



**RISK MANAGEMENT INFORMATION**  
**USE OF DEADLY FORCE AND USE OF FORCE REPORTS**

*\*This information was originally developed in conjunction with the League of Minnesota Cities Insurance Trust's PATROL program (Police Accredited TRaining OnLine). For information on PATROL, contact Laura Honeck at patrol@lmc.org or 651-281-1280. For questions about the material in this memo, contact Ann Gergen at agergen@lmc.org or 651-281-1291.*

**What is Deadly Force?**

Section 609.066 of the Minnesota Criminal Code provides two means for defining deadly force. The first is a legal test that states deadly force means force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm.<sup>1</sup>

Courts have found that:

- Ramming a vehicle at high speeds is likely to cause death or great bodily harm and therefore constitutes deadly force.<sup>2</sup>
- Throwing a flash-bang explosive device into an area of an occupied home where the officers knew there were accelerants constituted deadly force.<sup>3</sup>
- Striking a suspect over the head with an asp is “potentially deadly force.”<sup>4</sup>

On the other hand, courts have held that releasing a properly trained police dog to locate a suspect is not deadly force because it “does not carry with it a substantial risk of causing death or serious bodily harm.”<sup>5</sup>

The second part of the definition is a legal rule about the use of firearms. Discharging a firearm in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.<sup>6</sup>

<sup>1</sup> Minn. Stat. § 609.066, subd. 1, (2004).

<sup>2</sup> *Harris v. Coweta County*, 433 F.3d 807, 814 (11<sup>th</sup> Cir. 2005), cert granted, 127 S.Ct. 468 (Oct. 27, 2006).

<sup>3</sup> *Bing v. City of Whitehall*, 456 F.3d 555, 570 (6<sup>th</sup> Cir. 2006).

<sup>4</sup> *Nelson v. County of Wright*, 162 F.3d 986, 990-91 (8<sup>th</sup> cir. 1998).

<sup>5</sup> *Robinette v. Barnes*, 854 F.2d 909, 912 (6<sup>th</sup> Cir. 1988); see also *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 (8<sup>th</sup> Cir. 2003) (citing *Robinette* with approval).

<sup>6</sup> Minn. Stat. § 609.066, subd. 1, (2004).

This material is provided as general information and is not a substitute for legal advice.  
Consult your attorney for advice concerning specific situations.

## Requirements for Using Deadly Force

The use of deadly force by peace officers is governed both by state statute and federal law. In *Tennessee v. Garner*, the United States Supreme Court held the use of deadly force is a seizure under the Fourth Amendment.<sup>7</sup> The *Garner* Court established the following legal rules governing all uses of deadly force by peace officers:

- It is constitutionally reasonable to use deadly force only when there is probable cause to believe the suspect would pose a threat of serious physical harm to the officer or others if allowed to escape.
- The use of deadly force must be necessary.
- If feasible, officers should give some warning before using deadly force.<sup>8</sup>

Minn. Stat. § 609.066 lists three different sets of conditions authorizing the use of deadly force by peace officers. The statute provides that officers may use deadly force when confronted with “apparent death or great bodily harm,” when having “reason to believe” the suspect committed or attempted to commit a felony involving the use or threatened use of deadly force, or when having “reason to believe” that the suspect has committed a felony and will cause death or great bodily harm if apprehension is delayed. The standard announced in *Garner*, however, requires officers to have “probable cause to believe” these conditions exist.<sup>9</sup> Thus for training purposes (to ensure compliance with both the state and federal standards), a slightly reworded version of Minn. Stat. § 609.066 should be used. Deadly force may be used:

- When there is probable cause to believe the suspect poses a threat of death or great bodily harm to the officer or another.
- To capture or prevent the escape of a person whom the officer has probable cause to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force.
- To capture or prevent the escape of a person whom the officer has probable cause to believe has committed or attempted to commit a felony, if the officer has probable cause to believe the person will cause death or great bodily harm if apprehension is delayed.

## Using Deadly Force for Defense

An officer may use deadly force when there is probable cause to believe the suspect poses a threat of death or great bodily harm to the officer or others, and deadly force is necessary to counteract or stop that threat. For example, courts have found that:

- Deadly force was justified when the suspect was advancing toward officers on foot with a gun

---

<sup>7</sup> 471 U.S. 1 (1985).

<sup>8</sup> *Id.* at 11-12. Following the Supreme Court’s decision in *Graham v. Connor*, 490 U.S. 386 (1989), some courts have mitigated the “necessity” requirement, holding that the Fourth Amendment does not require officers to choose the least intrusive means for resolving a situation. *See, e.g., Scott v. Henrich*, 39 F.3d 912, 915 (9<sup>th</sup> Cir. 1994). These legal developments may not be of any relevance in Minnesota, however, since Minn. Stat. § 609.066, provides that deadly force may be used “only when necessary.”

