

# TACTICAL OPERATIONS LIABILITY: Are you meeting the requirements?

By Eric P. Daigle, Esq.

Over the past decade, the use of tactical operation teams to conduct high-risk warrant entries has significantly increased. Agencies using tactical teams must ensure that the teams have adequate resources and proper support in order to proceed safely and without resulting liability. This article will explore best practices in the use of tactical operation teams, specifically in situations such as high-risk entries of premises during warrant service and related activities.

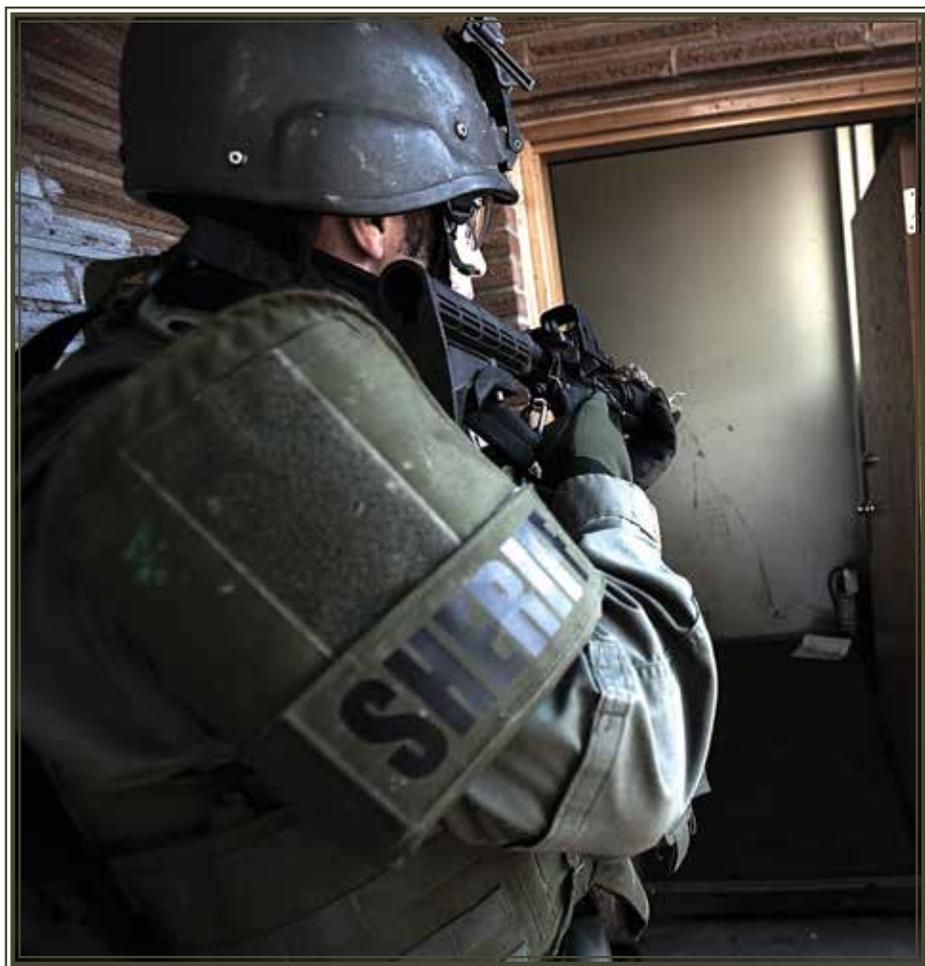
The term *high-risk* generally refers to a situation where the entry poses a risk to law enforcement officers, the occupants of the premises, and/or third parties. In order to justify the risk, law enforcement officers must obtain articulable intelligence and supporting information during a pre-raid investigation. Possible danger to law enforcement officers in these situations can be assessed by examining factors such as weapon availability, past history of occupants, environmental conditions,

geographic conditions and the presence of dogs.

Liability analysis regarding the use of tactical operation teams is a necessary requirement for command staff. This analysis requires particular attention to the operation, training and application of tactical teams. The agency should first analyze whether it has the necessary resources available for proper support of the team. Proper and adequate personnel, training and equipment are essential; without them, the agency would be open to liability.

One factor that should be considered is whether an agency has sufficient personnel to provide an appropriate number of candidates to enable a meaningful selection process. The selection process should contain requirements for candidates' physical ability, firearms capability and situational reasoning. If the agency does not have adequate resources, or resources are strained, it should consider joining with other agencies to form a regional team. Sharing of resources can easily be accomplished with a memorandum of understanding between the agencies.

Another factor that should be considered when analyzing liability is the agency's required training for team members. In *McCracken v. Freed*<sup>1</sup>, the Federal District Court in Pennsylvania analyzed whether the use of, and methods employed by, a tactical team to execute a high-risk warrant constituted excessive force. In *McCracken*, a regional tactical team was used to execute several arrest warrants on the plaintiff, a violent felon. During the execution of



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the warrants the tactical team created a diversion at the front of the residence and entered through the rear. McCracken was arrested without incident and treated for superficial injuries, including exposure to pepper spray.

