

**Washington State Criminal Justice Training Commission  
Level I Handgun Instructor Course  
2008**

**Legal Responsibilities  
Of the Firearms Instructor**

Law Enforcement officers who desire to become firearms instructors must be motivated by more than just the desire to have more opportunity to “shoot guns.” If not, they will soon discover that they have done a disservice to themselves, the public, their agencies and their fellow officers. We function in a litigious society, performing an occupation that is under constant scrutiny by the public and the court system. Additionally, we have a moral responsibility to ensure that all efforts have been made to thoroughly equip and train those who put it all on the line everyday keeping the peace and enforcing the laws. The preparation for firearms instructor training takes place long before the first shots have been fired at the range. It is not enough for the firearms instructor to know how to proficiently and safely shoot a variety of weapons. And while it is vital, it is certainly not sufficient, to simply be able to teach these skills to others. Every hour-long block of instruction on the range must be preceded by hours of preparation and is followed by even more hours of documentation and review. This aspect of the job description must be understood before students sign up for their first instructor class. They may be expected by their agency to be responsible for much if not all of the following tasks:

**ESTABLISH TRAINING:**

- Training must be comprehensive, relevant and current.
  - Training must reflect standards established by the courts of the land.
  - Research must take place to reveal trends in criminal activity, practices, and tactics and the training must reflect reasonable countermeasures.
  - Training must reflect conditions and situations that officers regularly encounter on the job and *should* address those that occur less regularly.
  - Always prepare each course of training with a thought towards being able to defend it in legal proceedings.
- The content of each block of instruction must be periodically reevaluated:
  - As criminal practices and tactics change.
  - As new statutes are passed and new case law is passed down by the court system.
  - As new equipment is introduced and authorized for use by the officers.
- Methods of training must be constantly reevaluated:
  - As new training aids are discovered and developed (power point, videos, props, etc.)
- Training must take place with each weapon that the officer is authorized to carry.
- Training should take place with duty or duty-equivalent ammunition.

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**QUALIFICATIONS/TESTING:**

Qualification is not training! Qualification is testing to ensure that the body of knowledge presented in training is understood and can be applied by those who were trained.

- Qualification Courses must reflect realistic, job related conditions: times, distances and equipment used.
- Justifiable, minimum standards must be established and maintained.
- Frequency of qualification must reflect industry and court standards. Nationally and internationally recognized associations such as IACP (International Association of Chiefs of Police) and IALEFI, (International Association of Law Enforcement Firearms Instructors) should be used as resources.
- Remedial training must be provided to bring personnel up to proficiency standards
- Written examinations should be administered on appropriate subject matter to verify an understanding of material taught.

**DOCUMENTATION AND RECORDS KEEPING:**

Documentation is a time-consuming but absolutely vital component of the training program. Without proper documentation the courts will not consider that the training took place. The amount of time spent documenting both training and qualification is well worth the peace of mind it provides when a subpoena makes its way to the desk of the trainer. Documentation should include:

- Identification and credentials of the trainers presenting the instruction and administering the qualification courses.
- Detailed lesson plans which include course objectives, lesson content, handouts, and any electronic media presentations. .
- Attendance rosters of attendees including complete and partial attendance
- Copy of qualification course(s) fired along with appropriate justification and objectives of each stage
- Qualification scores and make, model and serial number of weapon(s) used by the each student
- Copies of any written tests administered along with the scores of each student taking the test.
- Document any safety issues, injuries or problems with students including remedial or disciplinary steps that were taken.
- It is also recommended to record weather conditions for all outdoor training.

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**CASE LAW RELATED TO FIREARMS TRAINING**

Instructors must be familiar with past and current case law which establishes training standards. The following are just a few examples of case law which have helped determine and continue to affect Law Enforcement firearms training in the United States. This is by no means intended to be an exhaustive or comprehensive listing of applicable court cases. It is merely provided as an example of some of the more prominent cases. Instructors need to maintain a relationship with their agency's legal advisors to stay abreast of ever-changing case law.

**CITY OF CANTON OHIO V HARRIS 489 U.S. 378 (1989)**

Deliberate Indifference

- The critical nature of shooting incidents-not the statistical probability of their occurrence-makes firearms training important.
- If the need for training is obvious, inadequate training is likely to result in constitutional violations
- Therefore a basis exists for Civil Liability

**THE BOTTOM LINE:**

“The focus must be on whether the program is adequate to the tasks the particular employees must perform”

**POPOW VS CITY OF MARGATE 476 F. supp. 1237, 1246 (Dis. N.J. 1979)**

Summary: Bystander shot by an officer who misses the suspect while in a foot pursuit.

