



ISSN 1935-0007

Cite as: 2015 (7) AELE Mo. L. J. 101
Civil Liability Law Section – July 2015

What is Police Use of Force?

A Focus on DoJ Settlement Agreements

- Introduction
- DoJ Settlement Agreements with Police Agencies
 - Threshold Definitions
 - Levels of Force
- Correctional Settings
- Some Suggestions
- Resources and References

❖ Introduction

This article is a companion to [Mandatory Nationwide Use of Force Reporting by Police and Correctional Agencies – and Why This is an Important Issue](#), 2015 (6) AELE Mo. L. J. 501. That article concisely and forcefully presents the case for requiring that every police agency and jail report *all* uses of force and follow consistent use of force practices.

Consistently gathering such information can be invaluable in identifying use of force policies and practices that work and those that do not, and provide a variety of other benefits. “Ultimately, this paradigm shift will bring about a wealth of research data points that will allow our profession and researchers to examine use of force data and to learn intelligently from force encounters.” The presentation in that prior article will not be repeated here.

A key problem identified in the prior article was the lack of consistent definitions of the use of force:

“The very definition of force differs from state to state, and the justification of force often varies locally by agency policies. For example, a police agency’s definition of the use of force could be holding someone down on the ground when handcuffing an individual. In another agency a definition for the use of force is if someone has multiple stitches. Is pointing a firearm at a person a *use* of force or a *show* of force?”

If definitions are not generally identical, comparisons can be meaningless at worst and problematic at best.

This article is an attempt to briefly address that issue. The materials it focuses on are definitions of use of force contained in U.S. Dept. of Justice's Special Litigation Section's [consent decree settlements](#) reached with various police and correctional agencies following investigations that have often targeted alleged excessive use of force.

This article begins with an examination of the use of force definitions in settlements involving police agencies, following by an examination of similar issues in the correctional context. A brief series of suggestions to consider is then presented, followed by a listing of some relevant and useful resources and references.

❖ **DoJ Settlement Agreements with Police Agencies**

— **Threshold Definitions**

The settlement agreements that the U.S. Dept. of Justice has reached with a significant number of police agencies usually contain, before going into more detail about use of force reporting and various policies and practices on force, rudimentary “threshold” definitions that attempt to pin down in general just what a use of force is and is not.

The following are some examples of these threshold definitions which, as can be readily seen, differ in varying degrees.

[Albuquerque, N.M. Agreement](#) (2014):

“USE OF FORCE: Physical effort to compel compliance by an unwilling subject above unresisted handcuffing, including pointing a firearm at a person.”

[Portland, Ore. Agreement](#) (2014):

“USE OF FORCE: Any physical coercion used to effect, influence, or persuade an individual to comply with an order from an officer, above unresisted handcuffing, including actively pointing a firearm at a person.”

[Puerto Rico Agreement](#) (2013):

“USE OF FORCE: Any physical coercion used to effect, influence, or persuade an individual to comply with an order from an officer above unresisted handcuffing, including unholstering a firearm and acquiring a target.”

[New Orleans, La. Agreement](#) (2013):

“USE OF FORCE: Physical effort to compel compliance by an unwilling subject above unresisted handcuffing, including pointing a firearm at a person. A reportable use of force

is any force above hand control or escort techniques applied for the purpose of handcuffing, or escort techniques that are not used as pressure point compliance techniques, do not result in injury or complaint of injury, and are not used to overcome resistance.”

Los Angeles, Ca. Agreement (2015):

“32. ‘Reportable use of force’ means any use of force that is greater than that required for unresisted searching or handcuffing. Additionally, any use of force which results in injury or a complaint of pain must be reported.”

A common thread would appear to be that unresisted handcuffing is not a use of force, and that a use of force is generally a physical action directed at an unwilling subject intended to compel compliance. Some of the variations raise questions or issues. What is the difference, for example, between the “physical effort” cited in the Albuquerque and New Orleans agreement and the “physical coercion” mentioned in the Portland and Puerto Rico agreements?

Is there a difference between “pointing a firearm at a person” as mentioned in the Albuquerque and New Orleans agreements, “actively pointing a firearm at a person,” as mentioned in the Portland agreement, or “unholstering a firearm and acquiring a target” as mentioned in the Puerto Rico agreement?

