



# Law Enforcement

N E W S L E T T E R

## Welcome

to the eighth edition of the New York Municipal Insurance Reciprocal's Law Enforcement Newsletter. This newsletter is published to help keep NYMIR's law enforcement subscribers abreast of current developments and provide relevant law enforcement articles. It is designed to assist NYMIR's law enforcement professionals in controlling their law enforcement liability exposures.

This is YOUR newsletter! We would appreciate hearing from you about whether the articles are timely and relevant, and whether the information is useful to you. We welcome your comments and suggestions for improvement and on topics you would like to see. Please send your comments to Brett Carruthers, NYMIR Regional Risk Management Supervisor, at: 1711 Cudaback Avenue, Suite 5433, Niagara Falls, NY 14303 or

Email: [brett.csp@verizon.net](mailto:brett.csp@verizon.net)

Telephone: 716.282.4890

Facsimile: 716.285.0835

We look forward to hearing from you!

## Strip Search Litigation: Can You Maintain Jail Safety and Avoid a Lawsuit?

by **Gregg Johnson, Esq.**  
**Partner, Girvin & Ferlazzo, P.C.**

During the past several years, the number of federal lawsuits challenging the search procedures that apply to inmates and detainees has grown at an alarming rate. This trend has included class action litigation in New York State and around the country resulting in millions of dollars being paid out to purported victims of unconstitutional searches. The focus of many of these lawsuits is the intake procedure implemented at jail facilities, which understandably includes a variety of protocols designed to prevent the introduction of contraband into facilities and identify other risks presented by new inmates and detainees.

This litigation trend compels law enforcement officials to carefully balance two competing interests: the legitimate need to protect staff and other inmates/detainees, versus the need to avoid liability resulting from "unreasonable" searches which run afoul of the Fourth Amendment. Of course, what constitutes a "reasonable" search for Fourth Amendment purposes is largely dependent upon the particular circumstances. Federal courts have historically afforded public officials significant deference when it comes to personal searches of inmates after they enter jail housing units. In recent years, federal courts have applied different standards of what is "reasonable" when new inmates/detainees are subjected to personal searches or other potentially invasive procedures during intake processes.

### Defining the Problem

The prospect of having well-intentioned practices followed by your staff later questioned and scrutinized by plaintiff lawyers and judges in the confines of a courtroom is frustrating. Law enforcement/correctional staff are regularly

*continued on page 2*

## On the Lighter Side (aka we all need a laugh or two)

By Brett Carruthers, Regional Risk Management Supervisor

### NEVER SAY TO A COP

1. I can't reach my license unless you hold my beer.  
(OK in Texas)
2. Sorry, Officer, I didn't realize my radar detector wasn't plugged in.
3. Aren't you the guy from the Village People?
4. Hey, you must've been doin' about 125 mph to keep up with me. Good job!
5. Are You Andy or Barney?
6. You're not gonna check the trunk, are you?
7. I pay your salary!
8. Gee, Officer! That's terrific. The last officer only gave me a warning, too!
9. Do you know why you pulled me over? Okay, just so one of us does.
10. I was trying to keep up with traffic. Yes, I know there are no other cars around. That's how far ahead of me they are.

Winter 2005/2006

A publication of the New York Municipal Insurance Reciprocal



## *Strip Search Litigation: Can You Maintain Jail Safety and Avoid a Lawsuit?... continued from page 1*

called upon to make split-second judgment calls in the field that potentially impact the constitutional rights of individuals. The contours of the Fourth Amendment, which addresses searches and seizures, are not always clear cut. The degree of uncertainty is particularly high in the area of “strip searches” conducted upon intake.

For example, if a county jail has a long standing practice of conducting “routine hygiene checks” of all newly-admitted persons for the purposes of identifying medical conditions and lice infestation, but rarely conducts full-blown visual body cavity searches for contraband, can the latter practice be challenged? What if the written policy plainly states that visual body cavity searches are to be used in a limited number of circumstances? The answer to these questions may depend upon the manner in which the “hygiene check” check is conducted, who completes it, where it is completed, and what circumstances trigger the more invasive visual body cavity searches. Recent court decisions have made it clear that calling the procedure a “hygiene check” or any other euphemism will not prevent the courts from scrutinizing the practice as a type of “strip search.” Moreover, the fact that “contraband” is not the primary or stated focal point of the “hygiene check” will not prevent legal scrutiny. In light of the current state of the law and renewed interest in litigating these issues, institutionalized intake procedures should be reexamined.

