



BEWARE THE LAND MINES: 2023 IACP ECW MODEL POLICY

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Forewarned is forearmed!

While there is no such thing as a “perfect [law enforcement force option] policy,” this trusted saying applies to the numerous land mines hidden in plain sight within the new 2023 IACP “Electronic Control Weapons” (ECWs) Model Policy and the *Concepts and Issues* supporting document which were recently released. This September 2023 Model Policy replaces the IACP’s

March 2018 version. As an Associate Member of the IACP, this article is not to devalue the work of the IACP, but rather to alert public safety administrators, trainers, risk managers, and users of ECWs that “blind adoption” of this Model Policy may throw them “under the legal attacks bus.” The possible results are more high-profile, unfavorable, costly, and career ending discipline; civil litigations; and criminal prosecutions against ECW users, trainers,

administrators, and government employers. From a risk management perspective, **do not** thoughtlessly adopt this Model Policy without first considering some significant rehabilitation.

Space does not permit a full analysis of the 2023 IACP ECW Model Policy and its supporting *Concepts and Issues* paper, so only a select few of the potentially more serious risk management concerns are discussed. Administrators, trainers, risk managers, and/or ECW users are strongly encouraged to read and understand, in proper contexts (including critics’ potential attack points), the entirety of this new policy and make corrections to the several errors and omissions within its pages before adopting a corrected version. Like an algebra word problem, many people who read this policy may not see the hidden land mines; for others, they will be obvious. You can be sure plaintiffs’ counsel and/or prosecutors will see them and use their wording, coupled with legal and scientific inaccuracies, against their targets.

A downloadable PDF copy of the 2023 IACP ECW Model Policy can be obtained from the following URL: <https://tinyurl.com/yrrzu3ux7>

AREAS OF CONCERN

Following are several risk management issues which need thorough examination and potential adjustments to minimize potential policy complications:

- The new TASER® 10 ECW (released in January 2023) is not included in the policy. It is clear from the language and the descriptions used in this policy that it **does not** include the TASER 10 ECW. There are too many examples of this deficiency to identify and discuss here, but keep in mind that much of what is written can be used against TASER 10 ECW adopters and users.

- Electricity is a weapon. Per the *ECW Concepts and Issues* paper, TASER ECW inventor, Jack Cover, experimented with “electricity as a weapon.” While some folks may argue this is somewhat accurate, imagine a prosecuting or plaintiff’s attorney telling a jury that electricity is a weapon per the IACP ECW Model Policy. Many laypeople, including jurors, are highly misinformed about ECWs. They only know what they have seen on television, in a movie, read online or in print, and from testimony they heard that ECWs deliver 50,000 volts.

BEWARE THE LAND MINES: 2023 IACP ECW MODEL POLICY *Continued*

Per the IACP, all ECWs use electricity as a weapon. To clarify, electricity itself is not a weapon, but it is used as a component in weapons such as ECWs.

- Inaccurate force legal standards: Per the 2023 Model Policy, ECW users can “. . . use only the force that is objectively reasonable under the totality of the circumstances **known** to the officer at the time [emphasis added]. . . .” First, this does not include officers’ force analyzed under the Eighth Amendment “cruel and unusual punishment” standard. More importantly, this is patently a misstatement of *Graham v. Connor* (1989), and its progeny, including *Lombardo v. City of St. Louis, Missouri*, – U.S. –, 210 L. Ed. 2d 609, 141 S. Ct. 2239 (2021), which can foreseeably harm officers in legal proceedings. The standard is not what is *known* to the officer at the time force was used, but rather what was *reasonably perceived* by the officer at the time force was used. This is a major error which slipped by the authors and reviewers of this erroneous Model Policy. This significant inaccuracy conflicts with the clearly established law; with legal decisions; with many agencies’ force policies and guidelines; and with ECW and parallel force option training. Administrators and trainers must recognize this error and others before impulsively adopting and/or training on this new Model Policy.

- Confusing force policy and guidelines: In its *ECW Concepts and Issues* supporting paper, the IACP contradicts itself about ECW user force standards. “To protect the officer, subject, or others from a reasonable **perceived threat** of immediate physical harm” is somewhat accurate, but it falsely implies that an ECW can **ONLY** be used under these very limited circumstances and specifically contradicts the Model Policy language previously discussed [emphasis added]. This contradiction is not to be lightly dismissed because there is case law about such confusing policy language.

