INVESTIGATING POLICE MISCONDUCT

AN OUTLINE

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William W. Kurnik is a senior partner in the defense firm of **Knight, Hoppe, Kurnik & Knight, Ltd.**, located in Des Plaines, Illinois, a northwest suburb of Chicago. He concentrates his personal practice in the area of civil rights defense and has thirty years experience in all aspects of civil rights law, defending police civil rights cases ranging from deadly force to jail suicides, employer-related claims including First Amendment, due process and discrimination claims, land use-related civil rights claims, and claims under all of the various Civil Rights Acts. He is a member of the State Bars of Illinois and Indiana, all divisions of the District Courts located in Illinois and Indiana, the Seventh Circuit Court of Appeals, and the United States Supreme Court. He practices throughout the State of Illinois and in northwestern Indiana.

The cases selected for review represent opinions which he believes represent significant decisions which should be of some assistance in evaluating police misconduct of officers that are employed by entities that are members of the Association.

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"Leave no stone unturned"

WHO IS YOUR CLIENT?

ATTORNEY-CLIENT PRIVILEGE APPLIES TO ATTORNEY'S INTERVIEWS OF EVEN LOWER LEVEL EMPLOYEES.

> *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981). However, the attorney must be retained to provide legal advice – not simply to gather the facts. *In Re Allen*, 106 F.3d 582 (4th Cir. 1997).

DEPENDING UPON THE FACTUAL SHOWING, COURTS MAY RECOGNIZE A LAW ENFORCEMENT INVESTIGATORY PRIVILEGE OR A SELF-CRITICAL ANALYSIS PRIVILEGE IN CONNECTION WITH YOUR INVESTIGATION.

> *See Hogan v. City of Easton*, 2206 WL 3702637 (E.D. Pa. 2006); *Jones v. City of Indianapolis*, 216 FRD 440 (S.D. Ind. 2003). The privilege has been assumed to exist in Illinois but it does not appear that any case has found that all of the factors are satisfied. *See e.g. Hobley v. Burge*, 2006 WL 1460028 (N.D. Ill. 2006) (Magistrate Judge Brown).

RULE 407 (SUBSEQUENT REMEDIAL MEASURES) SHOULD OPERATE TO BAR POST-INCIDENT DISCIPLINARY ACTION AND RULE 403 MAY ALSO OPERATE TO BAR ANY STATEMENTS OR ADMISSIONS MADE DURING THE COURSE OF THE DISCIPLINARY PROCEEDINGS.

> *Maddux v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986); *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988); *Villalba v. Consol. F. Corp.*, 2000 WL 1154073 (N.D. Ill. 2000) (collecting cases) (Magistrate Judge Nolan).

IN DEATH CASES, CRISIS INTERVENTION SHOULD BE OBTAINED FOR THE OFTEN FORGOTTEN VICTIM RATHER THAN LOCKING HIM UP IN A ROOM UNTIL THE ILLINOIS STATE POLICE RESPONDS, AND A PSYCHOTHERAPIST-PATIENT WOULD ATTACH TO THE COMMUNICATIONS BETWEEN THE OFFICER AND A CLINICAL SOCIAL WORKER.

> *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923 (1996)

INVESTIGATION REQUIRES A KNOWLEDGE OF THE LAW, POLICE POLICIES AND POLICE PRACTICES

AFTER-THE-FACT DISCOVERY THAT THE SHOOTING VICTIM WAS UNARMED IS NOT ADMISSIBLE NOR IS IT ADMISSIBLE TO IMPEACH THE OFFICER'S TESTIMONY THAT THE VICTIM REACHED QUICKLY INTO HIS COAT.

Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1998); but see *Poole v. City of Rolling Meadows*, 253 Ill. App. 3d 154, 627 N.E.2d 112 (1993) (no abuse of discretion permitting victim to testify that he was unarmed).

THE OFFICER NEED NOT SEE A WEAPON IN THE HAND OF THE VICTIM IN ORDER FOR DEADLY FORCE TO BE JUSTIFIED.

DeLuna v. City of Rockford, 447 F.3d 1008 (7th Cir. 2006).

REVIEW THE APPLICABILITY OF SOME USE OF FORCE CONTINUUM, SUCH AS THE RCM, ATTACHED.

The use of a canine trained to "bite and hold" without prior warning, in other than situations calling for deadly force, may be unreasonable. *Szabala v. City of Brooklyn Park*, 437 F.3d 1289 (8th Cir. 2006); *see rehearing en banc*, 486 F.3d 385 (8th Cir. 2007) (discussing necessity of policy containing warning requirement).

The use of properly trained police dog is not deadly force. *Blake v. City of New York*, 2007 WL 1975570 (S.D. N.Y. 2007) (collecting cases).

The use of OC (Oleoresin Capsicum) or pepper spray on an individual may constitute reasonable force even though physical blows or baton may not be justified. *Meachum v. Frazier*, 500 F.3d 1200 (10th Cir. 2007); *see also Graham v. Hildebrand*, 203 Fed.Appx. 726 (7th Cir. 2006) (collecting cases).

Police officer's use of taser without warning may be excessive force. *Casey v. City of Federal Heights*, 509 F.3d 1278 (8th Cir. 2007) (collecting case law).

