ILLINOIS LAW ENFORCEMENT TRAINING AND STANDARDS BOARD

CORRECTIONAL 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 correctional officers acting as peace officers in maintaining custody and control of pretrial detainees or convicted persons. It is not designed to address the use of force standards applicable to peace officers in the seizure of persons with a right to be at liberty in the free community. Those standards are different.[1]

Unlike peace officers operating in the free community, the nature of the custodial relationship between correctional officers and committed persons leads to a heightened responsibility to protect committed persons from applications of force by third parties. This duty to protect committed persons from injury is often a great source of liability. The duty arises from the fact that when individuals are taken into custody, the individuals maintaining that custody become responsible for the welfare of the persons in their custody.2

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.

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[1] The right of persons at liberty to be free from unreasonable searches or seizures is governed by provisions of the Fourth Amendment. Graham v. Connor, 490 U.S. 396 (1989). The standard applied is one of reasonableness. 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). 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.

2 The duty to protect exists for both pretrial detainees and convicted persons. The rights of persons arrested and not yet convicted are secured by the provisions of 725 ILCS 5/103-2 (2004). The duty to safeguard individuals in county jails are outlined in the County Jail Act 730 ILCS 125/1 et.seq. (2004) and in the County Jail Standards (20 Illinois Administrative Code 701) promulgated pursuant to the provisions of 730 ILCS 5/3-15-2 (2004). The Illinois Code of Corrections, 730 ILCS 5/3-7-4 (2004), outlines the duty to protect persons committed to the Illinois Department of Corrections.

The Correctional Officer as 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 (2004) 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.

Question #2

Is a correctional officer a "peace officer"?

Answer #2

While Illinois statutes define the term "peace officer" there is no definition of the terms "correctional officer" or "guard". The powers of correctional officers to use force with respect to committed persons is found in statute and regulations governing the administration of prisons and jails. Further limitations on the ability of a correctional officer's use of force may be imposed by the entity employing him or her.

The answer to the question of whether or not a corrections officer is a peace officer depends on the jurisdiction employing the correctional officer. Some county correctional officers are fully deputized as peace officers able to carry out a full range of law enforcement duties, both in the jail setting and in the community. By contrast, correctional officers employed in the Illinois Department of Corrections (IDOC) are "conservators of the peace" and are only authorized to exercise peace officer powers outside of IDOC facilities "...in the protection arrest and retaking of committed persons." 730 ILCS 5/3-2-2 (1) (i) (2004).

Correctional officers should understand that if they attempt to use force in their capacity as a corrections officer whether on or off duty or in or out of uniform, they may be found to be acting under color of law for purposes of federal civil rights liability. This can be true even when the use of force is not authorized by the employer. In a circumstance where an officer uses force at a time or circumstance not authorized by his/her employer, the individual may not be entitled to indemnity or representation. Therefore it is important for each officer to determine whether or not the jurisdiction employing him/her has given him/her a full grant of law enforcement authority or whether that grant is limited to use of force directed solely to committed persons. This has important implications for use of force, indemnity and the carrying of firearms while off duty.

Concept of Force - Defining force

Question #3

What constitutes the use of force?

Answer #3

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. Even in the context of the free community applying a reasonableness standard, courts have recognized that 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).

However, when an officer displays a weapon in a particularly egregious or threatening manner, this may be treated by the court as an unreasonable seizure. 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 unreasonable given the circumstances. In the corrections setting, consider Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992) (court found "malicious and sadistic" actions of corrections officer placing a revolver to a prisoner's head and threatening to pull the trigger).

Absent such extraordinary circumstances the general the use of weapons by correctional officers, even pointing weapons in the direction or at committed persons is not likely to implicate constitutional protections. Even in the free community, under a more stringent Fourth Amendment standard, pointing has been found not to be actionable. See McNair, 279 F.3d at 466-67. Presence of large numbers of officers pointing weapons at the scene of an arrest while "frightening" is not necessarily unreasonable.

Concept of Force - Types of force

Question #4

Are there different types of force?

Answer #4

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

Concept of Force - Deadly force

Question #5

How is "deadly force" defined?

Answer #5

Under state law "deadly force" is that force which is likely to cause death or great bodily harm. 720 ILCS 5/7-8 (2004).

