



Ethics Roll Call

To Champion the Nobility of Policing

WINTER 2014

Ethics Corner:

It is not often enough that we have the opportunity to put forth the insights of guest authors in this newsletter. For this edition we are delighted to be able to present two thinkers and practitioners that have some provocative and informative things to share with us. The first is Dr. G.M. Cox, the Chief of Police of Murphy, Texas who generously provides a rejoinder to my article concerning why sexual harassment is morally wrong. The second is Mr. Keith Howse, J.D., who has 35 years of experience in the public safety professions of security and law enforcement. I will quickly step aside to present the first of these two authors.

Retort to Dr. Dan Primozic's Sexual Harassment Discussion

By G.M. Cox

I found an interesting article on sexual harassment in December's *Ethics Roll Call*. I appreciate Dr. Primozic exploring the topic in such an imaginative way. As a way of further exploring this topic in light of his discussion, I have a few comments and observations as something of a retort to his thesis.

I am not sure I agree with the "self-evident truth" comparison, though, between what Jefferson meant in his eloquent words found in the preamble to the Declaration of Independence and sexual harassment – are all things called sexual harassment, really sexual harassment? Is sexual harassment a self-evident truth? In self-evident truth, I would suggest, there is no gray area, while in my experience there is a huge gray area in this arena. And, considering that Jefferson fathered children by at least one of his slaves –

I'm not sure he would pass muster in today's environment as to what is sexual harassment or the credibility of those words measured against the standard of *quid pro quo* or hostile work environment sexual harassment (that is if one can even get by the owner-slave issues).

Sexual harassment is without a doubt a very sensitive and prolific topic in today's workplace. Yet, even the Supreme Court finds considerable gray area in this topic as to give some wiggle room as to its interpretation and application. But what it has not been in the gray on is that sexual harassment, if the behavior is that, is totally unacceptable and will not be tolerated in the halls of justice in the United States. Much of what we believe about sexual harassment is contextual and content sensitive.

According to the courts, at two of three basic conditions, in many situations they all can exist, must be present to establish sexual harassment: a *quid pro quo* (this for that) situation or a hostile work environment. There is a third condition that must exist and that is that the arrangement is unwanted. However, like so many things in this arena, whether the situation is "wanted" is the subject of a great deal of interpretation and/or misunderstanding.

The *quid pro quo* situation requires a power relationship to exist, but in the top-down mode. The person harassing must have power over the harassed and the "victim" must have "felt" the power in the situation. The hostile work environment suggests that the victim is made to feel negatively because of his or herself and the conduct is related to his or her sex or about sex, generally. For instance, crude or explicit language

Editorial Staff

EDITOR

Daniel T. Primozic, Ph. D.
1.972.244.3433
dprimozic@cailaw.org

STAFF ASSISTANT

Karen Zaccardo
1.972.244.3447
kzaccardo@cailaw.org

INSIDE THIS ISSUE

Retort to Primozic's Sexual Harassment article, G. M. Cox (p. 1).

"Cops, Culture and Smartphones: A Siren's Song," by Keith Howse (p.3)

could be the genesis of a hostile work environment for either men or women.

As an example, take the patrol sergeant who asks a subordinate out on a date. Is that sexual harassment? Well, agreed, it is problematic and it could violate any number of organizational policies prohibiting such a relationship. However, that offer in and of itself does not make it sexual harassment. It could very well be unethical if the behavior violates a clearly established policy or rule – that is what codes of ethics are. It must be an unwanted request, however, before it rises to the level of harassment. The power relationship is there and it is ripe for misinterpretation as well as complications further down the line. Clearly, if the subordinate informs the supervisor that his or her request is unwanted and not to repeat it, it must stop, period. To continue now would create a clear sexual harassment situation and may include both *quid pro quo* and hostile work environment conditions – the trifecta (coupled with unwanted).

