deadly weapon and most who had firearms posed a direct and immediate threat to officers.

The National Consensus Policy on Use of Force states: “An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his training whenever possible and appropriate before resorting to force and to reduce the need for force.” In a similar approach, the Final Report of the President’s Task Force on 21st Century Policing suggests that law enforcement agency policies for training on use of force should emphasize de-escalation where appropriate. The Final Report also proposes that policies should address procedures for implementing a layered response to mass demonstrations that prioritize de-escalation, and that basic recruit training must include tactical and operations training on lethal and non-lethal use of force with an emphasis on de-escalation and tactical retreat skills.

De-escalation issues in a civil rights claim

Up to a generation ago, police use of force training focused nearly exclusively on how to use force, and more intently, police marksmanship. Much in the same way that some courts are now posing questions about police agencies’ de-escalation training, a few courts in the 1970s and 1980s questioned the relevancy of 1940s combat marksmanship training where officers stood in a line, one hand on the hip and another hand extended to fire the revolver. Like many other subtle and not-so-subtle changes to police training and policy, this highlights the fact that police department training policies are never done evolving.

In one case speaking to the need to change, a police department offered no low-light training, no use of moving targets and no instruction on shooting in a residential area. The court encouraged the shift to scenario-based decision-making use of force training. Popow v. Margate, 476 F.Supp. 1237 (D. N.J. 1979). See also Zuchel v. Denver, 997 F.2d 730 (10th Cir. 1993) (Denver was deliberately indifferent when it failed to change its police training despite six deadly force incidents within a six-week time period, and despite repeated requests by the district attorney for new training.)
In my work as an independent force investigator and police practices expert, I have noted a marked increase in “failure to de-escalate” and “failure to train in de-escalation” claims woven into civil rights complaints. A slow tide of court decisions is examining the adequacy of police use of force training that does not include de-escalation training. In Valdez v. City of Philadelphia, 2016 WL 2646667 (E.D. Penn. 2016), the plaintiff claimed that an officer banged on his car window as he was seated at a gas station. He alleged that officers broke out the window, dragged him out of the car and beat him. The officers testified that they found him passed out, opened the car door and removed a syringe and drugs. When an officer shook Valdez to wake him, Valdez suddenly punched at the officer. The officer deployed a TASER, retreated and shut the car door. An officer broke the car window to assist with controlling Valdez. Valdez sued, claiming that the police department lacked adequate training in de-escalation tactics. The court held that there was enough evidence that a reasonable jury could determine that the agency’s failure to train constituted deliberate indifference. The court particularly emphasized a U.S. Department of Justice finding that the police department failed to provide consistent training in its use of force policies. Thus, the court denied the city’s motion to dismiss and let a jury consider the adequacy of de-escalation training in the police department.

One plaintiff cited several examples of outside police agencies that provided de-escalation training and their positive outcomes to support a claim of deliberate indifference when his local police department failed to train its officers in de-escalation techniques. The court refused the defendants’ motion to dismiss the claim. Sanchez v. Gomez, 283 F.Supp.3d 524 (W.D. Tex. 2017). See also Ramirez v. Escajeda, 298 F.Supp.3d 933 (W.D. Tex. 2018) (allegation of failure to provide de-escalation training states a cognizable claim for relief, denying dismissal on the pleadings).

A few states, such as Minnesota, are mandating de-escalation training in the face of major incidents and resulting litigation. After the Philando Castille shooting, the Minnesota Legislature passed legislation that required Minnesota police training officials to train every one of the state’s nearly 11,000 police officers in de-escalation techniques for at least 16 hours and allocated six million dollars to pay for the training. The Minnesota Board of Peace Officer Standards and Training estimated that it may take five years to deliver the training to all incumbent officers. Many agencies voluntarily and proactively provide de-escalation training for their street officers, including police departments in New York, Chicago, Dallas and Las Vegas. Other departments, such as Ferguson, Missouri, are requiring officers to receive de-escalation training under a consent decree with the U.S. Department of Justice.