Question #6

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

Answer #6

720 ILCS 5/7-8 (2004) 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. Further illustrations of the type of force which can be seen as deadly force can be found in the answer to Question 8. While these cases are decided under federal law, the same result would likely occur under state law.

Question #7

What is the federal definition of "deadly force"?

Answer #7

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). The use of deadly force must be intentionally directed to be actionable. Accidental discharge of a firearm is generally not considered to be a use of deadly force. See Clark v. Buchko, 936 F. Supp 212 (D. N.J. 1996) (finding no seizure when gun accidentally killing person in custody who backs into it); and Troublefield v. City of Harrisburg, 789 F. Supp. 160 (M.D. Pa. 1992) (no seizure where officer's gun accidentally discharges while being holstered injuring handcuffed suspect).

Question #8

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

Answer #8

Yes. When an instrumentality is used in such a fashion that it is highly unlikely that the fleeing suspect will escape without great bodily harm, 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.

Concept of Force - Non-deadly force

Question # 9

What are some examples of non-deadly force?

Answer # 9

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 same is also true with regard to Tasers and stun guns.

The following are some examples of court decisions analyzing use of chemical agents: Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984) (use of chemical agents in a corrections setting is permissible to prevent riots and escape or restrain a recalcitrant inmate, even a handcuffed one); Young v. Breeding, 929 F. Supp. 1103 (N.D. Ill. 1996) (spraying of mace through a food slot into a cell containing two inmates permissible to subdue the one inmate who assaulted an officer); Blair -El v. Tinsman, 666 F. Supp. 1218 (S.D. Ill. 1987) (use of chemical agent to disable spokesman for organized inmate demonstration permissible absent physical threat to prevent escalation of disturbance); [with regard to continued use of mace as opposed to pepper spray peace officers should consider Singleton v. City of Newburgh, 1 F. Supp. 2d 306 (S.D.N.Y. 1999); 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")].

The following are some examples of court decisions analyzing use of other instances of non-deadly force: Thomas v. Stalter, 20 F.3d 298 (7th Cir. 1994) (single punch to inmate's face requiring extraction of four teeth--actionable); Winder v. Leak, 790 F. Supp. 1403 (N.D. Ill. 1992) (shove from behind of a shackled inmate knocking him to the ground--actionable); Burton v. Kuchel, 865 F. Supp. 298 (N.D. Ill 1994) (single punch to inmate's stomach with no bruising or swelling when coupled with allegations of retaliation—actionable, but push in the shower with no injury, treatment or physical difficulty—not actionable); Lunsford v. Bennett, 17 F.3d 1574 (7th Cir. 1994) (pouring water over head of inmate during flood clean-up—not actionable). 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); 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 committed person with known, serious respiratory condition).

Question # 10

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

Answer # 10

Under Illinois law, the use of a firearm equipped with certain special ammunition designed to control without serious injury does not constitute deadly force. 720 ILCS 5/7-8 (b) (2004) 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 (2004)]." 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) and Omdahl v. Lindholn, 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 does not constitute deadly force. Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

Authority for use of force

Question #11

What is the authority for a correctional officer in Illinois to use force against a committed person?

Answer #11

In Illinois the authority of a correctional officer to use force centers around the need to maintain orderly custody of committed persons. While this guide outlines the restrictions imposed by state law and federal case law, most jurisdictions have promulgated regulations or policies on the use of force. Many times those regulations and policies are more restrictive than state and federal law. Officers must be careful to know and follow those more restrictive regulations or policies of their employing agency or else they will subject themselves to possible disciplinary action.

The ability to use force to preventing escape is provided in the Illinois Criminal Code by 720 ILCS 5/7-9(b) (2004). That statute provides in pertinent part:

> A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

In a further provision of the Illinois Criminal Code, 720 ILCS 5/2-14 (2004), the term "penal institution" is defined to include: "a penitentiary, state farm, reformatory, prison, jail, house of correction, or other institution for the incarceration or custody of persons under sentence or awaiting trial for offenses." An officer safeguarding a committed person during transport should be viewed as an extension of the institution.

