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An Overview of Lawsuits Against Police Supervisors

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This *TELEMASP Bulletin* is adapted from Chapter 2 of *Civil Liabilities and Rights of Police Officers and Supervisors in Texas* (forthcoming) by Rolando V. del Carmen, published by LEMIT.

- ✓ Second: according to the law under which the supervisor is sued. This liability category is sub-classified into liability under federal law and liability under state law.
- ✓ Third: according to status. This liability category is sub-classified into liability as a private person and liability as a public official.

Introduction

This bulletin gives an overview of lawsuits against supervisors. It presents the big picture—starting with the types of lawsuits brought against police officers in general, and ends with when supervisors might be held liable.

Lawsuits against supervisors may be classified into three categories: who committed the act, the law which was violated, and status. Under the first category, supervisors may be held liable for what their subordinates do (vicarious liability) and for what they do to their subordinates (direct liability). Under the second category, supervisors may be sued for violations of federal law or state law. Under the third category, supervisors may be sued as private persons or as public officials. Each lawsuit has its own prescribed procedure and specified remedies for violation.

Lawsuits Against Supervisors Classified

Lawsuits against supervisors may be classified into three general categories:

- ✓ First: according to who committed the act. This liability category is sub-classified into liability for what their subordinates do (vicarious liability) and liability for what they do to their subordinates (direct liability).

Liability According to Who Committed the Act

Liabilities of supervisors under this category are subdivided into liability for what their subordinates do (vicarious liability) and liability for what they do to their subordinates (direct liability).

A. Lawsuits Brought Against Supervisors for What Their Subordinates Do (Vicarious or Indirect Liability)

Example: X, a resident of Dallas, brings a lawsuit against Police Chief Y because his officers allegedly used excessive force when arresting X. Police Chief Y did not participate in the alleged excessive use of force but is sued in his capacity as supervisor. There was no direct intent on the part of Chief Y to cause harm to the plaintiff; therefore, this lawsuit is based on the theory of vicarious (meaning indirect) liability for what happened.

Lawsuits based on vicarious liability sometimes result in high-profile cases and widespread publicity—as in the Rodney King case in Los Angeles and the Diallo case in New York. The supervisor is included because the officer is under the control and influence of the supervisor; therefore, what the officer does also represents the act of the supervisor.



Rights of Police Officers that if Violated Can Lead to Liability of a Supervisor

I. CONSTITUTIONAL RIGHTS OF POLICE OFFICERS

- A. First Amendment freedom of religion, speech, the press, assembly and petition the petition to government.
- B. Fourth Amendment right against unreasonable searches and seizures.
- C. Fifth Amendment rights against self-incrimination.
- D. Fourteenth Amendment right to equal protection, due process, property interest, liberty interest.

(If violated, these constitutional rights are usually claimed by employees in a Section 1983 suit in federal court.)

II. RIGHTS OF POLICE OFFICERS CREATED BY AGENCY POLICY

A. Under Federal Laws

1. The Civil Rights Act of 1964
2. The Civil Rights Act of 1991
3. The Americans with Disabilities Act of 1990
4. The Age Discrimination in Employment Act
5. The Equal Pay Act of 1963
6. The Family and Medical Leave Act of 1993
7. The Pregnancy Discrimination Act
8. Fair Labor Relations Act (NLRA)
9. The Rehabilitation Act of 1973
10. Occupational Safety and Health Act of 1970 (OSHA)
11. National Labor Relations Act (NLRA)
12. Employee Retirement Act (ERISA)
13. Vietnam Era Veteran's Readjustment Assistant Act

(The above list covers only the more important federal laws. These federal laws usually specify how violations are redressed in court.)

B. Under State Laws

1. Many of the federal laws above have also been reenacted into state laws and can therefore be enforced by the states, usually by creating a Human Rights Commission for the state. Some states add other rights.
2. Whistleblower statutes and similar laws limiting what supervisors can legally do.

(Enforcement of federal and state laws are usually provided for in the statutes themselves. Federal laws are usually enforced through the EEOC; state statutes are usually enforced through a state Human Rights Commission.)

3. Civil Service Laws

(Violation of the civil service laws are actionable in regular state courts.)

