

TESTIFYING AS A SWAT TRAINER

BY KEVAN DUGAN

I recently spoke with a colleague who told me that he was asked, during a deposition, if he was a “certified SWAT instructor.” Not certain of the existence of such a certification, he approached me as an NTOA director and instructor. I was not aware of any courses that were available, but I knew that the subject had been raised before and discussed with other NTOA directors, and due to the ambiguous nature of what a SWAT instructor’s job entailed, creation of a certification had been deemed unlikely to succeed.

At a recent NTOA board meeting, I presented this issue to my fellow directors. They, too, did not know of any SWAT instructor certification classification, and we briefly discussed the difficulties that would be encountered in developing an instructor certification course. The question of what a certified SWAT instructor’s job requirements are was raised as well.

This article will examine the term “SWAT instructor,” with a focus on preparing for defense testimony in court or at a deposition. Words are easy to misinterpret and misrepresent, as any officer who has been on the stand would likely agree. Our task, then, is to define our instructor responsibilities as they relate to SWAT, including training records and communication skills, and to offer suggestions on providing coherent, impossible-to-misinterpret testimony.

DEFINING THE TERM “SWAT INSTRUCTOR”

The dictionary defines an instructor as simply “a person who instructs or teaches.” He or she is someone who furnishes knowledge on a subject, hopefully by using a systematic method that enlightens, educates and ensures comprehension. I think we can agree that this part of the term is straightforward, easily understood and unambiguous. A standard dictionary defines SWAT as “a special section of some law enforcement agencies trained and equipped to deal with especially dangerous and violent situations, as when hostages are being held.” While a fair definition, the one set forth in the September 2011 edition of the NTOA SWAT Standards for Law Enforcement Agencies is more comprehensive:

“A Special Weapons and Tactics (SWAT) team is a designated law enforcement team whose members are recruited, selected, trained, equipped and assigned to resolve critical incidents involving a threat to public safety which would otherwise exceed the capabilities of traditional law enforcement first responders and/or investigative units.”

So, on its face, a “SWAT instructor” would be a *person who teaches the recruitment, selection, training, equipping and task assignments of those law enforcement members who are responsible for resolving critical incidents that exceed the capabilities of first responders and/or investigative units.* When you consider the breadth of each of these areas, you can appreciate the complexity and challenges associated with putting together a training program for a SWAT instructor, if it is even possible. In reality, we know that a successful recruiting, selection and training program is administered by several competent members of the tactical team. It is a cadre of instructors,

not a sole instructor, that ensures officers in the program are properly educated in the required skills that enable them to resolve the critical incidents they will face. Each of these instructors are selected by their departments and, over their careers, sent to training to enhance their knowledge, receive certifications or learn new skills with the objective of paying forward their experience and expertise.

A well-trained cadre of instructors benefits us in another way. It provides our departments with a source of experts to help defend the team’s tactics, methodologies or use of specific safety-enhancing tools such as diversionary devices, ECWs¹, chemical agents and explosive breaching, among others, and to give sworn testimony to explain or clarify our actions.

While your team may go for years without a legal challenge, when it occurs, your department will expect to reap the benefits of their investment in your training. If you happen to be one of these officers, part of your department’s defense equation will rely on you establishing your background, qualifications and experience. For those of you who are excellent communicators with a well-maintained and up-to-date personal training file, the rest of this article may only be validation of your methods. For others who might lack in one of these areas, the following is an outline of recommendations to enable you to establish your credentials and defend your team’s actions against an aggressive attorney who asks you to explain your methodologies or requests your “SWAT instructor” certification.

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TRAINING FILES

In most agencies, officers become eligible for selection to a team only after they have a few years in the department. Once selected, another period of time passes before they are eligible for a training position. The end result is that they have received a substantial amount of training prior to the need to testify to their background.

In a perfect world, all this training would have been documented and stored in departmental training files. In the real world, it is possible that the officer personally paid for

training that did not find its way into the department files, or received instruction that did not come with an official training certificate. Perhaps, as an example, the officer slipped into an open training seat offered to him by a neighboring team. This can be documented not only by his team, but verified on the other team's training report as well. While not as strong as a certificate bearing his name, this documentation shows that the department or individual officer is seeking training opportunities, even during times of anemic training budgets.

While the responsibility to ensure a personal training file is properly maintained should fall on the individual officer, the team commander should have a mechanism to ensure that all training is captured as well.² The best system would be a central department repository for all the training an officer received, department-sponsored or not. The officer should also keep his own redundant file as insurance against lost or misplaced records. A computer document listing the training in chronological order would be useful for ease of retrieval and review during testimony preparations.

