ILLINOIS LAW ENFORCEMENT TRAINING AND STANDARDS BOARD

PEACE OFFICER'S USE OF FORCE IN ILLINOIS

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Introduction

This outline is designed to address legal issues concerning the use of force by peace officers in making arrests of citizens in the community. It is not designed to address the use of force standards applicable to pretrial detainees or convicted persons either in custody or at large. Those standards are different.[1]

Additionally, it should be noted that these questions and answers are predicated on use of force standards imposed by state and federal law. Any agency is permitted to impose use of force standards that are more restrictive than those standards. Individuals are encouraged to familiarize themselves with state and federal law as well as the policies of their respective agencies with regard to use of force.

Who Is a Peace Officer?

Question #1

Is there a legal definition of the term "peace officer"?

Answer #1

The definition is found in 720 ILCS 5/2-13 (1998) and states:

> **"Peace officer"** means any person who by virtue of his/her office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses.

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[1] The rights of pretrial detainees are protected by the Fourteenth Amendment. Bell v. Wolfish, 441 U.S. 520 (1979); Proffitt v. Ridgway, 279 F.3d 503 (7th Cir. 2002); Titran v. Ackman, 893 F.2d 145 (7th Cir. 1990) . The rights of convicted persons are guaranteed by the provisions of the Eighth Amendment. Whitley v. Albers, 475 U.S. 312 (1986). Under both the Eighth and Fourteenth Amendments the use of force is analyzed not by a standard of "reasonableness" but rather by a standard of "deliberate indifference." This "deliberate indifference" standard is much less restrictive concerning the use of force by peace officers to affect a legitimate law enforcement purpose.

Concept of Force - Defining force

Question #2

What constitutes the use of force?

Answer #2

Use of force is an act of physical coercion. Generally it involves actual physical contact between persons. The presence of an armed peace officer or the mere display of a weapon does not constitute the use of force. Simply pointing a gun at a suspect in the course of an arrest does not constitute a use of excessive force. McNair v. Coffey, 279 F.3d 463 (7th Cir. 2002); Wilkins v. May, 872 F.2d 190 (7th Cir. 1989). However, when an officer displays a weapon in a particularly egregious or threatening manner, this may be treated by the court as a use of force. For example, in McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992), the court analyzed the actions of an officer who held a gun to the head of a nine-year-old boy and threatened to pull the trigger as a use of force which was unreasonable given the circumstances. Clearly the excessive display of weapons will factor into a court's analysis as to whether a seizure was conducted in a reasonable manner. See McNair, 279 F.3d at 466-67 (presence of large number of officers pointing weapons at the scene of an arrest - while "frightening" - is not necessarily unreasonable).

Concept of Force - Types of force

Question #3

Are there different types of force?

Answer #3

Generally statutes and courts address force in two different contexts, deadly force and non-deadly force.

Concept of Force – Deadly Force

Question #4

How is "deadly force" defined?

Answer #4

Under state law "deadly force" is that force which is likely to cause death or great bodily harm. 720 ILCS 5/7-8 (2002).

Question #5

Did the Illinois legislature give any guidance as to what constitutes "force likely to cause death or great bodily harm?"

Answer #5

720 ILCS 5/7-8 (2002) gives two instances as examples of force likely to cause death or great bodily harm. Those examples are:

The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm, and

The firing of a firearm at a vehicle in which the person to be arrested is riding.

Peace officer's discharge of a firearm using ammunition designed to disable or control an individual without the likelihood of death or great bodily harm shall not be considered force likely to cause death or great bodily harm relating to a peace officer's justifiable use of force in making an arrest.

(Note that the two examples are ILLUSTRATIVE - NOT EXHAUSTIVE of the various fact situations a peace officer may encounter.)

Question #6

What is the federal definition of "deadly force?"