Subsequent Findings:

- Initial training with firearms took place 10 years prior to incident.
- In-service “training” took place only twice a year (this actually was qualification not training\*)<sup>1</sup>
- Training did not include shooting at moving targets.
- Training did not include low light/night shooting.
- Training did not account for shooting in populated areas.
- Training did not include shoot/don't shoot targets.
- There may have been inadequate training regarding city's policy and rules in firearms use.
- There may have been inadequate supervision and discipline of officers for misuse of force.

\*NOTE: City training standards were better than state standards at that time

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<sup>1</sup> Resulted in IACP recommendation of minimum quarterly firearms qualifications: “Firearms Concepts & Issues Paper. Rev. Feb. 2006, Dec. 2007. Sec. IIIA.1 IACP National Law Enforcement Policy Center” – Paper is included in back of this section

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THE BOTTOM LINE:

A department firearms program should include:

- A comprehensive *written* firearms and use of force policy which is published and taught.
- Classroom instruction to include: firearms safety, shooting skills and liability in the use of the firearm. Should cover both on and off duty situations.
- Written examinations to document officer's grasp of the material presented.
- Range training by qualified, credentialed instructor to include the following:
  - Marksmanship fundamentals
  - Multiple target shooting
  - Dim light/night shooting with and without flashlights
  - Tactical use of cover
  - Moving Targets
  - Decision making: shoot/don't shoot targets
- Qualification courses simulating realistic, job-related conditions: times, distances, equipment used.
- Re-qualification at regular intervals (preferably not less than quarterly\*\*)
- Regular refresher training in all of the above.
- Sufficient remedial training to deal with unqualified officers.
- Careful and complete documentation on all aspects of the firearms program.

CASE LAW RELATED TO USE OF FORCE

It is possible that as a firearms instructor you will be involved in the writing and teaching of your agency's comprehensive use of force policy. This will again require familiarity with applicable RCWs as well as knowledge of related case law. Some cases to be familiar with are:

**TENNESSEE V. GARNER** 471 U.S. 1 (1985)

Dealing with deadly force in the apprehension of fleeing felons

**GRAHAM V. CONNER** 490 U.S. 386 (1989)

The use of force in the course of an arrest, investigatory stop, or other seizure is properly judged by reference to the fourth amendment's "reasonableness standard."

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**ADDITIONAL ROLES AND RESPONSIBILITIES OF THE FIREARMS  
INSTRUCTOR:**

- Continue training. There is always something else to learn. Continue to improve your skills as a shooter, a trainer, and a communicator.
- Set an example by ALWAYS practicing professional, safe gun handling skills. Your credibility as an instructor is always being scrutinized by everyone who has ever attended or will attend the classes you teach.
- Maintain all instructor/trainer credentials. Complete all periodic updates and recertification courses.
- Subscribe to and read professional publications in the field of firearms and related fields.
- Serve as an authoritative source of firearms information for your agency and your officers. While being a “certified gun nut” is not an absolute requirement, having an ever-expanding knowledge base is.
- Don’t be afraid of saying “I don’t know.” Never make up an answer to a question.
- Joining and maintaining membership in international, national, state, and local instructor organizations provides the instructor with the resources needed to keep current in training methods and subject matter.
- Keep current on the latest legal issues pertaining to firearms-related training.
- It is possible that you will be the expert your agency turns to in developing any policy even remotely related to firearms. It is inevitable that you will be the expert they point the finger at when something goes wrong with the program. Build yourself a court-proof program from the beginning.
- Be prepared to testify in court to explain and justify your training program.
- Learn to motivate students. Don’t ever be quick to write off a difficult student as being “too dense to understand.” That is a lazy approach to teaching. You are the instructor. Use your imagination. Take difficult students on as a challenge!
- Represent the training program to agency administrators. Justify the time, budget and training needs. Reinforce these with thorough research.
- Continually reevaluate weapons, leather gear, ammunition and all related equipment from an overall agency perspective. Be objective. Set aside personal biases. What you like personally may be detrimental to the average officer in your agency who is not trained to your level of expertise.