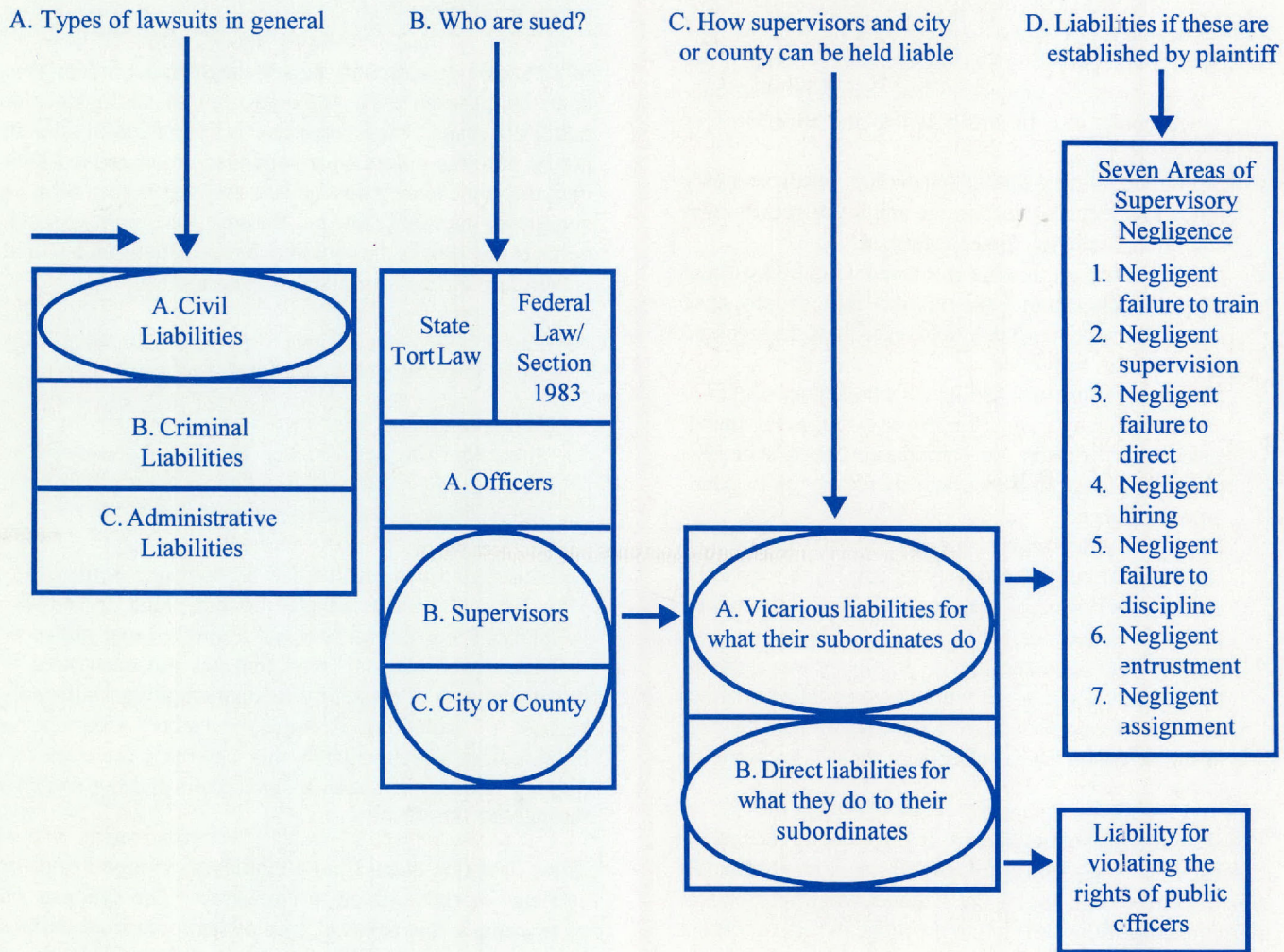
III. AGENCY POLICY RIGHTS OF POLICE OFFICERS CREATED BY

Agency policies giving rights to employees beyond those given by the Constitution and laws may also be binding on the agency.

(These rights are usually enforced in state or federal courts, depending on whether the person seeking redress is a state or federal employee.)