Use of force to enforce detention rules against committed persons to ensure appropriate institutional discipline can be found in other statutory or regulatory provisions. For example, IDOC correctional officers are authorized by the provision of 730 ILCS 5/3-6-4 (b) (2004) and by IDOC regulations to use non-deadly force against committed persons to enforce lawful orders and maintain discipline and to protect property. Correctional officers are permitted by that statute and those regulations to use both non-deadly and deadly force, to defend themselves and protect other employees or committed persons from injury, to prevent escape, and to suppress a riot or insurrection.

For county correctional officers, the use of force is expressly authorized by Section 701.160 of the Illinois County Jail Standards (20 Illinois Administrative Code 701.160). Those standards are promulgated pursuant to 730 ILCS 5/3-15-2 (2004). Section 701-160 provides:

> Limitations on the use of force do not prohibit self defense, prevention of injury to another staff member or detainee, prevention of property damage or efforts to thwart or subdue a recalcitrant or to thwart or prevent escape or attempt to escape. The least force necessary under the circumstances shall be employed.

Case law on the federal level recognizes that "prison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are necessary to preserve internal order and discipline and maintain institutional security." Whitley v. Albers, 475 U.S. 312 (1986). This reasoning was extended in Whitley to the firing of a shotgun into a cellblock to suppress a riot.

Question #12

Can correctional officers search prisoners or their property?

Answer #12

Prisoners and pretrial detainees have extremely limited privacy protections. In accordance with prison or jail regulations, searches of inmate persons or property are generally unrestricted. In Bell v. Wolfish, 441 U.S. 520 (1979), the court noted that pretrial detainees had no reasonable expectation of privacy in their cells and so searches can be conducted of those areas. The same is true of prison inmates. See Hudson v. Palmer, 468 U.S. 517 (1984).

Searches of the person, including strip searches of both, pretrial detainees and convicted persons, are also permissible. In Bell, strip searches of pretrial detainees with visual inspection of body cavities was upheld where those detainees were returning from contact visits. Strip searches and visual body cavity searches of prison inmates have been approved by courts under a number of circumstances: arrival or departure from the facility. See Peckham v. Wisconsin Dept of Corrections, 141 F.3d 694 (7th Cir. 1998). Courts have even upheld strip searches of committed persons conducted in conjunction with random drug testing. See Whitman v. Nesic, 368 F.3d 931 (7th Cir.2004).

Authority of county correctional officers to conduct searches including strip searches is provided by the provisions of the Illinois County Jail Standards (20 Illinois Administrative Code 701.40). Those standards are promulgated pursuant to 730 ILCS 5/3-15-2 (2004).

Question #13

What is my authority to use force outside a correctional facility?

Answer #13

The authority of IDOC personnel to use force outside of the institutional context is governed by statute. 730 ILCS 5/3-2-2 (i) (2004). Except where retaking inmates who have escaped from custody, or safeguarding inmates during transport, IDOC correctional officers are not authorized to use force outside of a correctional institution. IDOC parole officers have the ability to exercise peace officer authority outside the institutional context in the performance of their duties as parole officers. 730 ILCS 5/3-2-2 (i) (2004) and 730 ILCS 5/3-14-2 (2004). Their peace officer authority does not extend to general law enforcement duties not related to supervision of parolees.

Authority of county correctional officers outside the jail is governed by the individual sheriff's departmental policy.

Question #14

Are there affirmative limitations on the force that can be used in performing my duties as a correctional officer?

Answer #14

Yes. Limitations are imposed by both state and federal law. Different rules apply to persons like parolees who are permitted to be in free society and committed persons who are in custody or at large. As to parolees, peace officer should be guided by the general rule for peace officer use of force. See Peace Officers Use of Force in Illinois. As to committed persons in custody or at large the standards are outlined below.

Question #15

What are the federal limitations?

Answer #15

The federal limitations are all based on the Fourteenth Amendment to the U.S. Constitution for conduct affecting pre-trial detainees. Bell v. Wolfish, 441 U.S. at 535-36; and Weiss v. Cooley, 230 F.3d 1027 (2001). The Eight Amendment to the U.S. Constitution provides limitations for conduct affecting convicted persons. Whitley v. Albers, 475 U.S. at 318. There is "little practical difference between the two standards." Tesch v. County of Green Lake, 157 F.3d 465, 473-74 (7th Cir. 1998). Both the Eighth and Fourteenth Amendment protect against "cruel and unusual punishment."