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**GUIDELINES FOR USE OF PHYSICAL FORCE**

**A. RCW 9A.16.020 USE OF FORCE WHEN LAWFUL.**

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

- (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
- (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;
- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in the case the force is not more than is necessary;
- (4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;
- (5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;
- (6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

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[1986 c 149 §2; 1979 ex.s. c244§7; 1977 ex.s. c80§13; 1975 1st ex.s. c260 §9A.16.020.]

**NOTES:**

Effective date-1979 ex.s. c 244: See RCW 9A.44.902.

Purpose-Intent-Sever ability-1977 ex.'s. c 80: See notes following RCW 4.16.190.

**B. RCW 9A.16.040 JUSTIFIABLE HOMICIDE OR USE OF DEADLY FORCE BY PUBLIC OFFICER, PEACE OFFICER, PERSON AIDING.**

(1) Homicide or the use of deadly force is justifiable in the following cases:

(a) When a public officer is acting in obedience to the judgment of a competent court; or

(b) When necessarily used by a peace officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of legal duty.

(c) When necessarily used by a peace officer or person acting under the officer's command and in the officer's aid:

(i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;

(ii) To prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility; or

(iii) To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or

(iv) To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

(2) In considering whether to use deadly force under subsection (1)(c) of this section, to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a "*threat of serious physical harm*" are the following:

(a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or

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(b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm. Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given.

(3) A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.

(4) This section shall not be construed as:

(a) Affecting the permissible use of force by a person acting under the authority of RCW 9A.16.020 or 9A.16.050; or

(b) Preventing a law enforcement agency from adopting standards pertaining to its use of deadly force that are more restrictive than this section.

[1986 c 209 §2; 2975 1st ex.'s. c 260 § 9A.16.040.]

**NOTES:**

Legislative recognition: "The legislature recognizes that RCW 9A.16.040 establishes a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens' permissible use of deadly force under the authority of RCW 9.01.200, 9A.16.020, or 9A.15.050 is not restricted and remains broader than the limitations imposed on peace officers." [1986 c 209 §3.]

**JUSTIFICATION FOR THE USE OF FORCE**

Physical force should not be used as a punishment or consequence. The five situations where physical force may be justified:

- ◆ Prevent suicide or self injury.
- ◆ Prevent escape.
- ◆ Prevent harm to others.
- ◆ Protect self.
- ◆ Prevent damage to property.

Verbal abuse from a detainee/inmate is not considered a justification for the use of physical force by staff. It is the responsibility of staff to know agency policy and procedures regarding use of physical force. All critical incidents should be documented thoroughly and systematically, especially those which are resolved through the use of physical force.

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There are two ways to have legal action taken against a criminal justice officer, either civil or criminal.

- A. Criminal Liability. It is extremely rare for criminal justice personnel to be charged with a crime, such as assault or criminal homicide, for using force against a citizen. Particularly egregious conduct may result in criminal liability under state or federal statutes. A review of this subject is beyond the scope of this class.
  
- B. Civil Liability (preponderance of evidence). Most courts, in assessing the civil liability of a corrections officer or a police officer as well as their supervisors and agencies (where the issue of force is before them) may be sued under the Federal Civil Rights Act, 42 U.S.C., Section 1983 stem from the Due Process Clause of the 14th Amendment. This section provides that:

*"every person who, under color or any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subject, 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."*

- 1. **The 4th amendment** is the most commonly used amendment to invoke the civil rights act against police officers. The courts look at the totality of the circumstances as known to the officer at the time when the force was used, to determine whether the officer's actions were "objectively unreasonable." Primarily, both in terms of whether force should have been used at all and in terms of how much force was reasonable.

The standard in a federal civil rights act lawsuit for determining whether a law enforcement officer has used excessive force in the course of an arrest, investigatory stop or other seizure of a free citizen is a Fourth Amendment "objective reasonableness" standard, similar to the common law standard described above. see *Tennessee v. Garner*, 471 U.S. 1,85 l.ed.2d 1, 105s.ct.1694 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). This objective standard does not require that the plaintiff submit proof of bad faith or malice by the officer. Instead, the standard requires only that the plaintiff prove that the officer acted unreasonably in light of the totality of the circumstances -- including the seriousness of the crime at issue, the threat posed by the suspect, and whether the suspect is actively resisting arrest or attempting to escape. This fourth amendment standard does recognize the officer's need to make split-second judgments on the scene, and therefore allows for some conduct which might not look as reasonable after-the-fact as it did at the time of the incident.