Some early statistics suggest that de-escalation is effective in reducing force. Obviously, less force means less liability and litigation, potentially saving scarce budget dollars available for core policing needs. The Dallas Police Department reported an 18% drop in use of force the year after it instituted de-escalation training. Dallas has also seen a dramatic decrease in excessive force complaints against its officers—83% since 2010. Just four years after rolling out de-
escalation training, Las Vegas Metro Police reported a 50% reduction in officer-involved shootings. Coincidence or causation? We don’t yet know; better research may tell us.

Other research examining metropolitan police agencies found that those agencies with de-escalation policies had a higher numbers of officers killed or assaulted. Again, however, this is research that shows correlation, not causation. One must be very careful to jump to conclusions about de-escalation outcomes. Police leaders also recognize that there are also significant changes in the police applicant pool—police are increasingly recruiting from applicants who have grown up in a world that does not foster interpersonal communication skills as much as 25 or 50 years ago. Perhaps those hiring new police recruits incorrectly attribute social and interpersonal skills to the recruits that simply aren’t there. A recruit who grew up exercise thumbs on text messages and gaming controls may need more rudimentary communications training as a premise to de-escalation training.

What does de-escalation mean? Do we have a common understanding?

“De-escalation” in the policing context does not now, and may never, have a unitary definition. To some, de-escalating simply means slowing down a response. To others, de-escalation may mean trying to calm tense situations or emotionally aroused persons. Noted police writer, David Griffith, defines de-escalation as “the result of a combination of communication, empathy, instinct, and sound officer safety tactics.” D. Griffith, De-Escalation Training: Learning to Back Off, POLICE Magazine, Mar. 2, 2016. Many assume that de-escalation training has everything to do with training officers to manage heightened emotional responses when encountering a tense situation. It is certainly true that an officer cannot effectively de-escalate a crisis encounter if the officer cannot de-escalate himself.

There is nothing new about police de-escalating crises. Street officers have been calming bar fights, talking subjects into handcuffs, and soothing domestic battles for decades. In most cases officers skilled at de-escalation didn’t have any specialized training, instead they intuitively practiced the principles presented in modern de-escalation training.

Defining de-escalation may be like describing an attitude. Perhaps you will know it when you see it, or not. It is more helpful to describe essential behaviors. You can’t demand or be accountable for what you can’t describe. If it can be achieved, it can be seen. If it can be seen, it can be described. If can be described, it can be measured. At my police department, rather than wrestle with a new definition the department takes the approach of describing the essential behaviors of de-escalation. Following is my department’s de-escalation policy:

DE-ESCALATION

When circumstances reasonably permit, officers should use non-violent strategies and techniques to decrease the intensity of a situation, allowing time to improve decision-making, improve communication, reduce the need for force, and increase voluntary compliance (e.g., summoning additional resources, formulating a plan, attempting verbal
persuasion, slowing down the pace of an incident; waiting out subjects; creating distance between the officer and the threat; and requesting additional resources (e.g., Mobile Crisis Outreach Teams, CIT-trained officers)).

Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation. Officers should consider a variety of options, including lesser force or no force options.

Officers should continue de-escalation techniques, when feasible and appropriate, and take the time reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use force.

Officers should consider that taking no action or passively monitoring the situation may be the most reasonable response to a mental health crisis.

Once it is determined that a situation is a mental health crisis and immediate safety concerns have been addressed, responding members should be aware of the following considerations and should generally:

- Evaluate safety conditions.
- Introduce themselves and attempt to obtain the person’s name.
- Be patient, polite, calm, courteous and avoid overreacting.
- Speak and move slowly and in a non-threatening manner.
- Moderate the level of direct eye contact.
- Remove distractions or disruptive people from the area.
- Demonstrate active listening skills (e.g., summarize the person’s verbal communication).
- Provide for sufficient avenues of retreat or escape should the situation become volatile.

Responding officers generally should not:

- Use stances or tactics that can be interpreted as aggressive.
- Allow others to interrupt or engage the person.
- Corner a person who is not believed to be armed, violent or suicidal.
- Argue, speak with a raised voice, or use threats to obtain compliance.