<sup>9</sup> 471 U.S. at 11.

pointed at them and was nearing their positions of cover, even though the gun (unknown to the officers) was not loaded.<sup>10</sup>

- Deadly force was justified against an unarmed suspect when the suspect had severely beaten the officer, was advancing on her as if to choke her, the officer had no back-up and no other reasonable means of stopping his attack.<sup>11</sup>
- Deadly force was justified when an officer had been dispatched to a call of an armed robbery with shots fired, the fleeing suspect disregarded the officer's commands to stop, looked at the officer, and moved his arms toward his waistband. The court stated that an "officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."<sup>12</sup>
- Examination of case law indicates the suspect must pose a threat of death or great bodily harm to the officer *at the time* deadly force is used. If the threat has yet to materialize, or has ceased to exist,<sup>13</sup> then deadly force may not be authorized for purposes of defense.
- Even though the barricaded suspect had fired shots earlier, deadly force would not have been authorized if he was unarmed and not a serious threat to anyone at the time SWAT officers entered his house.<sup>14</sup>
- The suspect had a knife and was closing the distance between himself and the officer. There was evidence, however, that the man was so intoxicated he could barely stand and never made threatening statements or gestures with the knife. Under these facts, the suspect's actions did not constitute a serious, immediate threat against the officer, and deadly force was not authorized.<sup>15</sup>
- There were reports of two shootings. There was evidence the suspect had the gun pointed up in the air when the officer arrived, and did not make any threatening moves with it. Under these facts, the officer would not have been justified in immediately shooting the suspect with a shotgun.<sup>16</sup>

## Using Deadly Force to Prevent Escape

The probable cause determination required by *Tennessee v. Garner* necessitates that officers reach a conclusion about what a suspect is likely to do in the future. Officers must decide if there is probable cause to believe a suspect *will* cause death or great bodily harm if apprehension is delayed.

- Deadly force was authorized where the fleeing suspect put others in danger through his driving, tried to ram police vehicles during the chase, crashed into a police cruiser that was blocking his escape, and attempted to flee toward an area where officers were assembling to set up a road

---

<sup>10</sup> *Waybenais v. United States*, 769 F.Supp. 306, 309 (D. Minn. 1991).

<sup>11</sup> *Tom v. Volda*, 963 F.2d 952, 962 (7<sup>th</sup> Cir. 1992).

<sup>12</sup> *Thompson v. Hubbard*, 257 F.3d 896, 899 (8<sup>th</sup> Cir. 2001).

<sup>13</sup> The fact that an officer has authority at one time to shoot does not mean that the officer retains that authority indefinitely. *Ellis v. Wynalda*, 999 F.2d 243, 247 (7<sup>th</sup> Cir. 1993).

<sup>14</sup> *Bing v. City of Whitehall*, 456 F.3d 555, 571-72 (6<sup>th</sup> Cir. 2006).

<sup>15</sup> *Maras v. City of Brainerd*, 502 N.W.2d 69, 77 (Minn. Ct. App. 1993).

<sup>16</sup> *Craighead v. Lee*, 399 F.3d 954, 961 (8<sup>th</sup> Cir. 2005).

block.<sup>17</sup>

- The fleeing vehicle had stopped twice during the pursuit and the driver and passenger had opened fire on the pursuing trooper. The officer was justified in using deadly force to stop the suspect as he attempted to run away after his vehicle crashed. The officer could reasonably assume the suspect was a deadly threat and was seeking to escape to “continue his deadly doings.”<sup>18</sup>
- The driver of a semi-tractor and trailer was pursued in two states at speeds in excess of 90 miles per hour. He forced over 100 cars off the road and tried to ram police cruisers. Efforts to use roadblocks and disable the vehicle failed. An officer was justified in shooting the driver because the truck posed a serious danger to both the troopers and the general public.<sup>19</sup>
- Officers were pursuing a potentially suicidal female. Officers were not justified in using deadly force to stop her because she did not present a significant risk of harm to anyone at the time deadly force was used. She had not committed any crime before the chase started. Here earlier driving conduct may have been potentially dangerous, but she had kept her vehicle under control, had not hit any vehicles or pedestrians during the chase, and had not overtly threatened the officers or others.<sup>20</sup>
- Officers were not justified in using deadly force to stop a suspect wanted only for a speeding violation. The roads were mostly empty and the suspect was in control of his vehicle, so there was little, if any, actual threat to pedestrians or other motorists.<sup>21</sup>

### Use of Force Reports (checklist)

The following elements might be helpful to include in your use of force reports:

1. Set the stage. What was the nature of the call, including the reported behavior? What did you know about the suspect from past dealings? Describe the suspect’s apparent size, weight, age, and mental and emotional state.
2. What were you trying to accomplish? What was your reason for using force? Were you trying to make an arrest? Were you trying to defend yourself?
3. What happened when you tried presence and verbalization? Describe your efforts to talk the subject into compliance and how the suspect responded.
4. Provide a chronological step-by-step description of the events. Describe the words, actions, and movements that made up the incident so a judge and jury will have a clear picture of what happened.
5. Give yourself a license to testify to every important fact. Avoid getting “trapped” on cross-examination for omitting important details in your report. Provide at least some mention of each important fact in your report.
6. Describe the evidence. Torn clothing, bruising and injuries are physical evidence of the

---

<sup>17</sup> *Smith v. Freland*, 954 F.2d 343, 348 (6<sup>th</sup> Cir. 1992).

<sup>18</sup> *Daniels v. Terrell*, 783 F.Supp. 1211, 1213 (E.D.Mo. 1992).

<sup>19</sup> *Cole v. Bone*, 993 F.2d 1328, 1333 (8<sup>th</sup> Cir. 1993).

<sup>20</sup> *Mumm v. Mornson*, 708 N.W.2d 475, 495 (Minn. 2006).

<sup>21</sup> *Harris*, 433 F.3d. at 821.

struggle. Deal with them like they are evidence and mention the evidence in your report.

Ann Gergen 03/07