IV. RIGHTS GIVEN BY COLLECTIVE BARGAINING AGREEMENT (WHERE APPLICABLE)

(Violations of collective bargaining agreements are usually enforced through procedures provided for in the agreement itself.)



The Big Picture:
A Chart of the Legal Liabilities of Supervisors and Agencies



There are seven areas of supervisory negligence for which supervisors can be held liable for what their subordinates do: negligent failure to train, negligent supervision, negligent failure to direct, negligent hiring, negligent failure to discipline, negligent entrustment, and negligent assignment. For purposes of this bulletin, each is described as:

- ✓ Negligent failure to train: that the employee was not instructed or trained by the supervisor or agency to a point where he or she possessed sufficient skills, knowledge, or level of expertise needed for the job.
- ✓ Negligent supervision: that the employee was not properly overseen or supervised and therefore what happened could also be attributed to the supervisor or agency.
- ✓ Negligent failure to direct: that the supervisor or agency failed to adequately inform the employee of the extent and limits of the job to be performed.
- ✓ Negligent hiring: that the employee was hired without proper background investigation that should have alerted the supervisor or employer to the risks involved in hiring that employee.
- ✓ Negligent failure to discipline: that the supervisor failed to take action against an employee through reprimand, suspension, transfer, or termination when such employee demonstrated unsuitability for the job to a dangerous degree.
- ✓ Negligent entrustment: that the supervisor failed to supervise or control properly an employee's custody, use, or supervision of equipment or facilities entrusted to him or her on the job.
- ✓ Negligent assignment: that an employee was assigned by a supervisor to a job without ascertaining whether the employee was adequately prepared for it, or keeping an employee on the job after he or she was known to be unfit.

These seven areas of negligence do not exclude each other. In most cases, the plaintiff alleges all seven types of negligence in the lawsuit, hoping the evidence will prove some or all of the allegations. It is left to the judge or jury to sort out the facts of the case.

The cases brought under supervisor negligence are usually brought under state tort law, although some cases have also been decided under federal law, Section 1983. The allegation by the plaintiff is that were it not for the negligence of the supervisor, the injury to the plaintiff would not have happened. For the supervisor or agency to be liable, a link must be established by the plaintiff between the injury that occurred and the negligence by the supervisor. Failure by the plaintiff to do that means there is no liability.

Liability of supervisors under the above types of negligence is not automatic; in fact, it is usually difficult for plaintiffs to hold the supervisor liable. This is because courts have generally required that "deliberate indifference" on the part

of the supervisor must be proved for liability to ensue. What "deliberate indifference" means is not clear, but it is a much higher degree of fault than ordinary negligence. On a scale of 1 (being the lowest form of negligence) to 10 (being the highest form of negligence), deliberate indifference would likely fall between 7 and 8. So the good news is that supervisory liability for what their subordinates do is not automatic; the bad news is that the term "deliberate indifference" is subjective and depends upon how a judge or jury perceives a situation.

In some cases, particularly those brought under federal law, courts require an even higher degree of negligence for liability to ensue. Courts sometimes hold that liability should not be imposed unless what happened amounted to "conduct that shocks the conscience," an even higher form of negligence than deliberate indifference. On the above scale, conduct that shocks the conscience would likely be a 10 and is therefore difficult for plaintiffs to establish.

B. Lawsuits Brought Against Supervisors for What They Do to Their Subordinates (Direct Liability)

Example: Sheriff M is sued by a subordinate for allegedly firing her from her job without cause or hearing. The liability is direct because the alleged rights violation was committed by Sheriff M.

Lawsuits based on direct liability brought against the supervisor by subordinates usually do not result in massive publicity. There is probably not a single large police or sheriff's department in Texas that has not been sued or threatened with a lawsuit by its own employees allegedly because of violations of employee rights. Although no reliable figures are available, this is perhaps the more frequent type of lawsuit against supervisors and departments throughout the country.

These lawsuits stem from violations by supervisors or agencies of rights given to employees. The synopsis on page 2 shows that rights of employees come from various sources, namely: the U.S. Constitution, laws (federal and state), agency policy, and collective bargaining agreements.