Does “pointing a firearm at a person,” as opposed to “actively pointing a firearm at a person” excuse an inadvertent or accidental pointing of a weapon? Does “actively pointing” presume an intent requirement?

While some of this may initially strike some as unproductive nitpicking, the precise definitions used may have a dramatic impact on what is and is not reported as a use of force.

The New Orleans definition above is unlike the other examples presented in that it appears to factor in at some point the issue of whether a compliance technique results in “injury or complaint of injury.” If an escort technique “results” in injury or a complaint of injury, does that imply causation is required?

Many officers have experienced circumstances in which a suspect or arrestee being escorted suffers injury not because of a use of force, but due to the individual’s own physical or mental condition, alcohol or drug intoxication, inclement weather or surrounding physical terrain.

Any definition of reportable use of force, regardless of how well thought out, will necessarily give rise to additional practical and theoretical questions, and cannot anticipate all possible factual scenarios.

It can, however, and should anticipate all of the most common ones. Both rank and file officers and supervisory personnel will need to be adequately trained in the meaning of any definitions adopted, in order to know what to report as a use of force and what details must be included.

— Levels of Force

Beyond the general threshold definition some of the agreements more helpfully go on to address definitions of different levels of force. Ultimately use of force reports need to differentiate relatively minimal levels of direct physical force used to accomplish handcuffing of a noncompliant, but not actively resisting, suspect from the intermediate and ultimate levels of force such as the use of [Electronic Control Weapons \(ECWs\)](#) or [deadly force](#).

In a [May 26, 2015 settlement agreement](#) between the U.S. Justice Dept. and the City of Cleveland, for instance, the general threshold definition of use of force is very brief and incorporates by reference three much more detailed definitions of varying levels of force.

“Use of force means any physical coercion used by an officer in performance of official duties that is a Level 1, 2, or 3 use of force.” [Paragraph 458 of agreement].

The agreement elsewhere goes on to spell out the details of all three levels of reportable force, being very specific:

“The three levels for the reporting, investigation, and review of use of force correspond to the amount of force used and/or the outcome of the force. This Agreement’s categorization of these types of uses of force is based on the following factors: potential of the technique or weapon to cause injury; degree of injury caused; degree of pain experienced; degree of disability experienced by the subject; complaint by the subject; degree of restraint of the subject; impairment of the functioning of any organ; duration of force; and physical vulnerability of the subject. Each level of force will require increasingly rigorous reporting, investigation, and review. The levels of force are defined as follows:

“a. Level 1 is force that is reasonably expected to cause only transient pain and/or disorientation during its application as a means of gaining compliance, including pressure point compliance and joint manipulation techniques, but that is not reasonably expected to cause injury, does not result in an actual injury, and does not result in a complaint of injury. It does not include escorting, touching, or handcuffing a person with no or minimal resistance. Unholstering a firearm and pointing it at a subject is reportable as a Level 1 use of force with the exceptions set forth in paragraph 56.

[Paragraph 56 recites some detailed exceptions for 1) SWAT team operations, 2) deputized officers participating in federal task force operations with a supervisor present, and 3) officers assigned to gang, narcotics, homicide, sex crimes, domestic violence, and financial crime units while entering a building to execute an arrest or search warrant with a supervisor present. In the latter two instances, the supervisor rather than the officer reports the incident].

“b. Level 2 is force that causes an injury, could reasonably be expected to cause an injury, or results in a complaint of an injury, but does not rise to the level of a Level 3 use of force. Level 2 includes the use of an ECW, including where an ECW is fired at a person but misses; OC Spray application; weaponless defense techniques (e.g., elbow or closed fist strikes, kicks, leg sweeps, and takedowns); use of an impact weapon, except for a strike to the head, neck or face with an impact weapon and any canine apprehension.

“c. Level 3 is force that includes (1) uses of lethal force; (2) uses of force resulting in death or serious physical injury; (3) uses of force resulting in hospital admission; (3) all neck holds; (4) uses of force resulting in a loss of consciousness; (5) canine bites; (6) more than three applications of an ECW on an individual during a single interaction, regardless of the mode or duration of the application, and regardless of whether the applications are by the same or different officers, or an ECW application for longer than 15 seconds,” [Paragraph 87 of agreement].

While this may not be perfect, and could be further refined, it is far more helpful than the very general threshold definitions, and could serve as part of a basis for further discussion aimed at arriving at a set of uniform definitions to be used in mandatory nationwide force reporting.

