



Use of Deadly Force

A Legal Update

AB 392

Penal Code §835a

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BACKGROUND

When do Police Use Deadly Force?

- ❑ New Study: Proceedings of the National Academy of Sciences
- ❑ Database of 917 officer-involved fatal shootings in 2015 from more than 650 police departments nationwide
 - **55%** of suspects were white, **27%** were black, **19%** were Hispanic
 - Between **90-95%** of suspects were attacking police or other citizens
 - **90%** were armed with a weapon
 - This mirrored **The Washington Post's** statistics and findings (The Post has created a publicly available database of OIS incidents nationwide)

A CHANGE TO CALIFORNIA LAW

Effective January 1, 2020

- ❑ **Assembly Bill 392 amends Penal Code section 835a**
- ❑ **Redefines circumstances where police can use of Deadly Force**
- ❑ **Meant to encourage police officers to apply Less-Lethal Force or De-Escalation Techniques (in appropriate circumstances)**
- ❑ **Criminal and Administrative Investigations of OIS incidents must now follow the revised standards set out by this new law**

AB 392 (PC 835(a))

TRAINING OBJECTIVES

- A. Review new OIS standards created by AB 392**
 - B. Offer Practical Guidance**
 - C. Answer Your Questions**
- **Law Enforcement should expect enhanced scrutiny moving forward; from activist organizations, news media, prosecutorial agencies and the general public.**

DISCLAIMER

These amendments to Penal Code section 835a contain new language that is open to interpretation. This presentation offers our best analysis. Appellate court decisions will eventually define the proper application and scope of this law.

AB 392 (PC 835a)

STATUTE'S COMPONENTS

- “Legislative Intent” PC 835a(a)
- Use of Physical Force PC 835a(b)
- Use of Deadly Force PC 835a(c)(1)
 - ✓ Self-Defense PC 835a(c)(1)(A)
 - ✓ Dangerous Fleeing Felons PC 835a(c)(1)(B)
 - ✓ Suicidal Persons PC 835a(c)(2)

This preamble is NOT the operative part of the law!

PC 835a, Subsection (a) ***LEGISLATIVE INTENT***

- (1) Every person has the right to be free from excessive use of force by police;
- (2) Police should only use deadly force when NECESSARY in defense of human life. Officers shall evaluate the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible;
 **NOTE:** Requires that officers be able to articulate consideration of other non-lethal force options (aka: “de-escalation” tactics).
- (3) The decision to use force shall be carefully and thoroughly evaluated in order to ensure consistency with the law and agency policies;

PC 835a, Subsection (a)

LEGISLATIVE INTENT

- (4) An officer's decision to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time...officers may be forced to make quick judgments about using force;
- (5) Persons with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during law enforcement interactions based on their ability to either understand or comply with peace officer commands.



NOTE: The legislature is encouraging police officers to modify their tactics when confronting with suspects with mental health issues

PC 835a, Subsection (b)

USE OF PHYSICAL FORCE

□ If a peace officer has reasonable cause to believe a crime has been committed, s/he may use REASONABLE FORCE to:

- 1. Effect an Arrest;**
- 2. Prevent Escape; or**
- 3. Overcome Resistance.**

“**DEADLY FORCE**” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Section 835a(e)(1))

PC 835a, Subsection (c)(1)

USE OF DEADLY FORCE

- ❑ Police Officers may use DEADLY FORCE in two situations:
 - (A) Defend against an IMMINENT THREAT of Death or Serious Injury (aka: Self-Defense or Defense of Others);
 - (B) To apprehend a FLEEING SUSPECT for a Felony that Threatened or Resulted in Death or Serious Bodily Injury, if the **officer reasonably believes that the suspect will kill or seriously injure another person** Unless Immediately Apprehended.
- Where feasible, police shall, before using force, make reasonable efforts to identify themselves as police and warn that deadly force may be used, unless officer reasonably believes that the person already knows s/he's an officer.