Lawsuits According to the Law That Was Violated

The type of liability also differs according to the right violated. Violations of constitutional and federal rights of employees result in a Section 1983 lawsuit in federal court; violations of rights given by state law result in cases in state courts; whereas violations of rights given by agency policies and collective bargaining agreements lead to cases filed in state courts or to arbitration. In some jurisdictions, these alleged violations may be combined together and consolidated as one case in either state or federal court.



A. Lawsuits Against Supervisors for Violations of the U.S. Constitution or Federal Laws

1. Violations of Rights Given by the U.S. Constitution

If supervisors violate the constitutional rights of their subordinates, a Section 1983 lawsuit will likely ensue. A Section 1983 case stems from a violation of constitutional rights. It is based on the following provision of federal law:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (42 U.S.C. Section 1983)

A Section 1983 lawsuit has two requirements for the plaintiff to succeed: the officer must have acted under color of law, and there must be a violation of a constitutional right or of a right given by federal (not state) law.

Example 1: A citizen files a Section 1983 lawsuit against the police chief alleging a violation of her constitutional rights against unreasonable searches and seizures when her apartment was searched without a warrant and without probable cause.

Example 2: A police officer files a Section 1983 lawsuit against the police chief for violating his Fourteenth Amendment constitutional right against unreasonable searches and seizures, alleging that his office desk was searched for drugs by the chief without his consent and without probable cause.

The following constitutional rights are often invoked by the public or subordinates when suing supervisors:

- √ First Amendment freedom of religion, speech, the press, assembly, and petition the government for redress of grievances;
- √ Fourth Amendment rights against unreasonable searches and seizures;
- √ Fifth Amendment rights against self-incrimination; and
- √ Fourteenth Amendment rights to equal protection, due process, property interest, and liberty interest.

2. Violations of Rights Given by Federal Laws

Specific federal laws may also provide for lawsuits against supervisors in federal courts. *Example:* Violations by the supervisor of provisions of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, religion,

national origin, or sex) follow a specified procedure, namely: filing the case with EEOC (Equal Employment Opportunity Commission), investigation by EEOC and, if EEOC is unable to pursue the case on its own, the complainant must obtain a "right to sue" authorization from EEOC to pursue the case on his or her own. Without the "right to sue" authorization, complainants cannot initiate the lawsuit.

The more important federal laws under which supervisors may be sued are:

- √ The Civil Rights Act of 1964;
- √ The Civil Rights Act of 1991;
- √ The Age Discrimination in Employment Act of 1990;
- √ The Equal Pay Act of 1963; and
- √ The Age Discrimination in Employment Act.

Lawsuits Against Supervisors for Violations of Texas Laws

There are two ways a supervisor may be sued in state court: violation of state tort law and violations of specific laws protecting the rights of subordinates.

1. Under Texas Tort Law

A tort is defined as a civil wrong in which the action of one person causes injury to the person or property of another, in violation of a legal duty imposed by law. A supervisor is sued under state tort law usually by a member of the public who alleges that injury was inflicted on the plaintiff because of what police officers and the supervisor did. *Example:* X files a state tort case against the police chief for wrongful death of her husband, alleging that the husband was shot to death by officers without justification.

A supervisor may also be sued under state tort law by a subordinate, a police officer, who alleges that a tortious act was committed by the supervisor. *Example:* Officer Y sues the sheriff alleging that the sheriff defamed him by spreading false and malicious rumors about him accepting bribes.

2. Under Specific Texas Laws Protecting the Rights of Subordinates

Some of the federal laws giving rights to employees have been reenacted and have become state laws, with essentially the same provisions as the federal law. These replications of federal laws come from the desire to enforce the same laws on the state level. In some cases, the federal government provides that states will be given federal money if they reenact federal laws and enforce them on the state level. This frees the federal government from having to use its resources for state or local enforcement of federal laws. *Example:* The provisions of the Civil Rights Act of 1964 prohibiting discrimination have been reenacted by the Texas legislature and therefore can be enforced on the state level. In fact, some cities and counties have also reenacted these laws as ordi-



nances so as to allow their enforcement on the local level. If and when these laws are violated, the specific procedure outline for bringing the case to Texas state courts must be followed.