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**What de-escalation doesn’t mean**

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Discussions and prescriptions of de-escalation have largely happened outside of an evidence-based approach. There is much that we have yet to learn about what de-escalation means and best practices for de-escalation. De-escalation doesn’t mean giving up reasonably achievable safety. De-escalation isn’t appropriate for every situation. De-escalation doesn’t mean that public safety isn’t our top priority. De-escalation isn’t a self-contained technique. De-escalation isn’t a substitute for good tactics. In fact, many experts assert that de-escalation can’t happen without tactical superiority.

Finally, de-escalation isn’t the absence of force. Sometimes, a strong presence of potential force or a quick, decisive use of force absolutely prevents the need for much greater force and the probability of serious injury. De-escalation doesn’t mean that force won’t be used when the circumstances reasonably require force.

**Does de-escalation include not responding at all?**

When the police show up, officers bring uniforms, guns, TASERs®, pepper spray, and perhaps some unknown factor that triggers an escalation by the subject. Declining to respond may be declining to escalate and declining to precipitate a crisis. Perhaps police can take a page from Hippocrates and vow to “first, do no harm” and sometimes let a crisis run its own course. But police, by their very nature and training, have the urge to “do something!”

More agencies are encouraging officers to step back on calls where there is not a genuinely urgent emergency, attempting to “buy time” for a reasoned assessment of the circumstances and the best response. Particularly in cases of threatened suicide officers are being taught that—contrary to the urge to do something—there is no legal duty to keep a person from harming himself. This line of training prompts officers to ask:

- Is there a crime?
- If not, what are we doing here?
- What is the objective?
- What are the costs of achieving the objective?
- What is the legal duty?
- Do we have authority to force entry or effect custody?
- What do we hope to accomplish with force?

Officers know that calls involving suicidal persons can quickly morph from suicidal to homicidal. So-called “suicide by cop” accounted for as many as 11% of all officer-involved shootings in a ten-year study in Los Angeles County. The mere presence of police could provoke a police-assisted suicide response.

Perhaps the most promising de-escalation tactic in such cases is “tactical withdrawal” or “tactical repositioning.” Once the officers arrive and determine that the only one threatened is the subject with the weapon, it may be appropriate to tactically reposition and, in appropriate cases, make a mental health service referral. What initially seems like an emergency may well be a situation
affording time to seek a warrant, or perhaps a court order for mental health evaluation. One court explicitly rejected the claim that officers have a duty to prevent a suicide in such situations. *Adams v. City of Fremont*, 80 Cal.Rptr.2d 196 (Cal. App. 1998). Tactical withdrawal requires the harsh recognition that the subject may harm himself after police leave. *See* K. Wallentine, *Mitigating Suicide Threat Response Risks*, Police Chief, V. 86, No. 3 (2019); K. Wallentine, *Should I Stay or Should I Go?*, POLICE, October 2017.

A word of caution for those who enter in and then back away: though there is no duty to prevent a suicide, once having initiated an intervention, officers are obligated to use constitutionally reasonable tactics and force. In *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), the California Supreme Court relied on *Adams v. Fremont*, supra, to make it very clear that there will be no liability if officers allow a subject to commit suicide. However, the court said if the officers end up killing the suspect (i.e. suicide by cop), a jury will be permitted to consider whether the officers used “negligent tactics.” The court explained the difference between Fourth Amendment law and California negligence law regarding use of deadly force. Fourth Amendment law tends to focus on the moment when deadly force is used. California law considers the totality of circumstances surrounding any use of deadly force. *See also Munoz v. City of Union City*, 120 Cal.App.4th 1077 (2004).

**Effective de-escalation training**

De-escalation training should begin with a solid understanding of bedrock constitutional policing principles. Officers well-versed in the limitations on police power, who are trained and disciplined to understand that the lawfulness of an action or encounter is only the beginning, must ensure that their subsequent actions are, in fact, necessary. An officer who gains a thorough understanding of the seizure doctrine of the Fourth Amendment is often the officer who is less likely to effect a seizure when persuasion and negotiation are possible. Teaching and rewarding officers to seek legitimacy and practice equity and respect in every encounter often precludes escalation. In some police agencies, this may mean a watershed shift in department culture.