Answer #6

Under federal law deadly force is classified as force which carries with it a substantial risk of causing death or serious bodily harm." Estate of Phillips v. Milwaukee, 123 F.3d 586 (7th Cir. 1997). Under Brower v. County of Inyo, 489 U.S. 593 (1989), Fourth Amendment protections only apply to the use of force which results in an intentional seizure. Thus the use of deadly force must be intentionally directed. The accidental discharge of a firearm does not constitute a use of deadly force in violation of the Fourth Amendment because the Fourth Amendment only applies to intentional seizures. Clark v. Buchko, 936 F. Supp. 212 (D.N.J. 1996) (no seizure when gun accidentally killed person in custody who backed into it); Troublefield v. City of Harrisburg, 789 F. Supp. 160 (M. D. Pa. 1992) (no seizure where officer's gun accidentally discharged while being holstered, injuring handcuffed suspect).

Question #7

Can use of force other than a firearm constitute a use of deadly force?

Answer #7

Yes. When an instrumentality is used in apprehension of a suspect in such a fashion that it is highly unlikely that the fleeing suspect will escape without serious injury, the use of that instrumentality can constitute the use of deadly force. For example, backing a squad car into the path of a fleeing motorcycle was analyzed as an application of deadly force. Donovan v. City of Milwaukee, 17 F.3d 944 (7th Cir. 1994). Use of police dogs has also been analyzed as an application of deadly force. Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) (concluding that use of a police dog may constitute deadly force). Use of a baton may under certain circumstances constitute an application of deadly force.

Question # 8

What are some examples of non-deadly force?

Answer # 8

Generally, use of fists, feet, impact weapons, chemical weapons, restraint devices, and canines is analyzed as the application of non-deadly force because application does not carry with it a substantial risk of death or great bodily harm.

The following are some examples of court decisions analyzing non-deadly force: Lamb v. City of Decatur, 947 F. Supp. 1261 (C.D. Ill. 1996) (use of pepper spray against demonstrators requires factual determination of reasonableness); U.S. v. Holloway, 906 F. Supp. 1437 (D. Kan. 1995) (use of pepper spray to dislodge narcotics from mouth of arrestee analyzed for reasonableness); Singleton v. City of Newburgh, 1 F. Supp. 2d 306 (S.D.N.Y. 1998); Curtis v. City of New Haven, 726 F.2d 65 (2d Cir. 1984) (court cites with approval International Association of Chiefs of Police study suggesting mace is a "dangerous chemical agent capable of causing long-lasting injury"); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) (flashlight strike to head analyzed for reasonableness); Secot v. City of Sterling Heights, 985 F. Supp. 715 (E.D. Mich. 1997) (one stroke with a baton to the hand of a demonstrator requires analysis for reasonableness); Toth v. City of Dothan, 953 F. Supp. 1502 (M.D. Ala. 1996) (claim by a woman allegedly struck with a baton and held on bed with a baton at her throat as her room is searched is properly analyzed under the Fourth Amendment reasonableness standard); Ford v. Davis, 878 F. Supp. 1124 (N.D. Ill. 1995) (allegedly unprovoked punches and kicks by arresting officers sufficient to state a claim for excessive force); Griffin v. Filipiak, 2002 WL 1972272 (N. D. Ill. Aug. 27, 2002) (squeezing cheeks of suspect to force open his mouth to search for narcotics may constitute excessive use of force); Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (rejecting consideration that a properly trained and handled police dog constitutes deadly force); Carlson v. Mordt, 2002 WL 1160115 (N. D. Ill. May 29, 2002) (accidental release of dog who bites a suspect does not constitute a use of force); Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) (restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest); Smith v. City of Chicago, 242 F.3d 737 (7th Cir. 2001) (use of force to restrain a traffic offender who was chased for 12 blocks not unreasonable even where offender was "slammed" on hood of his vehicle with arms pinned behind and subsequently handcuffed).

Concerning conducted energy weapons of electro-muscular disruption technology devices, like Taser, and stun guns, consider the following: Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004) (Taser shock, while unpleasant does not inflict any serious injury); and Calunsinski v. Kruger, 24 F.3d 931 (7th Cir. 1994) (appeals court upholds conclusion that use of a stun gun in subduing a resisting arrestee was justified in that case). Officers should ensure that their use of these weapons is in strict compliance with their individual department's policies for use of such devices.

However, the use of what would ordinarily be non-deadly force can be considered as deadly force if applied in a fashion calculated to cause death or great bodily harm (e.g. an intentional baton strike to the head of a committed person, or use of chemical agents against a person with known, serious respiratory condition).