In *Ramirez v. Escajeda*, No. EP-17-CV-00193-DCG, Slip Copy, 2021 WL 1131721 (W.D. Tex., March 24, 2021), the court noted the agency’s “Use of Force . . . policy had imprecise language that left its officers to navigate two different concepts of decision-making (objective reasonableness and discretion) which appear contradictory and to some extent inconsistent with the Fourth Amendment’s objective reasonableness standard in *Graham v. Connor*.” Thoughtlessly adopting the 2023 IACP ECW Model Policy would also, arguably, create two or more different concepts of decision-making regarding reasonableness and discretion that, in this case, are contradictory and inconsistent with the Fourth Amendment’s objective reasonableness standard, as exists

today in “clearly established law,” rather than the basic *Graham* factors from 1989.

- Shall vs. May vs. Must: Experienced public safety administrators, trainers and employees should know that “shall” means they must do a task or procedure. In contrast, “may” is not mandatory and gives the employee decision-making discretion. The ECW Model Policy uses “shall,” “may” and “must” throughout to the potential disadvantage of administrators, trainers and employees. Knowing what task or procedure is required versus flexible versus forbidden/prohibited becomes a chore for even those employees with gifted memory. Add lay jurors to the mix and one can imagine how prosecutors and/or plaintiffs’ attorneys can focus on confusion in the minds of jurors after exacting cross-examination of employees about when they “shall,” “must” or “may” do something.

Here are a few examples in the Model Policy with emphasis added in bold type:

1. “An officer **shall** not draw or hold their ECW simultaneously with their firearm **or other force option.**”
2. “The ECW **should** not be carried in a position in close proximity to the firearm.”
3. “As soon as the subject is compliant and the situation is under control, a supervisor **shall** be notified of the use of force.”
4. “The ECW **may** be discharged for an initial cycle of up to five seconds.”

Hypothetically, in the first example, if an officer kicked a charging subject or struck the subject in the chest with an open hand to slow or stop forward movement while holding an ECW, the officer intentionally violated the Model Policy. How do you think a prosecutor and/or a plaintiff’s attorney could use these actions against the officer? The second example is a classic failure to define “close proximity to the firearm.” What is the meaning of “close proximity” and how do administrators define it, trainers teach it and agencies enforce it?

- Notifying a supervisor: The previous third example deserves a fuller explanation about the requirement to notify a supervisor. First, as the Bureau of Justice Statistics (BJS) has reported, most police departments in the United States are small, with 46% of all local police departments employing fewer than ten FTE (Full-Time Equivalent) sworn officers and far more than 50% have less than 25 FTE officers, with several agencies working one or two person shifts and some only working part-time. If there is not a supervisor rank or not one working a shift, the default is apparently to contact the Chief of Police after each ECW use which can include presentation compliance. After notification, per the

2023 Model Policy, “. . . Supervisors have a responsibility for ensuring accountability from their officers . . . Supervisors should:

1. “Immediately respond to the scene in which an ECW has been deployed . . .”;
2. If the ECW was deployed, the supervisor should “. . . ensure the cartridge, wire leads, probes, and AFIDs have been collected as evidence”; and
3. Perform the other varied duties per the *Concepts and Issues* paper.

The ECW Model Policy and supporting *Concepts and Issues* paper are filled with definitions, some of which are inaccurate, poorly defined or simply not defined. For example, the term “deploy” is not defined and, in some jurisdictions, can include removing from the holster or presentation compliance. Similarly, the term Anti-Felon Identification (AFID) tags claims they are “Confetti-like pieces of paper [which is only partially correct] installed on ECW devices that are expelled from the cartridge when deployed.” However, when AFIDs are present, they are in the cartridges and not installed on the ECW devices, and not all ECWs contain AFIDs (think TASER 10, Ultrason 2).