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- a) Law enforcement officer individual liability.

Public employees will have "qualified immunity" and therefore will not be held individually liable for civil damages under the civil rights act if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person (officer) would have known." see Harlow v. Fitzgerald, 457 U.S. 800 (1982); Simtra, Inc. v. Seattle, 119 Wn.2d 1 (1992). Such "qualified immunity" extends to conduct which is technically violative of a statutory or constitutional standard, and which would ordinarily make the officer subject to civil liability in state court under a common law theory, if the legal standard was not clearly established by statute or by the courts at the time of their actions. Reliance on the advice of a legal advisor (or adherence to agency policy) is significant evidence but is not determinative of qualified immunity for individual employees.

2. **The 8th Amendment** is the most commonly used Constitutional Amendment to invoke the civil rights act against correctional officers. The 8th Amendment prohibits cruel and unusual punishment and therefore prohibits conduct which "shocks the conscience," under the circumstances known to the correctional officer at the moment force was applied and under the circumstances of the case in question.

- a) Correctional officer individual liability:

The standard in a Federal civil rights act lawsuit for determining whether a correctional officer has used excessive force on an inmate requires proof of a special mental state that is not required when proving unreasonable force in an action against a law enforcement officer. Whitley v. Albers, 475 U.S. 312 (1986) and Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988). This standard is derived from the Eighth Amendment prohibition on "cruel and unusual punishment" and requires an additional showing by the plaintiff that the correctional officer acted maliciously and sadistically for the very purpose of causing harm to the plaintiff. Note, however, that a correctional officer may be liable for use of force which results only in "minor" or "insignificant" injuries to a prisoner, so long as the prisoner is able to show that their injuries were inflicted maliciously and sadistically. Hudson v. McMillian, 60 LW 4151 (1992).

- b) On the other hand, where a prisoner is challenging cruel and unusual "conditions of confinement," as opposed to the application of the

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use of force or of special punishment in an individual case, the officials of the institution may be liable under a lesser standard of proof; if they have shown "deliberate indifference" to the unconstitutional conditions of confinement, even though there is no evidence of malice and sadistic action by anyone in the correctional institution, they may be liable. *Wilson v. Seiter*, 115 L. Ed.2d 271 (1991).

3. State common law grounds for civil liability for the use of force by law enforcement and correctional officers. No constitutional violations to be shown. Generally, under the common law of Torts, a public employee may be civilly liable as an individual to another person (other than a fellow employee) for omissions or acts of negligence, and for intentional acts which are not privileged, where the acts or omissions cause harm to the other person. A negligence action against officers whose acts or omissions have inflicted injury on persons "turns on" the officers' breach of a duty to act in certain circumstances and to do so in a reasonable manner. The breach of duty must be shown to have been the cause of the injury. Both police and corrections officers can be sued via various state law causes of action grounded in the following:
  - a. Intentional Misconduct--voluntary act or omission which brings about a result against the interest in a way that the law will not allow.
  - b. Negligent Misconduct--breach of a lawfully owed duty resulting in damages primarily caused, i.e., failure to obey speed limit.
  - c. Gross Negligent Misconduct--conduct where there has been failure to exercise even slight care; or conduct that illustrates a high degree of negligence, yet short of intentional wrong, i.e., use of excessive force under arrest or exceeding the speed limit by 60 mph in a residential area. Various state statutes (such as the electronic surveillance laws at chapter 9.73 RCW and the criminal records privacy provisions at chapter 10.97 RCW) may also impose additional liability, but there are no special state statutory causes of action for the use of force applicable to law enforcement or correctional officers. However, the extent of an officer's privilege to use intentional force against a person is generally controlled by statute (see e.g. chapter 9A.16 RCW), supplemented by the common law.

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4. In an effort to determine whether the force used by an officer was excessive, the court must consider the following brief set of issues:
  - a. The need and authority for application of force. (RCW)
  - b. The relationship between the amount of force that was used and the need for using force.( Use of force continuum)
  - c. The extent of the injury inflicted upon the plaintiff.
  - d. The extent of the injuries the officer received.
  - e. The nature of the offense.
  - f. The behavior of the subject against whom the force was used.
  - g. The actions by third parties who may have been present.
  - h. The physical odds against the officer.
  - i. The feasibility or availability of alternative actions and,
  - j. Whether the force was applied in a good-faith effort to maintain or restore order or whether it was applied maliciously or sadistically for the very purpose of causing harm.