Adding to the foundation of constitutional policing and the pursuit of police legitimacy, officers should be schooled in minimal tactical prerequisites to de-escalation. Use of force consultant and attorney, Von Kliem, defines these tactical prerequisites as Containment, Control, Contact, and Communication. *See* V. Kliem, 4 Conditions for Effective De-Escalation, [https://www.lexipol.com/resources/blog/4-conditions-for-effective-de-escalation/](https://www.lexipol.com/resources/blog/4-conditions-for-effective-de-escalation/) May 20, 2020.

Containment means establishing a “zone of safety” in which the officer can operate and limit the subject’s movements. A contained subject is less able to launch a surprise attack against the officer or others. A contained subject is also less likely to flee. Control involves depriving the subject of access to weapons, access to victims, and preventing flight (and the certain and dangerous pursuit that would follow). Containment and Control are nearly always absolute pre-requisites to attempting de-escalation.
Contact simply means that the subject is able and willing to engage in dialogue with the officer (and that the officer is willing and competent to engage in de-escalating conversation with the subject!) Contact may not be possible, or may be less effective, when impaired by the influence of alcohol or drugs, mental or emotional barriers, or language barriers. Communication is the bridge to effective de-escalation once the first three pre-requisites have been satisfied. Teaching communications theories and tools comprise the core of de-escalation training.

The West Jordan Police Department has a corps of skilled facilitators who provide de-escalation to all new officers and in regular, mandatory in-service training. The Department uses the IADLEST National Certification Program-certified Realistic De-Escalation course developed by the Force Science® Institute. The Realistic De-Escalation Course dissects the complex concept of de-escalation and teaches concepts and methods that support de-escalation efforts when personal connections can be made between officers and subjects. Officers learn which tactics are needed or likely to be successful in a particular de-escalation process.

West Jordan Police Department de-escalation program elements include:

- Building on a foundation of constitutional policing, equity and police legitimacy.
- Teaching officers to assess and identify circumstances in which de-escalation is and is not an option.
- Rapid assessment of situation risk and tactical principles of de-escalation and decision-making; understanding that the proper assessment leads to the use of the most appropriate tools.
- Apply the Force Science Institute's “Response-ability Zone” and “Seven Ts De-Escalation Evaluation Model (Thought, Threat, Time, Travel, Tactics, Talk, Training).
- Application of the Thought/Emotion/Behavior Matrix to quickly recognize whether a subject is in a conflict, crisis or contaminated thinking state and understand which persuasion strategies will be most effective to address the subject’s thinking.
- Use of active listening and the appropriate questioning style to cognitively engage a subject in crisis.
- Recognize and avoid common communication barriers commonly unintentionally used by officers (and others).
- Ensuring officer self-regulation and emotional control in order for involved officers to maintain rational thinking processes throughout the encounter.

In addition to training officers in crisis communication and non-coercive de-escalation techniques, the West Jordan Police Department introduced outward thinking principles through adapting the Arbinger Institute’s Developing and Implementing an Outward Mindset courses. See https://vimeo.com/554921677/4c53995490. The Department promotes the motto “You matter like I matter,” a principle taught by the Arbinger Institute in its programs for business leaders of Fortune 500 companies. West Jordan Police Department recruits read and discuss The Anatomy of Peace and Leadership and the Art of Self-Deception in their pre-service academy and
during coursework in the Outward Mindset program. The impacts that officers make by building relationships, seeing people as people, and having conversations with them is visible within the department.

West Jordan Police Department officers were among the first to complete the Street Smart De-escalation program developed by myself in cooperation with the Utah Attorney General Training Center and CIT-Utah. Officers learned legal decision-making principles discussed above, tactical principles, communications strategies and tools for particular situations and populations. The same officers subsequently participated in the Best of State Award-winning Autism Awareness training to further develop de-escalation skills when dealing with persons affected by autism. The training features classroom training, interaction with persons and family members affected by autism, role play, and intense practice and testing in a VirTra® 300 virtual reality simulator.

Conclusion

Does de-escalation work? While we wait for researchers to design, complete and publish studies that identify evidence-based best practices, individual and collective experience signals success. My own police department has measured a notable decline in its use of force rates. Even as arrests and jail bookings grow steadily, coercive force drops. As in major metropolises like Las Vegas and Dallas, a broad program of teaching and demanding de-escalation efforts seems to be the explanation.