❖ **Correctional Settings**

The U.S. Dept. of Justice’s Special Litigation Section has also entered into a number of settlement agreements concerning the use of force and reporting of use of force in jails.

One key difference is that detainees and convicted prisoners in jails are already in custody, and varying levels of force is sometimes required to gain compliance with institutional rules and regulations involving a wide variety of incidents of daily life, usually unrelated to commission of a further criminal offense. Here are the definitions of the use of force contained in three of these settlement agreements:

Cook County, Illinois Jail Agreement (2010):

“29. ‘Use of force,’ means the application of physical, chemical, or mechanical measures on an inmate. ‘Use of force’ shall not include unresisted handcuffing or unresisted shackling of inmates for movement purposes.”

Miami-Dade, Fla. County Jail Agreement (2011):

“12. ‘Use of force,’ means the application of physical or mechanical measures to compel compliance by a subject. ‘Use of force’ shall include all force except un-resisted handcuffing or un-resisted shackling of inmates for movement purposes.”

Erie County, N.Y. Holding Center and the Erie County Correctional Facility Agreement (2011):

“VV. ‘Use of force’ means the application of physical, mechanical, or chemical measures to compel compliance by an unwilling subject. ‘Use of force’ will not include un-resisted handcuffing or un-resisted shackling of prisoners during movement if no other force is used.”

Note that the first and third definitions above include the application of physical, mechanical, or chemical measures, while the second does not mention chemical measures. This may simply be an oversight, as it seems unlikely that the use of a chemical agent on a detainee would not be regarded as a use of force.

In all three definitions, the unresisted handcuffing or shackling of an inmate is generally excluded from the definition of the use of force, but each of the definitions further specifies that such exclusion only applies if the handcuffing or shackling is “for movement purposes,” or “during movement.”

Yet sometimes, inmates in a jail may be subjected to unresisted handcuffing or shackling for purposes other than movement, such as for safety when an officer needs to enter a cell with the inmate in it, or as part of an effort to prevent inmate self-harm or suicide.

Would the proviso that such handcuffing or shackling must be for the purposes of movement imply that such other common incidents are, in fact, a “use of force” which must be documented? It may make more sense, it could be argued, to simply exclude unresisted handcuffing or shackling from the definition of use of force, since it restrains and places limits on the individual’s range of movements, but without resistance being overcome does not seem to fit within what most would think of as the use of force.

There are other differences, with the first definition including *all* uses of “physical, chemical, or mechanical measures on an inmate,” while the second is limited to “the

application of physical or mechanical measures to compel compliance by a subject,” requiring that the force be applied for that purpose to be included.

The third definition limits the definition of the use of force to “the application of physical, mechanical, or chemical measures to compel compliance by an unwilling subject.” So the second and third definitions only include as reportable force used for a particular purpose—compliance.

The difficulty with that is that it excludes precisely those applications of force that are not for purposes of compliance, but are applied maliciously, sadistically, or for the very purpose of inflicting pain. Clearly, that cannot be what is intended, and is an absurd result, making the first definition, incorporating all applications of such force regardless of specific purpose preferable. What looks, at first blush, like a simple matter of defining a reportable “use of force” can actually be tricky, and requires much thought.

One of the settlement agreements, the [Miami-Dade, Fla. County Jail Agreement](#) (2011), contains a very detailed and useful discussion of what is to be included in a use of force report once an incident fits within the parameters of the definition:

“5 c. Use of Force Reports

“(1) MDCR shall develop and implement a policy to ensure that staff adequately and promptly report all uses of force within 24 hours of the force.

“(2) MDCR shall ensure that use of force reports:

“ i. are written in specific terms and in narrative form to capture the details of the incident in accordance with its policies;

“ii. describe, in factual terms, the type and amount of force used and precise actions taken in a particular incident, avoiding use of vague or conclusory descriptions for describing force;

“iii. contain an accurate account of the events leading to the use of force incident;

“iv. include a description of any weapon or instrument(s) of restraint used, and the manner in which it was used;

“v. are accompanied with any inmate disciplinary report that prompted the use of force incident;

“vi. state the nature and extent of injuries sustained both by the inmate and staff member;

“vii. contain the date and time any medical attention was actually provided;

“viii. include inmate account of the incident; and

“ix. note whether a use of force was videotaped, and if not, explain why it was not videotaped.”