The 21-foot rule (or the three paces rule):

A person wielding a knife can close the distance of 21 feet and stab the officer before being shot. *See* www.policeone.com/writers/columnists/ForceScience/Articles/102828

SOME OBVIOUS AND NON-OBVIOUS ROCKS TO LOOK UNDER.

ISPERN/dispatch tapes

In-car video

Business establishment surveillance videos

Taser data

Officer "statistics"

LEADS/NCIC print-outs

Incident reports/use of force report

Department policies and procedures

Personnel files

Citizen complaint logs

Evaluations

Supervisors' files

Officer training handouts

Regional training (e.g. NEMRT) outlines

BASES FOR DISCIPLINE AND PROCEDURAL ISSUES

OFFICER CAN LAWFULLY BE DISCIPLINED FOR "CAUSE" REGARDLESS OF THE PRESENCE OR ABSENCE OF A RULE PERTAINING TO THE CONDUCT OF THE EMPLOYEE.

Sherman v. Board of Fire and Police Commissioners of Highland, 111 Ill. App. 3d 1001, 445 N.E.2d 1 (1983)

OFFICER CAN BE DISCIPLINED FOR EITHER ON DUTY OR OFF DUTY MISCONDUCT WHERE IT IMPAIRS THE OPERATION OR EFFICIENCY OF THE DEPARTMENT.

Kirsch v. Rockford, 55 Ill. App. 3d 1042, 371 N.E.2d 899 (1977); *Brown v. Sexner*, 85 Ill. App. 3d 139, 405 N.E.2d 1082 (1980)

TO TERMINATE THE EMPLOYMENT OF AN OFFICER, THE OFFICER MUST HAVE ENGAGED IN CONDUCT CONSTITUTING A SUBSTANTIAL SHORTCOMING.

DeGrazio v. Civil Service Commission of the City of Chicago, 31 Ill.2d 482, 202 N.E.2d 522 (1964)

TO SUSPEND OR GIVE A VERBAL OR WRITTEN WARNING TO AN OFFICER, THE OFFICER MUST HAVE ENGAGED IN NON-TRIVIAL, JOB-RELATED MISCONDUCT.

Lakin v. Gorris, 113 Ill. App. 3d 1034, 448 N.E.2d 215 (1983)

WHILE THE OFFICER HAS THE RIGHT TO INVOKE THE SELF-INCRIMINATION CLAUSE OF THE 5TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ITS ILLINOIS CONSTITUTION EQUIVALENT, THE CHIEF HAS THE RIGHT TO ORDER AN OFFICER TO ANSWER THE QUESTIONS OF THE CHIEF TO DETERMINE THE SUITABILITY OF THE OFFICER TO CONTINUE TO BE EMPLOYED. ONCE SUCH AN ORDER IS GIVEN BY THE CHIEF, THE ORDER MUST BE OBEYED. FAILURE TO OBEY THE ORDER ALLOWS THE CHIEF TO DISCIPLINE THE OFFICER FOR INSUBORDINATION.

Kammerer v. Board of Fire and Police Commissioners of the Village of Lombard, 44 Ill.2d 500, 256 N.E.2d 12 (1970); but testimony under threat of discharge is compelled and cannot be used in a subsequent criminal proceeding. *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967).

THE UNIFORM PEACE OFFICERS DISCIPLINARY ACT (UPODA) AS FOUND IN 50 ILLINOIS COMPILED STATUTES 725/1:

Pertains to oral interviews as opposed to written reports.

Does not apply to physical tests such as urine or blood test analysis.

Does not require that you interview the officer prior to instituting disciplinary action.

If the officer is interviewed, the warnings found in the Act (UPODA) need be given only if the chief is going to suspend the officer in excess of 3 calendar days.

UPODA warnings need not be given if the officer has been charged with a crime due to a complaint or information having been filed with the clerk of the court or the issuance of an indictment against the officer by a grand jury.

UPODA applies to all full or part-time officers regardless of rank and regardless of probationary status unless modified by a collective bargaining agreement.

LAW ENFORCEMENT EXECUTIVE CAN NOT RECEIVE THE RESULTS OF A PSYCHOLOGICAL EXAM WITHOUT THE CONSENT OF THE EMPLOYEE.

McGreal v. Ostrov, 368 F.3d 657 (7th Cir. 2004); but the department has the power to order a fitness for *duty* evaluation, terminate the employee who refuses to consent provided that the consent is for disclosure only of the ultimate determination. *Sangiardi v. Village of Stickney*, 342 Ill. App. 3d 1, 793 N.E.2d 787 (2003).

A CHIEF CAN LAWFULLY ORDER A LAW ENFORCEMENT OFFICER TO SUBMIT TO URINE OR BLOOD TESTING TO DETERMINE THE PRESENCE OR ABSENCE OF CANNABIS OR CONTROLLED SUBSTANCES; UPODA DOES NOT APPLY.

Corgiat v. Police Board of the City of Chicago, 155 Ill.2d 384, 614 N.E.2d 1232 (1993)

A LAW ENFORCEMENT OFFICER CAN BE DISCIPLINED FOR TELLING FALSEHOODS DURING AN INVESTIGATION OR AT A DISCIPLINARY HEARING.

Valio v. Board of Fire and Police Commissioners of the Village of Itasca, 311 Ill. App. 3d 321, 724 N.E.2d 1024 (2000); *LaChance v. Erickson*, 118 S.Ct. 753 (1998)