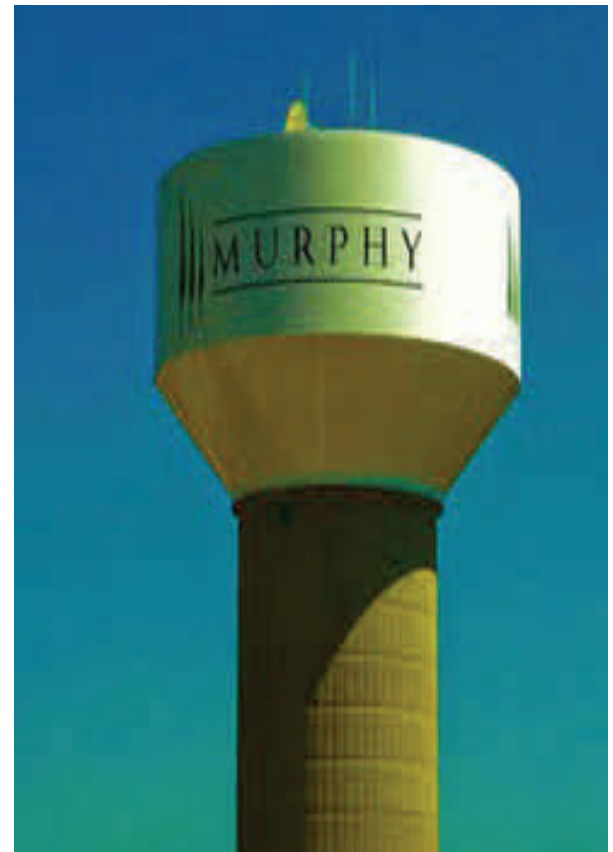
On the other hand, say the invitation comes from a co-worker of equal rank or pay grade. Is that a sexual harassment situation? Well, that depends. Is it an unwanted request by the requested employee? If it is, it could be a hostile work environment situation, but not a *quid pro quo* one – there lacks a power component.

While I would agree that “sexual harassment” is a bad thing, I think a lot of discussion fails to consider that the work place is one of the top date scenes in America and that somehow we have attempted to paint this environment off limits, and therefore attempt to deny human nature and possible hormones, to permissive human interactions. Are people who ask a co-worker out, evil? Have they committed some sort of social taboo?

In other words, legally and morally (not sure our forefathers even considered sexual harassment an issue worthy of a moral imperative) sexual harassment depends on the circumstances. Ethically speaking, and in the human context, dating a co-worker can and often does create strain at the work place not only between the two employees directly involved, but also with co-workers caught in the aftermath if and when the relationship ends. This is why many organizations have attempted to control such relationships by instituting policies prohibiting such relationships. Paradoxically, such policies fly in the face of human nature and experience – humans attracted to other humans will act upon those feelings even if they go underground with the relationships to avoid detection. This is a situation that is setting up employees to fail. However, creating policies that discourage such relationships with full disclosure as to the problems and outcomes may be a better path without putting our human assets at risk of committing an ethical breach and a policy violation resulting in disci-

pline or discharge. Not to mention the “label” that will follow the harasser the rest of his or her career.

Without a doubt, sexual harassment is wrong. The problem comes in trying to know what it is or what it is not. The whole human condition is fraught with such dilemmas, which is why we have codes of ethics in the first place – to guide us in our decision-making and behaviors. Wherever one falls on the continuum between consensual relationship and harassment, one must be aware of the basic ethical requirements of not putting anyone in a position to regret his or her own self-worth and character against the other’s actions. What is a self-evident truth is that no human should be subjected to a condition that places them in fear or inferiority because of their sex. We must learn to be sensitive to others and well aware of our own behaviors that impact others in meaningful and sometimes negative ways.



Study the past if
you would define
the future.

Confucius

Cops, Culture and Smart Phones –**A Siren's Song****By Keith Howse**

Law enforcement has embraced technology as an integral partner for information sharing, crime scene investigations, suspect identification and in-car technology. Any International Association of Chiefs of Police (IACP) Conference is a testament to that. Hundreds of vendors roll out their latest technological advances in tactical gear, emergency vehicle lighting, aviation support and firearms, just to name a few. I admit to walking through a sea of cool-looking police pursuit vehicles, strobing emergency lights, aerial drones and armored vehicles like a kid in a candy store. Obviously, technology can make the profession greater. But can that same technology create new challenges, or even be detrimental to law enforcement officers?