❖ Some Suggestions

The case for the importance of establishing a mandatory nationwide system of use of force reporting by police agencies and jails has been persuasively argued. Should that be accomplished, however, its success will greatly depend on having uniform, well-thought-out, and easily understandable definitions of both use of force in general and the different levels of force to be reported.

In grappling with trying to define a legal threshold test for obscenity, U.S. Supreme Court Justice Potter Stewart once wrote that he might not be able to completely define what fell within that category, “But I know it when I see it...” That quickly proved to be an untenable, unworkable definition for obscenity, and a similar approach will certainly also not work in defining the use of force for reporting purposes. The standard cannot be subjective, but must be spelled out in objective terms, to the extent possible.

1. A general ***threshold definition*** must be crafted after extensive thought and discussion as to how rank and file officers and supervisory personnel are likely to interpret it. It also needs to be fashioned in a manner that does not impose an unreasonable burden of excessive or unnecessary paperwork requiring the reporting of trivial incidents. At the same time, all significant uses of force should be included and reported.
2. ***Detailed definitions*** are also required, spelling out the differentiated levels of force to be reported.
3. Officers, and especially supervisors, will need to receive ***in-depth training*** through which they can gain a practical understanding of the definitions and what is to be reported.
4. The definition of and reporting the use of force in a ***correctional context*** raises unique issues, which need to be addressed separately.

❖ Resources

The following are some useful resources related to the subject of this article. Others may be found in the resources section to the AELE [companion article](#).

- [Criminal Justice Resources: Police Use of Force](#), Michigan State University.
- [Investigation of the Ferguson Police Dept.](#), U.S. Dept. of Justice (March 4, 2015).

- [Investigation of the Cleveland Division of Police](#), U.S. Dept. of Justice (December 4, 2014).
- [Use of Force](#): AELE Case Summaries (Menu).
- [Use of Force: Guides and Reports](#), DoJ Community Oriented Policing Services.
- [Use of Force Report Writing Guide](#). Author and date unknown.
- [Use of Force Reporting and Investigation](#). Seattle Police Dept. Manual.

❖ **Relevant Monthly Law Journal Articles**

- [Mandatory Nationwide Use of Force Reporting by Police and Correctional Agencies – and Why This is an Important Issue](#), 2015 (6) AELE Mo. L. J. 501.
- Other Monthly Law Journal Articles on [Police Use of Force](#).
- Other Monthly Law Journal Articles on [Correctional Staff Use of Force](#).

❖ **References:** (*Chronological*)

1. [Final Report of the President’s Task Force on 21st Century Policing](#) (May 2015).
2. [U.S. Customs and Border Protection: Use of Force Review, Cases and Policies](#), The Police Executive Research Forum (February 2013).
3. [Emerging Use of Force Issues: Balancing Public and Officer Safety](#), International Association of Chiefs of Police (March 2012).
4. [Use of Force Annual Report](#), Los Angeles Police Dept. (2010).
5. [Understanding Police Use of Force: A Review of the Evidence](#), by Klahm and Tillyer, 7 (2) Southwest Journal of Criminal Justice 214-239 (2010).
6. [The Ultimate Use of Force Report](#), by Tracey E. Bernhart, Corrections.com (June 8, 2009).
7. [A proper use of force report—protection against liability](#), by Chuck Joyner, PoliceOne (May 20, 2009).
8. [Documenting the Use of Force](#), by Todd Coleman, 76 (11) FBI Law Enforcement Bulletin 18-23 (Nov. 2007).
9. IACP Use of Force Model Policy (Feb. 2006). It defines nondeadly force as “any physical effort used to control or restrain another, or to overcome the resistance of another.” Also see Model Policy #67 Reporting Use of Force and Model Policy #76 Officer-Involved Shootings, In-Custody Deaths, and Serious Uses of Force. Model Policies can be [accessed gratis](#) by IACP members.

10. [Police Use of Force in America](#), IACP (2001).
11. [Use of Force by Police, Overview of National and Local Data](#), U.S. Dept. of Justice, Office of Justice Programs (1999).

AELE Monthly Law Journal

Bernard J. Farber
Civil Liability Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

© 2015, by the AELE Law Enforcement Legal Center

**Readers may download, store, print, copy or share this article,
but it may not be republished for commercial purposes. Other
web sites are welcome to link to this article.**

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
 - The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.
-

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)

This article appears in the [IACP Net](#) database.