Question #9

Does the use of a firearm equipped with ammunition designed to control and not cause death or great bodily harm constitute deadly force?

Answer #9

Under Illinois law, the use of a firearm equipped with special less-than-lethal ammunition does not constitute deadly force. 720 ILCS 5/7-8 (b) (1998) provides that "[a] peace officer's discharge of a firearm using ammunition designed to disable or control an individual without creating the likelihood of death or great bodily harm shall not be considered force likely to cause death or great bodily harm within the meaning of Sections 7-5 and 7-6 [720 ILCS 5/7-5 and 5/7-6 (1998)]." Under federal law, it is an open question whether or not bean bag rounds, or other less lethal technology, constitute "deadly force." See Bell v. Irwin, 321 F.3d 637 (7th Cir 2003); Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999). Conducted energy weapons or electro-muscular disruption technology devices (like Taser) that discharge projectiles by expanding gas are covered by the provisions of 720 ILCS 5/7-8 (b) (2004) and do not necessarily constitute deadly force under state law. Federal courts have concluded that their application may not constitute deadly force. Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

Authority for use of force

Question #10

What is the authority for a peace officer in Illinois to use force in making an arrest?

Answer #10

In Illinois the authority of a police officer to use force in making an arrest is governed by the provisions of Article I, Section 6 of the Illinois Constitution and 720 ILCS 5/7-5 (2002). That statute provides in pertinent part that "[a] peace officer (or any person whom he has summoned or directed to assist him), need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest." Case law on the federal level recognizes that "[t]he right of a law enforcement officer to make an arrest necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Frazell v. Flanigan, 102 F.3d 877 (7th Cir. 1996), quoting Graham v. Connor, 490 U.S. 386, 396 (1989).

Question #11

720 ILCS 5/7-5 (1998) appears to say that as long as I have the legal right to make an arrest, I'm under no legal obligation to stop my efforts to arrest even if the person to be arrested indicates that resistance to the arrest will occur. Is that correct?

Answer #11

Correct. While you're under no legal obligation to stop your effort to arrest, you should ask yourself if it might not be better to TEMPORARILY back off until you obtain backup to make the arrest.

Question #12

720 ILCS 5/7-5 (b) (1998) appears to say that if I have no reason to think that the arrest warrant that I believe exists or have in my hands is defective, I may still use that amount of force which is reasonably necessary even though the arrest warrant is later found to be defective. Is that correct?

Answer #12

Yes.

Question #13

Can an individual use force to resist arrest if the arrest is improper?

Answer # 13

No. 720 ILCS 5/7-7 (1998) provides that "[a] person is not authorized to use force to resist arrest which he knows is being made by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and in fact the arrest is unlawful." Two issues are of special note. First, the statute only applies where an individual is known to be a peace officer. Thus, it is incumbent on an officer not in uniform to properly identify himself or herself. Second, where an officer uses excessive force in making an arrest, the arrestee is entitled to use force in self-defense. People v. Bailey, 108 Ill. App. 3d 392 (2d Dist. 1982). Moreover, where an offender attempts to resist arrest, the amount of force an officer is authorized to use to effect arrest increases, Smith v. Ball State Univ., 295 F.3d 763 (7th Cir. 2002). The same logic applies to individuals who attempt to flee. Smith v. City of Chicago, 242 F.3d 737 (7th Cir. 2001).

Question # 14

Are peace officers authorized to use force in effecting a stop based on reasonable suspicion?

Answer # 14

Yes. If an officer conducts a stop of a person based on reasonable suspicion in accordance with the requirements of Terry v. Ohio, 392 U.S. 1 (1968), force can be used to effectuate the stop (725 ILCS 5/107-5 and 5/107-14 (2002)). However, if an officer is making a Terry stop he should be mindful that under the balancing test used to assess the reasonableness of a given use of force, it is unlikely that substantial force would be found to be warranted. Officers are, however, able to use force necessary to restrain the subject of a Terry stop and to protect themselves from the subject. See Smith v. Ball State Univ., 295 F.3d 763 (7th Cir. 2002) (court found reasonable forced removal from vehicle, attempted knee strike, and application of handcuffs on suspect thought to be drunk but found to be suffering from a diabetic condition).