As an attorney and former law enforcement officer, I consult with plaintiff and defense counsel on police procedure, including those involving the use of force by police officers. My role is much like a baseball umpire. I am not an advocate for one side or the other. There are times when a police officer uses excessive or inappropriate force against a citizen and there are times when a citizen alleges that an officer used excessive force when, in fact, the officer's use of force was reasonable.

In the last few years I have observed a troubling trend where technology intersects law enforcement: smart phones. Today phones are not just phones. We have smart phones that provide us with the ability to record audio, video and still images and anything else that an application designer can imagine.

There are two typical phone scenarios that get police officers into difficulty. The first scenario involves a situation where a citizen encounters police at a traffic-stop, or a subject interview, and takes photographs or video, though they are not usually directly involved in the matter. The second scenario is when a police officer encounters a subject in a traffic-stop or other investigative scenario and the officer uses force or deadly force against the citizen when the officer mistakenly believes the citizen is holding some kind of weapon that actually turns out to be a cell phone or smart phone. This analysis will address the former scenario.

I refer to these situations as "Siren's Song" cases. In Greek mythology, Homer wrote about the "Sirens" in the famous poem *The Odyssey*. They were female-like creatures who would sit on the rocky shore and sing beautiful songs for the passing ships, eventually luring the sailors and ships to their ultimate demise as they crashed upon the rocks unable to resist the hypnotic attraction of the Sirens. In many cases the cell phone or smart phone becomes the police officer's Siren song. I believe police

officers sense that they must exert control over the citizen who is recording, feeling intimidated or outright incensed that someone is overtly recording them.

The Smart Phone – Can You Arrest Me Now?

There have been many cases in the last few years where police officers have arrested individuals using their phones to video or record the officer's actions. Somewhere along the line we have either improperly trained officers or inadequately trained officers to deal with phone-wielding citizens. And sadly, some officers appear to have an inadequate grasp of the First Amendment and Fourth Amendment of the United States Constitution.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although every officer swears an oath to uphold the US Constitution, these two Amendments are probably the most violated by police officers. Nationally, there have been a large number of cases where police officers believed they had the authority to arrest a citizen, or seize the citizen's smart phone because the person was recording the officer's public activity.

In one Florida case, police officers seized a citizen's smart phone that was used to video officers during an officer-involved shooting. After a detective observed the citizen using the phone to video officers, according to the citizen, the detective entered her residence and took the phone from her. (CBS 4 Miami)

In a Texas case, a man was recording a traffic-stop from a distance, allegedly standing on his own property. After several minutes, a police officer can be seen walking up to the man and ordering him to stop recording. The man asserts that it is his right to record the officers. The officer instructs the man to identify himself and ultimately arrests the man when he refuses to give his

name to the officer. (KRIS TV Corpus Christi)

In California, a police officer arrested a man after he recorded the officer issuing him a citation. The officer instructed the man to put his phone away, the man refused and he was arrested for an "obstruction" related offense. (NBC News San Diego)

In a New Jersey case, a teenager used her phone to record a disturbance on a city bus she was riding home from school. Officers arrived, told her to stop taking video and to turn the phone off. When she did not, she was arrested and transported to a juvenile detention facility, but not before another police officer took her phone and deleted the video that she had recorded. (MSNBC.com)

Typically, in these cases, police officers rely on statutes that deal with interference with a public servant, or disturbing the peace in order to arrest a citizen when too often it is actually a case of the officer being upset that a citizen is not complying with their directive to stop recording. Unfortunately, many of these cases ultimately go "viral" because the recordings are often confrontational and appear on social media sites. There are also blogs and websites that are dedicated to documenting potentially illegal searches and seizures by police officers and there are some individuals who will actually seek out such confrontations with the police in hopes of setting up the officer to look less than professional on video. An officer's actions can be recorded on a smart phone and have a thousand "hits" on YouTube before the officer pulls into the back lot to call it a night. As more and more Americans obtain and use smart phones, we can expect a continued increase in police/citizen contacts where someone, if not everyone, has a smart phone. The Pew Research Center, a non-partisan think-tank for public policy matters, conducted a survey in May of 2013 that revealed 91% of American adults now have a cell phone and 56% of adults have a smart phone, and therefore the ability to record. (Aaron Smith, "Smartphone Ownership 2013." Pew Research Center, Washington, D.C. [June 5, 2013]). In addition, there has been dramatic growth in smart phone use in the last few years.