Question #16

What constitutes 'cruel and unusual punishment'?

Answer #16

The Supreme Court noted in Whitley v. Albers, 475 U.S. 312, 320 (1985):

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that undisputedly poses significant risks to the safety of prison inmates and prison staff, we think the question is whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically.' [citation omitted]. ...'[S]uch factors as the need and the amount of force that was used [and] the extent of the injury inflicted'[citation omitted] are relevant to that ultimate determination.

The Seventh Circuit recently ruled in Fillmore v. page, 358 F.3d 496, 503-4 (7th Cir. 2004) that to establish cruel and unusual punishment:

> ...several factors are relevant, including the need for the application of force, the amount of force applied, the threat the officer reasonably perceived, the effort made to temper the severity of the force used, and the extent of the injury that force caused to an inmate. [citations omitted] Such a claim cannot be predicated on a *de minimis* use of force. [citation omitted] Instead the quantum of force required for a constitutional violation is that which is "repugnant to the conscience of mankind. [citations omitted].

Question #17

How do courts determine whether a correctional officer's conduct rises to a level actionable under the Fourteenth or Eighth Amendment?

Answer #17

The Seventh Circuit Court of Appeals recently noted in Mayoral v. Sheahan, 245 F.3d 934, 938 (7th Cir. 2001):

> The standard against which official conduct is measured is the deliberate indifference standard set out in Farmer v. Brennan, 511 U.S. 825 [citation omitted] (1994). A plaintiff cannot establish a violation of the Eighth or Fourteenth Amendment, by a showing that the officials were negligent, but neither must a plaintiff show that the official acted with the purpose of causing him harm. Rather ' a prison official cannot be found liable under the Eighth Amendment ...unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts that a substantial risk of harm exists and he must also draw that inference. Id at 837. A plaintiff must show both an objective risk of danger and that defendants have actual knowledge of the risk.

The "deliberate indifference" standard is a higher standard than that of "reasonableness" which is the liability standard under the Fourth Amendment. Graham v. Connor, 490 U.S. 386 (1989).

Question #18

Are there specific limitations on the use of deadly force?

Answer #18

Yes. State law places express restrictions on the use of deadly force. In addition to addressing the use of deadly force in the context of escape as outlined above, state law also addresses the use of deadly force in the context of self defense and defense of others as well as the use of force in effecting an arrest. Illinois statutes expressly permit the use of deadly force to protect one's self or others from death or great bodily harm 720 ILCS 5/7-1 (2004). The use of deadly force is not permitted to protect property 720 ILCS 5/7-3 (2004).

Question #19

What are the limitations imposed by federal law?

Answer #19

There are no express limitations against the use of deadly force under the Eighth and Fourteenth Amendment except for the prohibition against cruel and unusual punishment. See Whitley v. Albers, 475 U.S. 312, 320 (1985).

Question # 20

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 # 20

While the federal law does not require the application of lesser amounts of force, departmental policies may place additional restrictions on an officer's ability to use force. For example, both the Illinois Department of Corrections rules (20 Illinois Administrative Code 501 A) and the Illinois County Jail Standards (20 Illinois Administrative Code 701.160) require utilization of the least amount of force necessary in addressing inmate or detainee conduct.

Concerning federal liability, 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). While Plakas is a Fourth Amendment case, its analysis would be applicable to Eighth and Fourteenth Amendment cases. The court noted that ". . . where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first."

Liability for Use of Excessive Force

Question #21

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 #21

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 disciplined (to and including discharge). 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); and Thomson v. Jones, 619 F. Supp. 745 (N.D. Ill 1985) (correctional officer liable for failure to intervene in another officer's beating of an inmate). You may also be held liable for failing to protect inmates from the use of force by other inmates.

Question #22

Under what circumstances can I be held liable for inmate on inmate violence?

Answer #22

Both the Eighth and Fourteenth Amendment impose upon correctional officers a responsibility to safeguard pre-trial detainees or inmates in their charge. See Mayoral v. Sheahan, 245 F.3d 934, 938 (7th Cir. 2001). While officers are not vicariously liable for the acts of inmates against other inmates, liability can attach where an officer is deliberately indifferent to a substantial risk of serious harm. Riccardo v. Rausch, 359 F.3d 510 (7th Cir. 2004).