Question #15

As a peace officer am I authorized to make an arrest or conduct temporary questioning anywhere in the state of Illinois at any time?

Answer #15

No. As a peace officer you are only granted arrest authority within your jurisdiction (including your police district as that term is defined in 65 ILCS 5/7-4-8 (2002)) at any time or outside your jurisdiction as provided in 725 ILCS 5/107-4 (2002).

Question #16

Does flight from police give rise to reasonable suspicion for a Terry stop?

Answer #16

Although flight from police alone is insufficient for a Terry stop, flight combined with other factors, such as its occurrence in a high crime area upon noticing police can support a stop. See Illinois v. Wardlow, 528 U.S. 119 (2000). However, officers must be aware that the area is a high crime area.

Limitations on use of force

Question #17

Are there affirmative limitations on the force which can be used in making an arrest?

Answer #17

Yes. Limitations are imposed by both state and federal law.

Question #18

What are the federal limitations?

Answer #18

The federal limitations are all based on the Fourth Amendment to the U.S. Constitution. Graham v. Connor, 490 U.S. 386 (1989). That amendment provides:

> **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.**

Question #19

How does the Fourth Amendment bear on the use of force?

Answer #19

The Supreme Court noted in Graham v. Connor, 490 U.S. 386 (1989):

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person.

In the case of Tennessee v. Garner, 471 U.S.1. (1985), the United States Supreme Court stated:

> Whenever an officer restrains the freedom of a person to walk away, the officer has seized that person. To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. . . . Because one of the facts is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.

Question #20

How is reasonableness of use of force determined?

Answer #20

The Supreme Court noted in Graham v. Connor, 490 U.S. 386 (1989):

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520 [citation omitted] (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See Tennessee v. Garner, 471 U.S. 1985 (the question is "whether the totality of the circumstances justif[ies] a particular sort of . . . seizure").

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The determination of reasonableness is a legal question and where facts surrounding the underlying conduct are not disputed, reasonableness should be assessed by a judge as a matter of law. Bell v. Irwin 321 F.3d 637 (7th Cir 2003).

Question #21

Is the motive of the officer in using force relevant to the determination of whether or not the use of force is reasonable?

Answer #21

No. The Supreme Court in Graham v. Connor, 490 U.S. 386 (1989), has concluded:

> An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

The court also noted:

> [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Question #22

Are there specific limitations on the use of deadly force?

Answer #22

Yes. Both state and federal law place restrictions on the use of deadly force.

Question #23

What are the limitations imposed by federal law?

Answer #23

In Tennessee v. Garner, 471 U.S. 1 (1985), the U.S. Supreme Court concluded:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Question # 24

In a situation where the use of deadly force is warranted, are officers required to use the least lethal alternative before using deadly force?

Answer # 24

No. If the conduct of a suspect warrants the use of deadly force, the officer need not resort to a less deadly alternative before employing deadly force. Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994). The court noted that ". . . where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first." The court further noted that "[t]he Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable."

Question #25

What are the limitations under state law?

Answer #25

720 ILCS 5/7-5 (2002), entitled "Peace Officer's Use of Force in Making Arrest," states:

> (a) . . . An officer is justified in the use of any force which he/she reasonably believes to be necessary to defend self or another from bodily harm while making the arrest. However, he/she is justified in using force likely to cause death or great bodily harm only when he/she reasonably believes that such force is necessary to prevent death or great bodily harm to self or such other person, or when he/she reasonably believes both that:
>
> > (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
> >
> > (2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

Question #26

What type of "forcible felony" provides a justification for use of deadly force?

Answer #26

While the term "forcible felony" is defined in 720 ILCS 5/2-8 (2002), not every forcible felony provides a basis for the use of deadly force. For purposes of deadly force, "forcible felony" means first degree murder, second degree murder, aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, robbery, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and any other felony, which involves the use of threat of physical force or violence against any individual (heinous battery, home invasion, aggravated discharge of a firearm).