So, what is the verdict? Can police officers arrest citizens for obstruction of justice or disturbing the peace or some other creative charge for recording the officer's actions? The short answer is probably not. However, as with all legal matters, the long answer is "it depends." If a citizen is truly physically interfering with an officer's ability to arrest an individual while that individual is recording the officer with a smart phone, or inciting bystanders to violence, or otherwise making threatening statements to the officer then the officer most likely will

have sufficient probable cause to arrest regardless of the presence of a smart phone. If the citizen is using a smart phone to record police activities occurring in the public view and is not otherwise physically inhibiting police from doing their job, then the citizen is entitled to their First Amendment rights and freedoms.

Have the Courts rendered any form of opinion on these kinds of cases? The United States Court of Appeals for the First District heard a case where a Boston attorney was arrested for recording Boston police officers who were involved in a use of force situation that was occurring in a public place. Mr. Simon Glik overheard a bystander say that police were hurting a man that was being arrested, so he began recording the officers with his smart phone. Officers asked Glik if he was recording audio, to which he replied in the affirmative, and officers arrested him and seized his phone, removing the memory chip from the phone. The Commonwealth of Massachusetts charged Mr. Glick with illegal wiretapping, aiding in the escape of a prisoner and disturbing the peace. The criminal charges were ultimately dismissed as there was no finding of probable cause for any of the three charges.

The Court held the arrest of Mr. Glik was a violation of the protections afforded by the First Amendment and Fourth Amendment of the United States Constitution. Then Mr. Glik sued the City of Boston and the officers involved for violating his civil rights. The City of Boston and Mr. Glik reached a \$170,000 settlement. (*Glik v. Cunniffe* 655 F.3d 78 [1st Cir. 2011])

It should be noted the Court's ruling is only legally binding in the First Circuit which includes Massachusetts, Rhode Island, New Hampshire, Maine and Puerto Rico. However, as the most significant bright-line Federal ruling to specifically address the issue of a citizen video recording a police officer's actions in public, the case is considered persuasive evidence in other Courts and is often cited. But what about recording police officers when the venue is not public. In Glik's case, he was arrested in the Boston Common, a public park (ironically, perhaps the oldest public venue in America). However, there is no clearly established rule that specifically addresses recording police activity in a private environment such as a business or residence. Nevertheless it is my opinion such recordings would also likely be protected as long as there is no interference with the police physically and as long as the police are performing official duties.

Further, the Court asserted that reasonable restrictions may be considered on a citizen recording police activities such as time, manner and place. For instance in *Kelley v. Borough of Carlisle*, the US Court of Appeals in the Third Circuit held that a citizen's right to video a police officer who had stopped him for a traffic stop was

not clearly established. (622 F.3d 248 [3rd Cir. 2010]) This was because the traffic stop has been described as an inherently dangerous situation by the Supreme Court, citing *Arizona v. Johnson*, U.S., 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009). Though the Federal Circuit courts appear to have split rulings it should be noted the Kelley decision was prior to the Glik decision. However, no case directly on point with this issue has yet to make it to the US Supreme Court. Therefore, the door is still open to some interpretation. In my opinion, the door is closing fast.

It should also be noted that smart phones obviously record audio. In some cases prosecutors have relied upon wiretapping and invasion of privacy laws in order to bring charges against a citizen for the audio recording of police officers. Under Federal law only one party of a conversation needs to consent to an audio recording. (18 USC § 2511 - Interception and disclosure of wire, oral, or electronic communications prohibited).

However, states are split on this issue with 38 states and the District of Columbia also permitting one-party consent while 12 states, California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington require that both parties to a conversation consent. (Reporters Committee for Freedom of the Press 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209: <http://www.rcfp.org/reporters-recording-guide/interstate-phone-calls>).

In the Glik case discussed above, Boston police and Massachusetts prosecutors relied on the State's wiretapping law that requires two-party consent for audio recording as the basis for charging Glik with a crime arguing the officers never provided their consent to be recorded.