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COMMUNICATION SKILLS

Testing for or verifying communicative abilities is part of the selection process for many teams. It is recognized as an important trait for a new SWAT officer to have, especially during the initial training and education process. However, we know it is a critical skill to possess during an operation in regards to receiving, understanding, conveying and carrying out the commander's intent. But after the operation is long over, skilled communication can be equally critical when the officer is attempting to paint a picture of what occurred to a jury panel that has little to no frame of reference for that which is being described. Communicative ability can be developed and improved, and like all skill improvement, it requires a training plan and time on task.

There are many resources and massive amounts of information available to improve your ability to communicate and connect with listeners. Many of these resources reiterate the same skeletal plan:

1. Determine your message or the objective you want to convey. Be clear in your stated message, using terms that are understandable to your listener.
2. Present your message in a concise manner, devoid of unnecessary filler words. Avoid repetition; a well-stated message does not need to be repeated in three different ways. Do not present several ideas at once. Focus on getting one message understood before moving on to the next. Your goal is to leave them no room for interpretations or assumptions. If it is clear the first time, there is no need to repeat it, and moreover, the more you talk, the more is available for examination by the other side.
3. Ensure your message is obvious. Do not overwhelm them, but guarantee that important details and vivid facts are presented. Guard against the use of technical terms unless you can clearly and competently explain them.

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4. What you say needs to be correct — *everything* — even down to names, weather, clothing, location of furniture, height of fences, etc. While perceptual differences will occur between witnesses, truth is king. This is not to infer that anyone would purposely be untruthful, but preparation and research ensure correctness and truth will be presented in your testimony. Bad case law can be borne of improper judicial decisions, representation by unqualified attorneys, failure to provide expert testimony, having an unqualified expert witness or poor reporting. Do not add poor testimony about appropriate police action to the list.

5. Ensure continuity. As you link all your messages together, it needs to form a coherent block of information that comes as close as possible to transporting the listener into the event described or enabling them to visualize the flow-chart of your decision-making process at that time.

GAME-PLANNING YOUR TESTIMONY

As a normal course of business, SWAT plans everything in fine detail — warrant services, training days, even equipment replacement cycles. Adopt the same mindset when planning your testimony. Think of it as your operational plan. Make a list of

everything you need to review prior to testimony, and methodically check them off as you review them.

A note of caution: anything you write down in preparation could become discoverable material. If the preparation is done on your own, simply discard the notes afterwards. If, however, you are preparing notes under the advice of an attorney, write the following phrase at the top of the first page: “These notes are drafted at the direction of my attorney, Mr. John Doe, and are considered to be protected as privileged and confidential.”

Imagine you are defending your methodology or actions during an operation. Following within the context of an operational plan, revisiting the site can be beneficial. Just keep in mind that some things may have changed. If a site visit is not possible, a review of any recon video and photographs will help to refresh your memory and make it easier for you to relate the scene to the jury or answer questions.

Also examine any drawings in the file or photos of the whiteboard that depict the scene. As you review, make a mental note of any geographical or environmental factors that entered into the decision-making process in regard to team actions. Note any irregularities between the drawings and the actual

WHEN YOU NEED TO SEE

ACTIONABLE VISUAL INTELLIGENCE (AVI)



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How many?
What type of arms?
Positioning?

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photos and then imagine any questions you may be asked in this regard and determine how you will respond.

Review the command post log and individual officer reports for timelines and essential elements of information that motivated actions or formed beliefs at that time. If any part of the operation was captured by a patrol vehicle's mobile video recorder, operator cameras, the suspect's surveillance system or the media, make every effort to obtain and analyze it. A video can corroborate actions and officer's verbal commands. However, it can also provide the plaintiff's attorney with an opportunity to exploit differences.



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During your review of the video, if you see an event discrepancy that can give the other side a chance to impeach your testimony, plan your responses around case law and attempt to challenge any assumptions that the plaintiff's attorney will try to make. Remember that *Graham v. Connor* has provided law enforcement with one of the fairest decisions in regard to how our actions are to be judged. If you are aware of any video that will be used to represent the event from

the "officer's perspective," ensure that your department attorney tries to limit the jury's exposure to only one viewing, straight through, from beginning to end. Any repeated viewing, or stopping and starting, is in direct contradiction to *Graham*.

The assumption that the camera captures what the officer saw is not accurate. It captures that to which the lens is pointing, and no more. Further, the camera records the event in two dimensions and is devoid of the perceptual changes influenced by an officer's perceived risk from the threat and his perceived time available to respond.³

Evaluate any case law that may have application to the alleged misconduct and use it to help formulate your defense position. Maintaining a case law file is as important as maintaining your training file. Ongoing collection and electronic logging of pertinent cases as they are decided makes it easy to immediately search and retrieve those that are relative. SWAT no longer is a new concept, so many court decisions are based upon established previous SWAT activity.

Cases exist on excessive force, diversionary devices, explosive breaching, ECWs, use of chemical agents, less-lethal munitions, restraints, emotionally disturbed persons and more.⁴ Search those cases for similarities to your operation and then research the case itself. Discovering how those officers testified and uncovering what approach the plaintiff's attorney took can pay big dividends in your planning.