Lawsuits Against the Supervisor According to Status

Plaintiffs have a choice to sue the supervisor as a private person or as a public officer. Chances are the supervisor will be sued as a public officer so that in case he or she is held liable, the city or county can also be held liable. In a few cases, however, the supervisor is sued as a private person.

A. Lawsuits Against Supervisors as Private Persons

In general, lawsuits against supervisors as private individuals do not hold the agency liable. When sued and held to be acting as a private individual, liability is to be paid by the supervisor, but nothing prevents the agency from paying that liability if it so chooses. The only exception is if the court decision itself or agency policy prohibits the agency from making such payment, or if agency policy prohibits payment of the liability.

Supervisors are usually sued as private persons in three instances: (1) if the agency cannot be held liable because of protection given by state laws; (2) if the agency is protected from liability by sovereign immunity; and (3) if what happened was solely the fault of the supervisor and cannot possibly be blamed on the agency. Even under (3), however, plaintiffs will likely include the agency in the lawsuit anyway and leave it to the agency to raise it as a defense against agency liability.

B. Lawsuits Against Supervisors as Public Officials

In a great majority of cases, the supervisor is sued as a public official. This has the advantage of the plaintiff being able to dip into the "deep pockets" of the city or county in case liability ensues. In the case of *Brandon v. Holt*,¹ the U.S. Supreme Court held that a lawsuit against a public officer in his or her official capacity imposes liability on the employer regardless of whether or not the agency was named as defendant in the lawsuit.

Who Is My Lawyer and Who Will Pay If Held Liable?

As discussed, police officers and supervisors can be sued and are sued individually in many civil lawsuits. Under U.S.C. Section 1983, individuals are liable for damages if they are not found within the scope of immunity from lawsuit. In considering individual liability in the context of a civil lawsuit, the issues of who will defend the officer, who will pay for attorney's fees, and who will actually pay the judgment if one is entered against an individual becomes important. Texas

law mainly answers these issues. The following section discusses the individual's right to counsel, right to have attorney's fees paid or reimbursed, and the right to be indemnified from any judgment when sued in a civil lawsuit.

A. Defense of Civil Suits Against Peace Officers, Firefighters and Emergency Personnel in Texas

1. Local Government Code—Representation of Officer

Provision 180.002 of the Texas Local Government Code provides that a municipality or special purpose district must provide a peace officer who is sued for damages representation if:

- ✓ legal counsel is requested by the employee; and
- ✓ the suit involves an official act of the employee within the scope of the employee's authority.

The municipality may provide counsel already employed or retain private counsel.

2. Officer May Recover Attorney's Fees

If the municipality or district fails to provide counsel, the employee may recover fees incurred in defending the lawsuit if the trier of fact finds that:

- ✓ the fees were incurred in defending the suit involving an official act of the employee; and
- ✓ the employee is without fault or the employee acted with a reasonable good faith belief that the employee's actions were proper.

3. What Attorney Will Represent the Officer?

In addition, the Local Government Code specifies that a county official or employee sued for an action arising out of public duty is entitled to representation by the county attorney, district attorney or both. If there is a conflict of interest between the defendants, then the employee may retain other counsel and request commissioner's court to pay the attorney's fees. However the basis of the complaint must also subject the employee to possible criminal charges.

B. Legal Defense of Employees in Texas

A county official or employee sued for any action arising from a public duty is entitled to be represented by the district attorney, county attorney or both. If additional counsel is needed in the representation of the employee or official, and the act complained of forms the basis for filing a criminal charge against the official or employee, the employee is entitled to have commissioner's court pay for private counsel. The county employee or official is not required to accept legal counsel provided for by the municipality. [Local Government Code Section 157.901(a)(b)(c)]



C. Indemnification for Elected or Appointed County Officers in Texas

The Local Government Code also provides for the indemnification of elected or appointed county officers for personal liability for loss of county funds or personal property damage incurred in the performance of the duties as long as the loss was not the result of the officer's negligence or criminal conduct. This statute covers only elected and appointed county officials and would not extend to regular employees and police officers.

