



U.S. Department of Justice
Civil Division, Torts Branch
Constitutional and Specialized Torts Staff
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SUMMARY OF EMERGENCY, INTERIM, LEGAL REPRESENTATION OF FEDERAL LAW ENFORCEMENT AGENTS INVOLVED IN CRITICAL INCIDENTS

I. Introduction

The Attorney General has authorized, under appropriate circumstances, representation of federal law enforcement agents by private counsel at Department of Justice ("DOJ") expense in the immediate aftermath of line-of-duty critical incidents. Private counsel will provide personal capacity representation for a subject of a criminal investigation directly related to or arising out of a critical incident only on a temporary basis while the Civil Division, Torts Branch, Constitutional and Specialized Torts Staff ("Constitutional Torts Staff"), processes a request for representation.

II. Background

In accordance with 28 C.F.R. §§ 50.15 and 50.16, DOJ may provide direct representation or retain private counsel at Government expense, as appropriate, to present and former employees who are sued, charged or otherwise the subject of judicial or administrative proceedings for acts done in the course of their official duties. These guidelines apply to a line-of-duty discharge of a weapon or use of force resulting in death or serious bodily injury, following which a federal law enforcement official needs representation because he or she has become the subject of a federal, state, or local criminal investigation related to the incident.

As a general matter, DOJ representation is provided to federal employees in their individual capacity after it is determined that they were acting within the scope of employment and it is in the interest of the United States to provide representation. However, in the immediate aftermath of a critical incident, interim legal representation may be needed by a law enforcement official before the agency or DOJ has had the necessary opportunity to fully consider the representation issue.

For Limited Official Law Enforcement Use – Office of General Counsel or Agency Equivalent

To fill this need, DOJ has put into place procedures for considering requests for emergency, interim, legal representation by private counsel at DOJ expense for federal law enforcement officials involved in a line-of-duty discharge of a weapon or other serious use of force. This enhancement of DOJ's representation policy provides important safeguards for federal law enforcement officials while preserving the integrity of DOJ's investigative and prosecutorial functions.

III. Definition of Critical Incident & Serious Bodily Injury

The term "critical incident" should be strictly defined as one in which there has been the use of force by a federal law enforcement official in the line of duty which results in death or serious bodily injury.

The phrase "serious bodily injury" generally means an injury which is so severe as to require the hospitalization of the alleged victim.

IV. Delegation of Authority and Administrative Responsibility

At the time of the critical incident, personnel designated by the involved agency will contact (b) (6), Assistant Director, Constitutional Torts Staff. For purposes of authorizing emergency interim representation for a critical incident only, Mr. (b) (6) may be contacted directly by a designated agency representative at his office at (b) (6), or after hours or on weekends via CELL at (b) (6).

The Constitutional Torts Staff will make the decision on representation after considering scope of employment and other pertinent issues, based upon the facts and information provided by the agency designee. The Constitutional Torts Staff will consider whether a federal civil rights investigation has developed evidence, in the opinion of the Civil Rights Division, indicating there is potential prosecutive merit.

Once emergency interim representation is approved, the agency designee will contact an approved private attorney to undertake representation. At that time, the applicable limitations of DOJ reimbursement of private counsel fees should be explained. The explanation of limitations should be followed up in writing.

The agency designee is then responsible for promptly providing the Constitutional Torts Staff with contact information for the private attorney so that a letter authorizing representation can be sent out. Additionally, written confirmation of the request for emergency interim representation should also be provided by the agency as soon as possible, usually by COB of the following business day. This can be provided via email (b) (6) or by facsimile to (b) (6).

V. Duration of Representation

Emergency representation by private counsel will be provided for a limited period until the Constitutional Torts Staff has an opportunity to consider the representation issue. In any event, however, such representation will be provided for no longer than 1 week, unless otherwise authorized by the Constitutional Torts Staff, in exceptional circumstances. An investigating agency and/or the Civil Rights Division will have the continuing responsibility of advising the Constitutional Torts Staff of the initiation of an investigation, as well as its potential merit, to inform the consideration of whether emergency representation should continue.

If the Constitutional Torts Staff withdraws its authorization to pay private counsel, decides not to extend it, or is unable to make a decision on representation or denies representation, the employee may, at his or her own expense, continue to be represented by the same private attorney. Current DOJ regulations pertaining to requests for reimbursement for private counsel fees and expenses then apply.

VI. Limitation on Representation

A private attorney will be provided on an emergency basis for a federal, state, county or municipal criminal proceeding which arises out of the critical incident. However, a private attorney will not be provided for representation in an internal agency investigation arising out of the critical incident.

Prior to accepting such representation, the employee will agree to turn over all non-testimonial evidence connected with the incident to the appropriate agency representative, including the employee's weapon, if appropriate.

VII. Identification and Procurement of Private Attorneys

The Constitutional Torts Staff will maintain an informal listing of private attorneys who have provided or agree to provide representation on this limited, emergency interim basis. Each U.S. Attorney's Office is asked to establish a point of contact (who is usually the Civil Chief or his or her designee) to help coordinate the list, and to maintain contact with the private attorneys on the list as appropriate.

At the time that interim representation by private counsel at Department of Justice expense is approved, the Constitutional Torts Staff will take all necessary steps to ensure prompt processing of requests for the payment of legal services rendered. All record-keeping will be performed by the Constitutional Torts Staff.