PC 835a, Subsection (c)(1)

USE OF DEADLY FORCE – NECESSARY

- Peace Officers are justified in using deadly force only when they reasonably believe, based on the **Totality of the Circumstances**, that such force is **NECESSARY**

“**TOTALITY OF THE CIRCUMSTANCES**” means all facts known to the peace officer at the time, including the conduct of the officer and the subject *leading up to the use of deadly force*. (835a(e)(3))

“**IMMINENT THREAT**” means that a reasonable officer would believe the suspect has the present ability, opportunity, and apparent intent to immediately cause death or serious injury to the officer or another person.

A threat that must be instantly confronted and addressed. (835a(e)(2))



PC 835a, Subsection (c)(2)

USE OF DEADLY FORCE – DANGER TO OTHERS?

- ❑ A peace officer shall not use deadly force against a person based on the danger that person poses to himself, if there is an objectively reasonable belief that the person does not pose a threat to police or others.



NOTE: This becomes significant in “suicide by cop” situations. OIS investigators will ask: *When deadly force was applied, was the suspect an imminent threat to others, or only to himself?*

PC 835a, Subsection (d)

NO NEED TO RETREAT

- ❑ A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts because the suspect resists or threatens to resist
- ❑ A peace officer shall not be deemed the aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest, or to prevent the escape, or to overcome resistance

NOTE: Retreat does not mean tactical repositioning or other de-escalation tactics.

PRACTICAL CONSIDERATIONS

- ❑ 835a(e)(3)'s definition of **Totality of Circumstances** expands our OIS analysis beyond what was happening *at the moment* an officer makes the decision to pull the trigger.
- ❑ We consider the **entire chronology of events** leading up to the OIS.

For Example:

- Nature of the original call/crime/situation?
- Prior, unsuccessful, efforts by police to de-escalate or apply non-lethal force?
- Relevant Information the OIS officer knows about the suspect?
- Threatening changes in the suspect's behavior/demeanor prior to the OIS?
- Etc.

PRACTICAL CONSIDERATIONS

- ❑ 835a now arguably requires OIS review teams to consider all **Non-Lethal Techniques and Resources** that were available to the OIS officer.

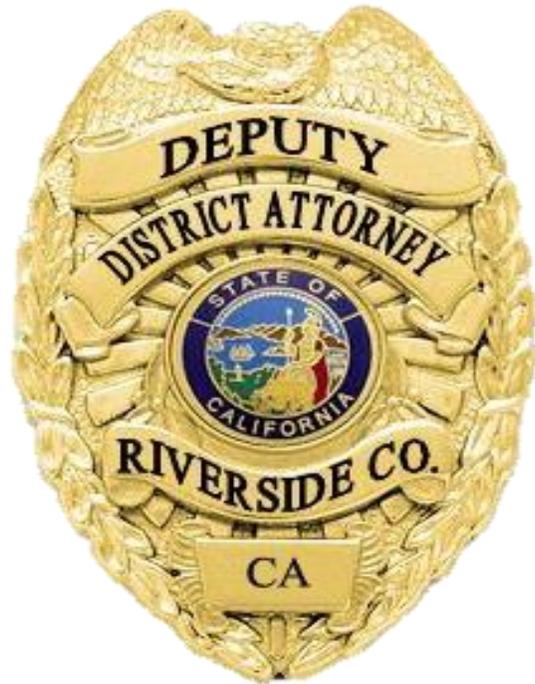
For Example:

- Were non-lethal techniques applied, but unsuccessful, before the OIS?
- Were non-lethal options considered, but unlikely to be effective?
- Were potential non-lethal force options unavailable to officers?
- Did officers follow departmental training and/or policies during the incident?
- Etc.

Post OIS Peace Officer Interview

- ❑ **Peace officers who apply deadly force should be prepared to clearly articulate why they used lethal force:**
 - Totality of the Circumstances, include every relevant thing known to you from the initial call until your decision to apply deadly force.
 - What caused you to conclude the suspect had the ability, opportunity, and intent to immediately kill or seriously hurt you (or others)?
 - Did you consider other non-lethal force options, but conclude they wouldn't be effective? Why?
 - Did you attempt any non-lethal force options before applying deadly force?
 - Did agency training or department policy guide your actions? Explain how.

Questions?



Additional AB 392 Resource: P.O.S.T. Website (<https://post.ca.gov/Use-of-Force-Standards>)

➤ **Includes a 15 minute training video & information on a live 2 hour P.O.S.T. AB 392 Course**