Sensitive body areas include the “chest/heart area,” but later is only identified as the “chest area.” These are not synonymous! In another section, the Model Policy warns ECW users to avoid these areas in “probes or activation” modes and later it says, “preferred probe target location” and also directs in the same paragraph, the ECW “should not be intentionally aimed at a sensitive area . . .” which includes the chest. Per this Model Policy, a drive stun to the “chest area” is not preferred. This conflates a touch/contact stun to a “drive stun.” Even a probe striking the chest area when following the “split the beltline” targeting paradigm would not be preferred. Again, consider how prosecutors and plaintiffs’ attorneys can use this language against the ECW user whose probe or drive stun contacted the “chest area.”

- Elevated Risk Population Groups: Axon International, Inc. (Axon) and the IACP Model Policy both caution against using an ECW on populations which are potentially at greater risk of injury or death. However, neither the manufacturer nor the IACP provide exacting definitions for each group. In short, the liability may be placed onto the agency, agency trainers and ECW users. However, the Model Policy definition of “Elevated risk population groups” is concerning because it may ambiguously include or exclude certain individuals. This group consists of “. . . those who reasonably appear or are known to be elderly, medically infirm, pregnant, users of internal cardiac devices, or who have low body mass, such as small children.”

Current Axon ECW (effective September

BEWARE THE LAND MINES: 2023 IACP ECW MODEL POLICY *Continued*

20, 2022) and the IACP ECW Model Policy (September 2023) do not define “elderly.” Some time ago, a number of law enforcement professionals got together and attempted to define “elderly” only to be met with so many diverse definitions that no one definition is workable. One definition said an elderly person is “anyone retired” which could mean a 30-year-old who just sold a business for millions of dollars and is retired. Most of us who are over 50 can recall when, at age 18, we thought 30-year-olds were “old,” but no longer.

Another label, “pregnant,” is also a slippery one. The IACP model policy fails to distinguish a person who is “visibly pregnant” from one who is two weeks pregnant.

Lastly, most of us cannot possibly know who “appears [to be] users of internal cardiac devices.” Even Transportation Security Administration (TSA) officers ask people to tell them if they have an internal defibrillator or other implanted device so they can be “wanded.”

• Evidence Collection: Section H of the Model Policy focuses exclusively on “Evidence Collection.” Per this section, “Officers will collect all evidence of the encounter . . . [and] shall collect the cartridge, wire leads, darts, and anti-felon identification markers (AFIDs)” Regardless of weather conditions (think blowing wind, rain, snow, etc.), the officer “will collect” AFIDs among other items. This appears to be an example of

non-ECW practitioners writing policy which sounds good on paper, but is hard to follow and very rarely done in practice.

SUMMARY

Unfortunately, space limitation does not permit a full detailed analysis and corresponding explanations of the 2023 ECW Model Policy which means administrators, trainers and/or ECW users must carefully read it in context and in sync with current established science, clearly established law and operational considerations, and then identify concerns and conflicts with existing policy, guidelines, procedures, training, and other relevant documents. A major risk management concern is how the Model Policy can be used against municipalities, administrators, trainers, and/or ECW users during criminal and/or civil legal actions. Too often, expert witnesses on both sides testify that the IACP, through its Model Policies, set “national standards” or “generally accepted police practices” for law enforcement agencies, administrators and officers. This is incorrect. Advocacy groups such as the IACP do not set “standards” for agencies. However, when a municipality or an agency administrator adopts a Model Policy, then it can inappropriately be conflated to an enforceable standard, with potentially severe consequences for that agency.

Another concern focuses on the careers of ECW users. If the IACP ECW Model Pol-

icy is blindly adopted or unofficially used by a municipality, administrator and/or trainers, violations of it can arguably lead to it being used as a predicate for career-ending discipline, criminal prosecution or civil litigation. Union stewards and members will want to obtain and read the ECW Model Policy and then mandate for its modification to parallel extant force legal standards, update agency policy, guidelines, procedures, training, and, where necessary, to update existing ECW use protocols. A robust discussion should produce contemporary, positive and practical results.

The IACP is an excellent organization and I’m proud to be a member, but the 2023 ECW Model Policy is similar to another deficient one it published in 2009 that, by its own ECW definition, did not include TASER devices. The IACP must quickly rewrite the 2023 ECW Model Policy to correct its many inaccuracies, deficient definitions and the absence of the TASER 10. However, until then: *Caveat emptor*. **P&SN**

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