### **Action Plan to Reduce Your Legal Exposure**

NYMIR recently undertook a risk management initiative to review the written policies and practices of a number of municipalities. While there is no “perfect policy” that meets the needs of all, there are several fundamental steps that every law enforcement and correctional facility housing inmates/detainees can take to reduce the risk of a successful challenge to intake procedures.

- *Review your written policies.* Having a written policy in place that prescribes unconstitutional procedures can create exposure and/or compromise your ability to defend your practices. Make sure that the review of your existing written policies and any policy changes are evaluated by legal counsel knowledgeable about the most recent court decisions.
- *Tailor your policy and practices to meet your local needs.* Borrowing or adopting policies from other governmental agencies can be helpful. However, it is advisable to consider your local facility, the population of individuals housed in your facility, and the specific safety and security needs of your facility before you adopt the policies of another agency.
- *Evaluate the privacy interests of inmates/detainees during the intake process.* While inmate/detainee privacy interests may be limited, there nonetheless are some privacy interests that the courts will protect. A careful assessment of the intake process should include an assessment of the physical layout of the facility, the location where searches and change-outs are conducted, and the definition of who has access to such areas. There may be minor adjustments to your facility or the manner in which you utilize your facility (e.g., changing the location where searches are conducted) that might eliminate unnecessary privacy intrusions without compromising security.
- *Look beyond the labels given to procedures which potentially intrude upon the privacy interests of new inmates/detainees.* Recent court decisions have ruled that various labels which law enforcement agencies apply to different procedures (e.g., “strip search,” “strip frisk search,” “visual search,” “pat search,” “hygiene inspection,” or “clothing change-out”) will not shield from legal scrutiny any procedure that could result in unreasonable privacy invasions. Therefore, any administrative procedure conducted during the intake process which routinely places a newly-admitted inmate/detainee in a position where his or her naked (or mostly naked) body is observed, or even observable, should be evaluated as a potential “search” that may be challenged.
- *Consider the “gender issue.”* While the Fourth Amendment does not prescribe any different protections for males and females, it is important to consider the gender of the inmate/detainee who is processed and/or searched by a staff member. The courts are predictably more sensitive to cross-gender searches than such procedures which are carefully limited to same-gender interactions.
- *Scrutinize the justifications for differential search procedures during intake.* In light of recent court decisions, many facilities have developed personal search policies around distinctions based upon the nature of the pending criminal charge (e.g., felony versus misdemeanor), type of inmate, and other factors. While that approach may be legitimate, it is critical to consider that such distinctions are founded upon interpretive case law, not the Fourth Amendment itself. Accordingly, those distinctions should be considered as broad guidelines and revisited periodically since such case law can develop and change.
- *Make reasonable suspicion the cornerstone of invasive procedures.* The controlling court decisions applicable to New

Inmate Name \_\_\_\_\_ Inmate No.: \_\_\_\_\_  
Date: \_\_\_\_\_ Time: \_\_\_\_\_

### **VOLUNTARY Inmate Search Authorization**

I do hereby voluntarily consent to allow the [ \_\_\_\_\_ ] Correctional Facility to search my person, which may include a search of my clothing, shoes, mouth, hair, buttocks, anus, genitals, feet, or other part of my body/body cavity.

\_\_\_\_\_  
Inmate Signature \_\_\_\_\_ Date \_\_\_\_\_

*If inmate signs above, proceed to the Corrections Officer signature section*

### **INVOLUNTARY Inmate Search Checklist**

I, \_\_\_\_\_, as a Corrections Officer for the [ \_\_\_\_\_ ] Correctional Facility, considered the following factors, which provided reasonable suspicion for a comprehensive personal search (i.e. "strip search") of the above named inmate's body.

**Part A.** Check **ALL** applicable factors which give rise to reasonable suspicion.

- Criminal history check; arrest information from current offense; information from corrections file.
- Information or documents received from the Court, arresting agency, transporting agency, or informant indicating a particular contraband risk.
- Information provided during the booking process (i.e., inmate volunteers information, sets off electronic detection device/BOSS chair, or alerts drug sniffing dog).
- Inmate history of escape, attempted escape, or serious/dangerous contraband possession in the correctional setting.
- Inmate is suicidal or has a history of suicidal tendencies.
- Current charges against inmate involve drugs and/or weapons.
- Information derived from a minimally invasive search (e.g., "pat search") or property inventory.
- Inmate appears to be under the influence of or is actively using drugs.
- Observation of the inmate's unusual behavior (e.g., particularly nervous, fidgety, sweaty, uncooperative, disturbed, or aggressive/assaultive).
- Inmate gives evasive or contradictory answers to questions.
- Gang affiliation.
- Inmate wearing loose-fitting, baggy, or bulky clothing which precludes an effective pat search and/or indicates concealed contraband.
- Inmate recently had personal contact with other inmates, friends, or relatives which gave inmate access and/or opportunity to access contraband.