However, such laws were written before the invention of the smart phone and, as evidenced by the First Circuit's ruling, such evidence is specious and doesn't appear to withstand the test of time and new technology. Not to mention the fact that smart phone recordings are now simply an every-day part of American life. Needless to say, Boston police now provide officers with training on how to handle citizens who are recording them. Their lead should be noted and followed. In practically every situation where a citizen is arrested for videoing a police officer or where a smart phone is seized, the police officer relies on either "catch-all" statutes like disturbing the peace or obstruction related charges, or antiquated wiretapping laws. Like it or not, smart phones are here to stay. During any given police-citizen contact it is safe to assume the presence

of many smart phones. Just imagine how many smart phones would pass by an officer during a short five-minute traffic stop.

Management Strategies and the Police Culture

Police managers must be keenly aware of attempts by police officers to justify arrests and smart phone seizures after-the-fact. Managers must review arrest reports in a light that is most favorable to the protections afforded all citizens by the First and Fourth Amendments. These are also typically echoed in State Constitutions as well. We must train all patrol officers, detectives and supervisory personnel on the law and develop departmental policies and procedures to guide officers in the handling of citizens who are exercising their constitutional rights.

A word of caution concerning prosecutors. It is not unusual for police officers to consult with the local prosecutor's office when faced with a complex situation, such as a smart phone recording scenario. However, police managers should always be in the loop on such consultations. Often times these legal consultations with an intake prosecutor occur via phone. The attorney providing the advice may or may not have a full understanding of what goes on at the scene. Police managers should pay particular attention when an officer says the prosecutor said it was appropriate to arrest. Supervisory police personnel should always be involved in these situations as they are more likely to know the officer's temperament, experience and general performance and can help protect against pretext arrests where the officer is simply angry or offended and is fishing for whatever charge can be filed.

Finally, as we all know, policing is one of the most challenging professions that one can choose. From day one in the police academy you realize that you are now part of something special. The police culture is unique and often discussed. A running theme in many of the arrests of citizens for recording police officers has been the attitude and demeanor of the police officer. The typical scenario involves an officer seeing a citizen recording his activities with a camera or smart phone and the officer tells the citizen to stop recording. The citizen usually ignores the officer's instructions and continues to record. The officer feels duty-bound to somehow address this public flaunting of his or her authority. From here, it can go down-hill quickly.

I remember a media officer training class I attended many years ago at the Southwestern Law

Children should be educated and instructed in the principles of freedom.

John Adams

Enforcement Institute, the forerunner of the Institute for Law Enforcement Administration. The long time Dallas-Fort Worth television and radio personality Alex Burton said something I have always remembered. He said, paraphrasing, "When dealing with the media, remember, they always have the last word." That means whatever you say or do on camera can and often does appear on television, and now the internet, with someone else describing your actions and interpreting your words.

One recent evening, I watched one of the local newscasts only to see a smart phone video of a former colleague who had gone on to work for a different law enforcement agency in the area. Much to my chagrin, the video showed a close-up of the officer yelling, screaming and making threats directly into a bystander's smart phone camera while the officer was assisting another officer. My former colleague, clearly fueled by adrenaline, had responded to another officer's request for assistance with a subject resisting that officer's attempt to take him into custody. True to the Burton theory, it did not end well for my former associate. Thousands of YouTube hits and national cable news replays later, he was terminated. Sadly, the smart phone video continues with a life of its own with more than 200,000 views as of this writing.

In the much discussed book by author Radley Balko, *Rise of the Warrior Cop-The Militarization of America's Police Forces*, he writes the following passage quoting former Seattle police chief, Norm Stamper.