The court explored the sufficiency of the team's training and policies as a basis for liability. In examining the training requirements, the court found that it was reasonable for team members to complete a 40-hour initial training program and participate in ongoing 16-hour, monthly in-service trainings. The regional team members were also sent to schools based upon individual assignments, such as those specific to the duties of long riflemen and K-9 officers. The court concluded that this training regimen was adequate for team members, thereby defeating the plaintiff's argument that team members were not properly trained.

The Court also analyzed whether the use of the tactical team itself was excessive force. The court considered information the chief had available to him when he made the decision to activate the team, and concluded that the use of the team was reasonable. This conclusion was based upon articulable information including McCracken's criminal history, two outstanding felony arrest warrants and other facts within the chief's personal knowledge. The court warned that "the decision to activate a tactical team can constitute excessive force if it is not objectively reasonable in light of the totality of the circumstances."

Lastly, the court examined policies governing the tactical operations of the team. The court found it appropri-

ate that a tactical team should have a policy to govern the command and operation of the team, as well as its use-of-force standards. As a result of the *McCracken* decision, command staff at agencies who utilize tactical teams should ensure a clear policy that identifies particular situations when the team will be used and who has the authority to activate it.

The importance of clear policy and adequate training was also stressed in the case of *Neace v. City of Massillon, et al*<sup>2</sup>. In the *Neace* case, a drug raid was conducted, ultimately resulting in the shooting of Shay Neace. The police department did not activate their tactical team; instead, they gathered available officers, some of whom had no prior specific training, to conduct the raid. The *Neace* court found that the city's lack of policies and regimented training for conducting raids resulted in a defective raid with too few officers, some of whom were inadequately experienced. As such, even detectives who execute warrants on occasion without a tacti-



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In *Warren v. Reynolds*<sup>3</sup>, the Connecticut District Court addressed whether the decision to utilize tactical teams to execute a search warrant amounted to excessive force. In *Warren*, the plaintiffs filed a lawsuit against the Connecticut State Police (CSP) in connection with a search conducted at the Waterbury Outlaws Motorcycle Club (OMC) on Dec. 20, 2003. CSP was conducting a search at OMC for evidence of firearms violations and guns which they believed may have been stored at the clubhouse by Frank Nelson, the subject of the search warrant. CSP believed that Nelson served as the sergeant-at-arms for the club, a member who is known to carry a weapon or have weapons in close proximity. Furthermore, CSP obtained information from various sources — including both past and current members of the club — indicating that extreme precautions were necessary to conduct a search of the OMC clubhouse. CSP determined that the club’s practices, structure and propensity for violence made it necessary to use the CSP tactical team

to execute the warrant, particularly since only the tactical team had the equipment and training necessary to get past the club’s security measures.

The plaintiffs claim that the CSP’s decision to utilize the tactical team constituted excessive force, calling into question the reasonableness of the threat assessment posed by the club. The plaintiffs argued that it was unreasonable to ascribe the same reputation for violence and lawlessness to the Waterbury chapter of OMC as had been associated with the OMC in general.

The defendants argued that the decision to utilize the tactical team was objectively reasonable because the CSP, after extensive investigation into the practices of both the OMC in general and the Waterbury branch of the club, had knowledge regarding the OMC’s propensity for violence.

As part of its analysis, the District Court looked to *Holland v. Overdorff*, wherein the District Court for the Third Circuit held that “while the specific conduct of the SWAT team in that case gave rise to excessive force claims, the decision to use the SWAT team was not itself excessive as the defendants did not

“lack any plausible basis for believing that dynamic entry was warranted in [the] situation.”<sup>4</sup>

The District Court held that “[g]iven the nature of the violations that were the basis of the search warrant, and the voluntary association of the Waterbury OMC with the national OMC, it cannot be said that the decision to use the tactical team was excessive, or that the defendants ‘lacked any plausible basis’ for believing that its use was reasonable.”<sup>5</sup>

While the use of a tactical operation team is a highly effective law enforcement tool, it is necessary to ensure that team members have proper training, that sound governing policies are in place and that the decision to deploy the team rests on a sufficient analysis to justify its use. Only then will command staff and team members be protected from liability. ▮

## ENDNOTES

1. *McCracken v. Freed*, 2006 U.S. Dist. Lexis 924 (E.D. Pennsylvania 2006).
2. *Neace v. City of Massillon*, 2006 U.S. Dist. Lexis 65678 (N.D. Ohio Eastern Div. 2006).
3. 2006 WL 860998 (D. Conn.).
4. 268 F.3d 1179, 1191 (10th Cir. 2001) (emphasis added.)
5. *Warren*, 2006 WL 860998 at \*30. (emphasis added).

## ABOUT THE AUTHOR

Eric P. Daigle, Esq. practices civil litigation in federal and state court with an emphasis on defending municipalities and public officials. Mr. Daigle acts as legal advisor to police departments in Connecticut and across the country. Mr. Daigle is general counsel for the FBI Law Enforcement Executive Development Association and a member of its instructor cadre.

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