Often neglected during testimony preparation is the review of training files that pertain to operational actions. Be prepared to answer how many times you trained for this eventuality, who provided the training and the qualifications of the instructor, as well as examples to show that the training is contemporary in the SWAT world.

(As an aside, you should review your training files to ensure that what is captured on paper is reflective of the actual training.)

The training officer should be descriptive when filling out the report. Training scenarios, especially, should be described in detail to provide an account of what event is trying to be replicated and the conditions under which the replication is portrayed.⁵ The training report should include weather conditions, time of day, location (indoors or outside), type of weapon the role-player had, whether a criminal or emotionally disturbed person was being portrayed, etc. The more details the better.

While we can never anticipate all possible scenarios, we need to properly document and take credit for the scenarios that we develop and for which we train. It provides us with a written record to produce when asked and it reflects the professionalism and preparedness of the team in a positive manner.

Review your department policies, team policies and SOPs as they pertain to the action in question. Compare them against training files if the policy or SOP dictates that an officer will do something on a regular basis. For instance, if the policy states that each officer must qualify twice a year with a certain weapon or munition, did that officer in fact do so? If not, why? It is better to find these discrepancies now and prepare a response than to find out about it after you testified that your team always follows policy.

Finally, rehearse and memorize concise answers to predictable questions such as why one course of action was chosen instead of another. In another example, if the allegation is an excessive force complaint for use of a diversionary device, be prepared to describe what the device is, why it is used by law enforcement, what your team's

policy is on use, what team training is done in association with the device and why it was used that day. It is better to develop these answers in a calm atmosphere with an unstressed mindset than to come up with a hastily assembled response the day you are asked on the stand or during a deposition.

TESTIMONY REHEARSAL AND CRITIQUE

One of the most important and often overlooked points in communication is listening during the testimony process. We can become so focused on our message that we don't always give our full attention to what the question is. There is a specific reason behind every question you are asked by a well-prepared plaintiff's attorney. Take your time in responding. Consider not only your answer but why the question may have been asked. Think about the direction in which the question or questions are leading.

Pay attention to the non-verbal gestures of the plaintiff's attorneys. Their conflicting signals may give you an edge in preparing for the next question or clue you in to discerning their level of frustration with your answers. Tempo is as important here as in an operation. Taking time to contemplate your answer and analyze the direction of the questioning can have an impact on the tempo that the plaintiff's attorney is trying to establish. While our intent is to have a prepared answer to any question, remember that it is acceptable to say "I don't know" when presented with an unanticipated question for which you do not have the information. An even better response may be, "I don't have knowledge of that and don't want to give incorrect information."

Rehearse your testimony by role-playing with your department's attorney or another officer. This rehearsal

will help you manage your stress and emotional response. Remember, on game day, you want to respond, not react to the questions.

You can practice testifying as part of annual training. Record this as you would any other training and critique yourself afterward. While reviewing the tape, remain cognizant of your non-verbal communication, especially your tone of voice, your affect, your body posture and any conflicting signals, such as shaking your head "no" while verbally answering the question "yes."



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PREPARATION, FROM START TO FINISH

Our approach to defending our training backgrounds, tactics and methodologies should be as well planned as any operation in which we intend to engage. We should develop a structured framework or process that enables us to proceed in an intelligent manner from the moment we are notified of litigation through testimony, and should include a critique of our performance after the process. By treating testimony preparation as an operation, we can more effectively define skills that are necessary for success and structure appropriate training to develop and improve these skills.

While you may have a vast amount of training and buckets full of certificates, this alone will not be of much assistance if you struggle with explaining your background and how it applies to the case in point. As American businessman Bernard Baruch stated, "The ability to express an idea is well nigh as important as the idea itself." ■

ABOUT THE AUTHOR

Capt. Kevan Dugan retired after 28 years with the Pennsylvania State Police where he was the director of the Tactical Operations Division, overseeing the canine, explosives and Special Emergency Response Team sections. He was a former member, team leader and coordinator for SERT. He is an Eastern Director of the NTOA's Board of Directors and a former NTOA Section Chair of the Commander's Section. He can be reached at sertwest@verizon.net.

ENDNOTES:

1. Electronic control weapons, including Tasers.
2. From personal experience, while our team maintained a file for all the training to which we sent officers, this information was not necessarily captured in their department-wide training file until an internal regulation was changed in 2005.
3. Have your department attorney review Force Science Research Center newsletter #145. It contains a printable Video Advisory that may be beneficial.
4. Staying current on legal cases may actually prevent lawsuits since this knowledge can be incorporated into planning decisions and/or training scenarios.
5. While assisting in the defense of a team in the Northeast, the prosecuting attorney asked me how many times the team had done scenarios that involved an EDP, armed with a knife, outside, at night.