A suspect could commit a forcible felony and not have a deadly weapon, or give any indication of endangering human life or inflicting great bodily harm unless arrested without delay (for example, burglary). Garner states that simply because a forcible felony has been committed does not automatically justify shooting the suspect. Additionally, based on Garner, a peace officer subject to Section 7-5 will have to reasonably conclude that a suspect who is escaping from the peace officer "will endanger human life or inflict great bodily harm unless arrested without delay." (720 ILCS 7-5).

While Garner states:

> A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead

Garner also states:

> Clearly a peace officer could encounter a situation where an unarmed suspect has committed a "forcible felony" and has inflicted or threatened to inflict serious physical harm against persons present at the site of the burglary.

Based on the aforesaid language from Garner, the peace officer could constitutionally use deadly force "necessary to prevent escape, and if, where feasible, some warning has been given."

Liability for Use of Excessive Force

Question #27

What can happen to me if I use force when I'm not allowed to OR if I use more force than that which I'm legally allowed to use?

Answer #27

If you use force not allowed by law OR use more force than that which you are allowed by law to use, you may be sued, prosecuted, and/or fired. Additionally, you may also be held liable for failure to intervene in circumstances where a use of excessive force occurs in your presence and you fail to take measures to stop it from continuing. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Yang v. Hardin, 37 F.3d 282 (7th Cir. 1994).

Civil liability

Question #28

You said that as a peace officer I could be sued if I used force when I was not legally entitled to use such force or used more force than that which I'm lawfully entitled to use. Would you explain in detail?

Answer #28

Both state and federal courts recognize the ability of persons to file civil actions against police officers in connection with allegations of excessive force.

Liability under federal law

Question #29

What is my potential liability under federal law?

Answer #29

Under the provisions of the U.S. Code (which is the federal equivalent of the ILCS), police officers may be sued civilly for claims of a use of force which violates constitutionally protected Fourth Amendment rights. 42 U.S.C. Section 1983 of the United States Code provides:

> **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 person 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 proceeding for redress.**

Since a police officer is defined by 720 ILCS 5/2-13 (1998) and since a peace officer is authorized to use force by 720 ILCS 5/7-5 (1998), such would be sufficient "color of law" so as to allow a federal court to receive and act upon an allegation of excessive use of force by an officer. An individual may be found to be acting under color of law even when off duty. Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990). It is not the duty status but rather the actions of the individual which provide the basis for a conclusion that an individual is acting under color of law. Hughes v. Meyer, 880 F.2d 967 (7th Cir. 1989).

Question #30

What types of allegations of excessive force are sufficient to support a claim under 42 U.S.C. Section 1983?

Answer #30

In Graham v. Connor, 490 U.S. 386 (1989), the Court noted:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

On the federal level, as an example, one of the first cases in Illinois under Section 1983 was the case of Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983). That case dealt with police officers who allegedly used excessive force in arresting Lenard. Although the officers were found not guilty of the allegation, the case demonstrates that an Illinois police officer may be sued in federal court for alleged excessive use of force. A more recent example in which Section 1983 liability has been found against a police officer is the case of Frazell v. Flanigan, 102 F.3d 877 (7th Cir. 1996). There the officer was found liable for using excessive force against an arrestee. The jury awarded $156,000 in compensatory damages and $3,900 in punitive damages. Even a police chief who used minimal force to effect the arrest of an offender in someone else's home was subject to suit. Jones by Jones v. Webb, 45 F.3d 178 (7th Cir. 1995).

Liability under state law

Question #31

What is my potential liability under Illinois law?

Answer #31

On the state court level, Simmons v. City of Chicago, 118 Ill. App. 3d 676 (1st Dist. 1983), dealt with a lawsuit in which it was alleged that a Chicago police officer had used excessive force in shooting and killing Simmons. In ruling that the officer had used reasonable necessary force within the terms of 720 ILCS 5/7-5 (1998), the court stated that the determination of the reasonableness of force used by a officer in the performance of his duty is a question of fact to be resolved by the jury in a lawsuit seeking damages.

Illinois courts have concluded that allegations of excessive force can be maintained under common law theories of assault and battery. In Bohacs v. Reid, 63 Ill. App. 3d 477 (2d Dist. 1978), the court concluded that the plaintiff had alleged sufficient facts to raise a claim for assault and battery. There the officer was accused of dragging a suspect motorist out of the motorist's car by the neck and striking him about the head with his hands and fists.