The commissioner's court of a county may provide for indemnification of an elected or appointed county officer against personal liability for loss of county funds or loss or damage to personal property incurred by the officer in the performance of official duties if the loss was not the result of the officer's negligence or criminal action. [Local Government Code Section 157.903]

D. Liability Insurance for Employees in Texas

The Texas Practice and Remedies Code Section 101.027 of the Civil Practice and Remedies Code (CPRC) states that each governmental unit may purchase insurance protecting the unit and its employees from liability of civil claims. The policies of insurance may give the insurance company the right to investigate, defend, settle or try any claim submitted under the policy. Neither the state of Texas nor any political subdivision may require an employee to purchase liability insurance as a condition of employment if the state of political subdivision already has insurance.

E. Local Governments May Provide Counsel, Settle Cases and Pay Attorney's Fees for Employees

Section 102.004 of the Civil Practice and Remedies Code allows local governments to provide counsel, settle cases, and pay damages on behalf of employees. A local government may provide counsel for a defendant who the local government may have to pay damages on the basis of the Texas Tort Claims Act. The counsel provided to the employee may be a regularly employed attorney. However if a conflict arises between the government unit and the employee, then the governmental unit can hire private counsel to defend the employee. Any legal counsel provided to the employee may settle the portion of the suit that would result in the payment of damages by the governmental unit.

F. Payment of Certain Tort Claims Under the Texas Civil Practice and Remedies Code

1. Can Pay Damages on Behalf of Employees

Section 102.002 of the Texas Civil Practice and Remedies Code provides that a local government may pay damages awarded against an employee if:

- √ the damages resulted from an act or omission committed in the course of employment for the government unit; and/or
- √ the damages arise out of an action for negligence.

2. Cannot Pay Damages on Behalf of Employees

The local government may also pay the court costs and attorney fees awarded against an employee for whom the local government may have to pay damages. However, a local government may not pay damages awarded against an employee if:

- √ the damages were a result of official misconduct; and/or
- √ the damages were a result of willful or wrongful act or omission or an act amounting to gross negligence.

G. Texas Case Law

1. Individual Liability

The Texas Tort Claims act does not eliminate individual liability for negligence. *Gibson v. Spinks*²

2. Insurance

Section 101.027 of the CPRC affords cities the ability to protect individual employees through liability insurance in excess of liability that might be incurred by the city. *City of Bedford v. Schattman*³

3. Civil Practice and Remedies Code Section 102.004

Tex. Atty Gen O. JM 127 (12-27-90) Civil Practice and Remedies Section 102.004 includes officers, employees, directors or other persons working on behalf of the government. However, the act does not authorize the payment of attorney fees incurred representing commissioner's court in a suit.

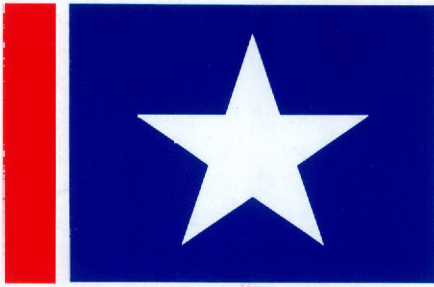
Endnotes

¹469 U.S. 464 (1985).

²869 S.W.2d 529, 531 (Tex. App.—Corpus Christi 1993), aff'd in relevant part 895 S.W.2d 352 (Tex. 1995).

³776 S.W.2d 812, 814 (Tex. App. Fort Worth 1989).

Civil Liabilities and Rights of Police Officers and Supervisors in Texas will be published later in 2003. An announcement and ordering information will be found in a future *TELEMASP Bulletin* when it is available.



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Executive Director

Kay Billingsley
Publications Manager

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Jamie L. Tillerson, Program Manager

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For information about TELEMASP
Bulletins, call (936) 294-1704 or
email: jtillerson@shsu.edu

This bulletin was authored by Rolando V. del Carmen, Distinguished Professor of Criminal Justice (Law) at the College of Criminal Justice, Sam Houston State University. He obtained his J.D. degree from the Philippines, an MC.L. from Southern Methodist University, an LL.M. from the University of California at Berkeley, and a J.S.D. from the University of Illinois.

**Bill Blackwood Law Enforcement
Management Institute of Texas**
Criminal Justice Center
Sam Houston State University
Huntsville, TX 77341-2417

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