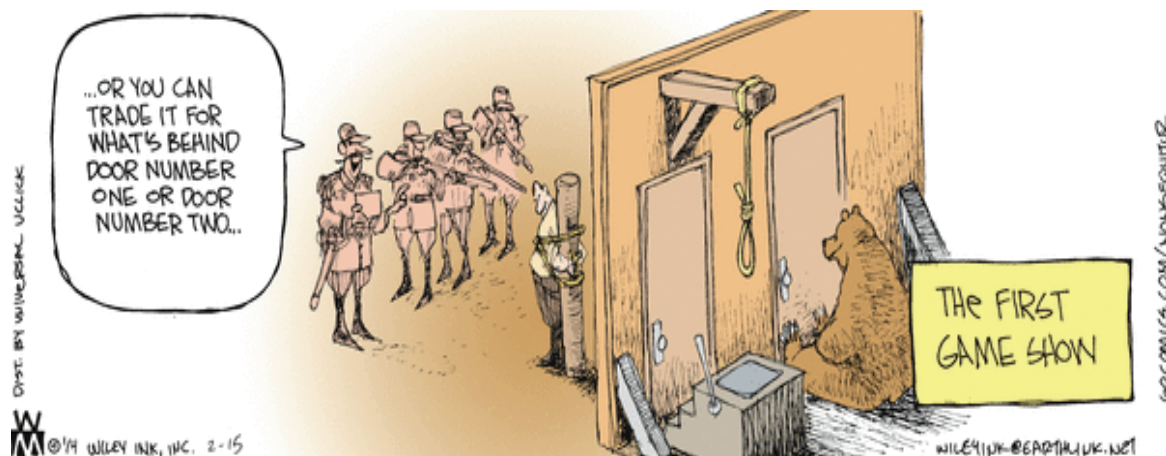
I think about the notion of *command presence*," Stamper says. "When you as a police officer show up at a chaotic or threatening or dangerous situation, you need to demonstrate your command presence – that you are the person in command of this situation. You do this with your bearing, your body language, and your voice. What I see today is that this well-disciplined notion of command presence has been shattered. Cops today think you show command presence by yelling and screaming. In my day, if you screamed, if you went to a screaming, out-of-control presence, you had failed in that situation as a cop. You'd be pulled aside by a senior cop or sergeant and made to understand in no uncertain terms that you were out of line. The very best cops I ever worked around were quiet. Which is not to say they were withdrawn or passive, but they were quiet. They understood the value of silence, the powerful effect of a pause." (Radley Balko, *The Rise of the Warrior Cop: The Militarization of America's Police Forces*, New York: Public Affairs, 2013, p. 327)

When encountering citizens with smart phones, we must train officers to maintain a professional demeanor and command presence. Officers should understand that a citizen using a smart phone to record their activity is not necessarily a challenge to their authority or control of a situation. We must train our officers to ignore the Siren's song that lures them into making poor decisions.

We all raised our right hand and took an oath to defend and protect the Constitution of the United States. The problem with this is the oath is normally taken at the beginning of an officer's career, upon graduation from the police academy. Police executives should entertain the idea of having officers take the oath periodically throughout their career, perhaps ever year. A few law enforcement appointments require an annual oath to be sworn, but for the vast majority of law enforcement officers the swearing of their oath is but a fond and distant memory. Over the years of public service, the oath can be chipped away at by the everyday grit and grime that street policing throws at an officer and cynicism can silently begin to influence their actions over time.

So I think we should polish that badge once again and renew our solemn oath. More than anyone else we enjoy and understand what a unique privilege it is to protect the rights of citizens so that we may all exercise free speech and be free from oppression.





NON-SEQUITUR 2014 Wiley Ink., Inc. Dist. By UNIVERSAL UCLICK. Reprinted with permission. All rights reserved

Upcoming ILEA Courses

Internal Affairs, Professional Standards and Ethics: Safeguarding the Commitment to Excellence

April 7 - 11, 2014 in Plano, Texas, USA

Police and Family Conference: For Law Enforcement Officers and Their Significant Others

April 26 - 27, 2014 in Fishers, Indiana, USA

School of Police Supervision: What's a supervisor? What's a leader? What's the difference?

June 2 - 27, 2014 in Plano, Texas, USA

Basic Police Supervision

July 21 - 25, 2014 in Shawnee, OK, USA

Ethics Train-the-Trainer in Corrections

July 21 - 23, 2014 in Littleton, CO, USA

Get your facts first, then you can distort them as you please.

Mark Twain



Institute for
**LAW ENFORCEMENT
ADMINISTRATION**

ETHICS ROLL CALL

Institute for Law Enforcement Administration
Center for Law Enforcement Ethics
The Center for American and International Law
5201 Democracy Drive
Plano, TX 75024
972.244.3430
972.244.3431 Fax
www.theLEA.org



**THE CENTER FOR AMERICAN
AND INTERNATIONAL LAW**



CENTER FOR LAW ENFORCEMENT ETHICS

To Champion the Nobility of Policing

Ethics Roll Call