Question #32

Does my conduct have to be intentional?

Answer #32

No. While you will be liable for intentional conduct you are also liable for conduct found to be willful and wanton.

The Illinois General Assembly defined the term "willful and wanton" in 745 ILCS 10/1-210 (2002) as follows:

> **"Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.**

Under Illinois law, peace officers have been found liable for the unintentional but reckless use of force if it is found to be willful and wanton. In Medina v. City of Chicago, 238 Ill. App. 3d 385 (1st Dist. 1992), the appellate court affirmed a jury verdict against the officer where the evidence established that the officer accidentally shot a suspect while chasing the suspect with the officer's finger on the trigger of his service revolver. The court noted that "a person is guilty of willful and wanton conduct when he ignores known or plainly observable dangerous conditions and does something that will naturally and probably result in injury to another."

Criminal liability

Question #33

If I'm alleged to have used excessive force, could I be criminally prosecuted?

Answer #33

Yes. You may be prosecuted under both state and federal criminal laws.

Federal criminal liability

Question #34

What federal criminal laws are applicable?

Answer #34

On the federal level, the Illinois officer could be criminally prosecuted under 18 U.S.C. Section 242, which reads:

> **Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both, and if death results shall be subject to imprisonment for any term of years or for life.**

United States v. Hoffman, 498 F.2d 879 (7th Cir. 1974), clearly shows that a peace officer who obtains his or her authority to act under Illinois law is within the definition of "color of any law" and that such allows the federal government to criminally prosecute an Illinois officer in federal court for excessive use of force. Also see United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993) (police officers and supervising sergeant prosecuted for use of excessive force during arrest). Section 242 is but one of several statutes which could be utilized to prosecute an officer in federal court.

State court criminal laws

Question #35

Can you give me an example of state court criminal statutes?

Answer #35

On the state court level People v. Smith, 76 Ill. App. 3d 191 (2d Dist. 1979), stated that the firing of a loaded weapon in the general direction of another may support a verdict of reckless conduct. In People v. Johnson, 20 Ill. App. 3d 1085 (4th Dist. 1974), the Illinois Appellate Court stated that the firing of a gunshot into the ground which ricocheted and caused injury could constitute reckless conduct.

"Reckless conduct" is defined in 720 ILCS 5/12-5 (2002) as follows:

A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.

Note that reckless conduct is but one of several statutes that could be utilized to prosecute a police officer under Illinois law for excessive use of force, other examples being assault, aggravated assault, battery, aggravated battery, intimidation, official misconduct. Peace officers in Illinois have been prosecuted for these crimes.

"Official misconduct" is defined in 720 ILCS 5/33-4 (2002). A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he commits a Class 3 felony.

Question #36

Can I be prosecuted for both state and federal criminal law violations?

Answer #36

Yes. Police officers can be subjected to successive state and federal prosecutions for the same conduct. U.S. v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993).

Question # 37

If I'm alleged to have used excessive force, may I be subject to disciplinary action?

Answer #37

Yes. In Serio v. Police Board of the City of Chicago, 275 Ill. App. 3d 259 (1st Dist. 1995), the appellate court affirmed the discharge of two police officers who slapped one juvenile suspect and dropped him and another juvenile off in an area of the city where they were subjected to physical attack. In affirming the discharge the appellate court noted that cause for discharge is defined as "a substantial shortcoming which renders an employee's continuance in an office detrimental to the discipline and efficiency of the service and which the law and public opinion recognize as good cause for dismissal." The courts have upheld discharges for use of excessive force on or off duty. Carrigan v. Board of Fire and Police Commissioners of the Village of Glendale Heights, 121 Ill. App. 3d 303, (1984) (finding that police officer who shot into an area where ricochet bullet nearly struck his wife while on duty constituted cause for discharge of police officer; finding of reckless conduct and unlawful discharge of firearm sufficient).