**Part B.** Provide a brief detailed description of all of the factual circumstances which support each of the factors checked above. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Part C.** Once **ALL** appropriate bases for your suspicion are recorded, sign here and have your Supervisor sign below your signature.

\_\_\_\_\_  
Signature of Corrections Officer \_\_\_\_\_ Badge Number \_\_\_\_\_ Date \_\_\_\_\_

\_\_\_\_\_  
Signature of Supervising Corrections Officer \_\_\_\_\_ Badge Number \_\_\_\_\_ Date \_\_\_\_\_

## *Strip Search Litigation: Can You Maintain Jail Safety and Avoid a Lawsuit?... continued from page 2*

York have made clear that invasive personal searches, such as visual strip searches of misdemeanor detainees and other classes of non-felons, must be based upon reasonable suspicion in order to be constitutional.

- *Monitor intake procedures to ensure consistent application of policies and practices.* Once you are comfortable that your written policies and approved practices are legitimate, take steps to ensure that they are being followed. That means that training processes should be clear, the actual intake practices should be monitored, and corrective action should be taken when deviations are identified.
- *Stay abreast of changes in the law.* It is highly likely that there will be important legal developments in the near future to which you may need to react. NYMIR Risk Management will issue summary bulletins when changes occur due to legal challenges in the courts.
- *Train and re-train your staff.* Refresher and timely training of new officers to ensure that they are familiar with the goals of relevant intake procedures and the distinctions between personal searches and other administrative procedures is critical.

### **Careful Documentation and Approval of Invasive Searches is Recommended**

Reasonable suspicion involves a particularized analysis of the circumstances giving rise to the suspicion which justifies each search. It is advisable to memorialize the decision-making process which precedes a legitimate search and to have a supervisor approve the search and thereby confirm that reasonable suspicion exists. In an effort to assist facilities with conducting and documenting their reasonable suspicion analysis and the approval process, NYMIR has prepared a model checklist that may be helpful. This model checklist is available at:

<http://www.nymir.org/docs/InmateSearchForm.doc>. The checklist (see page 3) is designed to minimize the administrative burdens associated with its use, but, like all forms, it should only be utilized after it is tailored to your particular facility, reviewed by your local counsel, and accompanied by appropriate training.

---

New York Municipal Insurance Reciprocal (NYMIR) provides information and material through this newsletter to Law Enforcement officials throughout the state. NYSIR makes no representations about the suitability of this information and material for any purposes other than research and discussion. Please consult your insurance representative and legal counsel if you have legal, procedural or safety-related questions.

## *Law Enforcement Newswatch*

### **Taser Cameras**

When Miami, Florida police used a Taser to shock a 6-year-old last year in an elementary school office, public outrage was immediate. Police said it was essential to use it because the student had cut himself twice with a shard of glass and threatened to slash himself again. There was no option, they said. Taser International Inc. has now introduced a Taser Cam, an audio and video recorder, that affixes to the butt of the gun. It starts taping when the weapon is turned on, and records all action, whether the weapon is fired or not. In the Florida case, imagery would have shown why the officers felt they needed to take the action they did. The cameras add another layer of accountability for police officers, but with policies governing the retention of the audio and video recorded, it is hoped they will also go a long way in building public trust.

### **No More eBay Sales**

eBay Inc. is blocking the sale and shipment of stun guns and other illegal weapons to New York residents, it was announced in October, under an agreement with Attorney General Eliot Spitzer. In his office's investigation, it was determined that more than 1,100 stun guns had been sold to New Yorkers from September 2003 to August 2005. Spitzer's office reported that New York is one of seven states that ban electric stun devices.

### **Does the Use of Pepper Spray Reduce Officer Injuries?**

A recent report published by the U.S. Department of Justice Office of Justice Programs presents findings from two studies that used different methodologies to test pepper spray's safety and effectiveness. One looked at officer and suspect injuries in three North Carolina police jurisdictions before and after pepper spray was introduced. It found that the number of injuries to police officers and suspects declined after pepper spray was introduced. Complaints that the police used excessive force also declined. While a true quantitative study is difficult, the results provide interesting reading.

<http://www.ncjrs.gov/pdffiles1/nij/195739.pdf>