Question #23

What constitutes deliberate indifference to a serious risk of harm?

Answer #23

Knowledge of general risks of violence is not sufficient. Weiss v. Cooley, 230 F.3d 1027, 1032 (7th Cir. 2000). Liability can attach where an officer has knowledge of a specific threat from an inmate or detainee and fails to take steps to abate it. See Billman v. Indiana Department of Correction, 56 F.3d 785 (7th Cir. 1995).

In some cases the characteristics of an inmate making them unusually vulnerable may also give rise to liability. See, Langston v. Peters, 100 F.3d 1235, 1238-39 (7th Cir. 1996) (discussing inmates likely to targeted by gangs) and Walsh v. Mellas, 837 F. 2d 789, 793 (7th Cir. 1988) (inmates who are members of identifiable groups).

Civil liability

Question #24

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 #24

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 #25

What is my potential liability under federal law?

Answer #25

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 peace officer is defined by 720 ILCS 5/2-13 (2004) and since a peace officer is authorized to use force by 720 ILCS 5/7-5 (2004), 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 #26

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

Answer #26

In Hudson v. McMillian, 503 U.S. 1, at 9 (1992), the Court noted: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates a prisoners constitutional rights." However when a prison official maliciously and sadistically uses force to cause harm liability will attach even in the absence of a significant injury. Id at 9.

However liability has been found for the following circumstances: Thomas v. Stalter, 20 F.3d 298 (7th Cir. 1994) (single punch to inmate's face requiring extraction of four teeth--actionable); Winder v. Leak, 790 F. 2d 1403 (7th Cir. 1992) (shove from behind of a shackled inmate knocking him to the ground--actionable); Case v. Ahitow , 301 F.3d 605 (7th Cir. 2002) (where officers allegedly have knowledge that one inmate is out to "get" another, permitting the aggressor access to the other inmate by placing them in close proximity is sufficient to state a claim); and Peate v. McCann, 294 F.3d 879 (7th Cir. 200) (failure to intervene in an inmate fight--actionable). Officers may be held liable for both compensatory and punitive damages. See Bogan v. Stroud, 958 F.2d 180 (7th Cir. 1992) (the Seventh Circuit upheld a jury verdict for punitive damages against two correctional officers)

Liability under state law

Question #27

What is my potential liability under Illinois law?

Answer #27

Federal courts have recognized that state court battery actions are coextensive with the Eighth Amendment protections and can be maintained when injuries are minor. Davis v. Lane, 814 F. 2d 397 (7th Cir. 1987); and Freeman v. Franzen, 695 F.2d 485, 492 (7th Cir. 1982) cert. den. 103 S. Ct. 3553 (1983).

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 (2004), 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 #28

Does my conduct have to be intentional?

Answer #28

No. While you will be liable for intentional conduct you are also liable for conduct found to be willful and wanton. Negligent conduct is not actionable.

The Illinois General Assembly defined the term "willful and wanton" in 745 ILCS 1-210 (2004) 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 #29

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

Answer #29

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

Federal criminal liability

Question #30

What federal criminal laws are applicable?

Answer #30

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. Oliver and Hooper et. al, 00 CR 961 (N.D. Ill May 15, 2001) (correctional officers criminally prosecuted and incarcerated for use of excessive force). Section 242 is but one of several statutes which could be utilized to prosecute an officer in federal court.

State criminal laws

Question #31

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

Answer #31

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 (2004) 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 (2004). 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.

Where an officer's use of force was excessive and not legally justified, the officer could be prosecuted for 1st or 2nd degree murder.

Question #32

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

Answer #32

Yes. Police officers can be subjected to successive state and federal prosecutions for the same conduct. See U.S. v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993), affirmed in part, reversed in part by Koon v. U.S., 518 U.S. 81 (1996) (police officers and supervising sergeant prosecuted for use of excessive force during arrest)

Employment Implications

Question #33

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

Answer #33

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, 459 N.E.2d 659 (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 Board 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).

Indemnification

Question #34

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

Answer #34

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 (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 (2004).

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 (2004).

Indemnification of state employees is guaranteed by the provisions of 5 ILCS 350/2 (2004). 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 (2004).

Question #35

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

Answer #35

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 (2004). 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 (2004).

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.