Almost all departments have rules against using excessive force. A single violation of a single rule may in certain circumstances be sufficient to warrant discharge. Caliendo v. Martin, 250 Ill. App. 3d 409 (1st Dist. 1993). Discharge of officers has been affirmed for using excessive force during arrest (Hayes v. Police Bd. of the City of Chicago, 268 Ill. App. 3d 1107 (1st Dist. 1995)) and off duty force-related misconduct including incidents of domestic violence (Garza v. Hillard, 303 Ill. App. 3d 1094 (1st Dist. 1999); McCloud v. Rodriguez, 304 Ill. App. 3d 652, 1999)).

Indemnification

Question #38

If I am sued for using excessive force, what are my legal protections?

Answer #38

While any lawsuit filed against you alleging use of excessive force is your own personal responsibility, if the allegations concern actions taken within the scope of your employment as a peace office, under Illinois law you will be entitled to indemnification unless your actions constitute willful misconduct.

Indemnification of municipal employees is guaranteed by the provisions of 65 ILCS 5/1-4-5 and 5/1-4-6 (2002). Additional provisions for indemnification may be found in collective bargaining agreements and local ordinances. However, indemnity for any award of punitive damages against an officer is prohibited. 745 ILCS 10/2-301 (2002).

Indemnification of county sheriffs and deputies is guaranteed by the provisions of 55 ILCS 5/5-1002 (1998). Additional provisions for indemnification may be found in collective bargaining agreements and local ordinances. However, indemnity for any award of punitive damages against an officer is prohibited. 745 ILCS 10/2-301 (1998).

Indemnification of state employees is guaranteed by the provisions of 5 ILCS 350/2 (1998). Additional provisions for indemnification may be found in collective bargaining agreements and local ordinances. However, conduct found by the Attorney General to be willful and wanton misconduct and not intended to serve the interests of the state need not be indemnified. 5 ILCS 350/2 (2002).

Question #39

If I am sued for using excessive force, am I entitled to representation?

Answer #39

Under Illinois law local public entities such as counties and municipalities are permitted to represent peace officers who are sued in connection with actions taken as employees. 745 ILCS 10/2-302 (2002). Additional provisions for representation may be found in collective bargaining agreements and local ordinances.

State employees are entitled to representation by the Attorney General. 5 ILCS 350/2 (2002).

Appendix A

65 ILCS 1-4-5, "Indemnification for Injuries caused by police officer – Liability for injuries caused while assisting police officer." (Chicago Police Officer)

"In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of 500,000 or over, while the member is engaged in the performance of his or her duties as a police officer, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his or her duties as police officer shall indemnify the police officer for any judgment recovered against him or her as the result of such injury, except where the injury results from the willful misconduct of the police officer. A municipality, which is not otherwise required to indemnify pursuant to this Section, may indemnify a police officer for any judgment recovered against him or her for injuries sustained as a result of the police officer's performance of his duties as a police officer.

If any person in obeying the command of any such police officer to assist in arresting or securing an offender is killed or injured or his or her property or that of his or her employer is damaged and such death, injury or damage arises out of and in the course of aiding such police officer in arresting or endeavoring to arrest a person or retaking or endeavoring to retake a person who has escaped from legal custody, the person or employer so injured or whose property is so damaged or the personal representatives of the person so killed shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such police officer is employed at the time such command is obeyed."

Appendix B

65 ILCS 1-4-6, "Indemnification for Injuries caused by police officer-Notice – Liability for injuries incurred while assisting police officer."

"In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of less than 500,000, while the member is engaged in the performance of his or her duties as a police officer, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his or her duties as police officer shall indemnify the police officer for any judgment recovered against him or her as the result of such injury, except where the injury results from the willful misconduct of the police officer, to the extent of not to exceed $500,000 including costs of action.

Any police officer, or any person who, at the time of performing such an act complained of, was a police officer, who is made a party defendant to any such action shall, within 10 days of service of process upon him or her, notify the municipality by whom he or she is or was employed, of the fact that the action has been instituted, and that he or she has been made a party defendant to the same.

Such notice shall be in writing, and shall be filed in the office of the city attorney or corporation counsel, if there is a city attorney or corporation counsel, and also in the office of the municipal clerk, either by himself, his agent or attorney. The notice shall state in substance, that such police officer, (naming him or her), has been served with process and made a party defendant to an action wherein it is claimed that a person has suffered injury to his or her person or property caused by such police officer; stating the title and number of the case; the court wherein the same is pending; and the date such police officer was served with process in such action, and made a party defendant thereto. The municipality which is or may be liable to indemnify the police officer shall have the right to intervene in the suit against a police officer, and shall be permitted to appear and defend. The duty of the city to indemnify any such policeman for any judgment recovered against him shall be conditioned upon receiving notice of the filing of any such action in the manner and form here in above described.

If any person in obeying the command of any such policeman to assist in arresting or securing an offender is killed or injured, or his or her property or that of his or her employer is damaged, and such death, injury or damage arises out of and in the course of aiding such policeman in arresting, or endeavoring to arrest, a person or retaking or endeavoring to retake a person who has escaped from legal custody, the person or employer so injured, or whose properties so damaged, or the personal representatives of the person so killed, shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such police officer is employed at the time such command is obeyed.

If a police officer is acting within a municipality other than his or her employing municipality under an agreement pursuant to Section 11-1-2.1, the liability or obligation to indemnify imposed by this Section does not extend to both municipalities. Only that municipality designated by the agreement is silent as to such liability or obligation, then the municipality by which the police officer is employed is subject to such liability or obligation.

If a police officer is acting within a municipality other than his or her employing municipality under the provisions of Section 1-4-8, the liability or obligation to indemnify imposed by this Section shall be the liability or obligation of the requesting municipality only. The notice required in this Section 1-4-6 shall be given to the municipality in which he or she was acting if other than his or her employing municipality."

Appendix C

34 ILCS 5-1002 "Indemnity of sheriff or deputy."

"If any injury to the person or property of another is caused by a sheriff or any deputy sheriff, while the sheriff or deputy is engaged in the performance of his or her duties as such, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the county shall indemnify the sheriff or deputy, as the case may be, to the extent of not to exceed $100,000, including costs of action.

Any sheriff or deputy, as the case may be, or any person who, at the time of performing such an act complained of, was a sheriff or deputy sheriff, who is made a party defendant to any such action shall, within 10 days of service of process upon him or her, notify the county, of the fact that the action has been instituted, and that he or she has been made a party defendant to the action.

The notice must be in writing, and be filed in the office of the State's Attorney and also in the office of the county clerk, whether by himself or herself, his or her agent or attorney. The notice shall state in substance, that the sheriff or deputy sheriff, as the case may be, (naming him or her), has been served with process and made a party defendant to an action wherein it is claimed that a person has suffered injury to his or her person or property caused by that sheriff or deputy sheriff, stating the title and number of the case; the Court wherein the action is pending; and the date the sheriff or deputy sheriff was served with process in the action, and made a party defendant thereto. The county, which is or may be liable to indemnify the sheriff or deputy sheriff, as the case may be, may intervene in the action against the sheriff or deputy sheriff, as the case may be, and shall be permitted to appear and defend. The duty of the county to indemnify any sheriff for any judgment recovered against him or her is conditioned upon receiving notice of the filing of any such action in the manner and form herein above described."

Appendix D

LAW ENFORCEMENT EMERGENCY CARE ACT 745 ILCS 49

Sec. 70. Law enforcement officers, firemen, Emergency Medical Technicians (EMTs) and First Responders; exemption from civil liability for emergency care.

Any law enforcement officer or fireman as defined in Section 2 of the Line of Duty Compensation Act, any "emergency medical technician (EMT)" as defined in Section 3.50 of the Emergency Medical Services (EMS) Systems Act, and any "first responder" as defined in Section 3.60 of the Emergency Medical Services (EMS) Systems Act, who in good faith provides emergency care without fee or compensation to any person shall not, as a result of his or her acts or omissions, except willful and wanton misconduct on the part of the person, in providing the care, be liable to a person to whom such care is provided for civil damages.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT 745 ILCS 10

10/1-210. Willful and Wanton conduct.

"Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

TITLE 18 U.S. CODE

241. Conspiracy against rights.

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

242. Deprivation of rights under color of law.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

TITLE 42 U.S. CODE

1983. Civil action for deprivation of rights. 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 person 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.