

DEADLY FORCE DECISION-MAKING

THE LEGAL USE OF FORCE

Although laws vary from state to state when defining our legal right to use force to protect ourselves, others, our homes and our property, at their heart, most states' laws require that any use of force be "reasonable for the circumstances." That is, in addition to any specific rules outlined in statutory or case law, we must also pass the "reasonable person" test. When we've employed deadly force, we'll need to pass not only the "reasonable" test but also other test criteria, which we'll explore in a moment.

Reasonable Force

Although laws vary, most states will define "reasonable force" as the minimum level of force required to end a threat – without going beyond that level. Said another way, reasonable force can be thought of as a level of force that does not exceed the threat. For example, if a threat to you included the possibility that you'd be bruised or receive a bloody nose, it wouldn't be considered reasonable for you to respond with a level of force that could break bones or permanently disfigure your attacker (that's the theory at least). You'll have seconds (or less) to decide whether or not your attacker will be satisfied with bloodying your nose, while the prosecutor gets days or months to make the same determination.

Deadly Force

Each state's laws also define when it is permissible to use what is generally referred to as "deadly force," "lethal force" or "the justifiable taking of a life." To simplify this topic, we'll refer to this level of force as "deadly force." While specific state laws vary, a common standard for the use of deadly force exists, which is:

Deadly force may only be used when there is an immediate and unavoidable danger of death or great/grave bodily harm to an innocent person, where no other option exists other than the use of deadly force.

As simple as that statement may sound, each state will provide further legal definitions or interpretations for each component of that statement, including what "innocent" means, what "immediate" means and what "great" (or "grave") bodily harm means. To help, we've summarized what those definitions typically mean and don't mean into four key rules outlined on Pages 3-6. After any use of deadly force, the prosecutor and/or jury will get a chance to determine whether or not they agree with your interpretation of those definitions, and, of course, they'll get to conduct their thought experiment over the course of hours or days (and in the relative safety of a courtroom) while you'll need to make your decision in seconds while under attack. The phrase "deadly force" itself can also be misleading. Based upon the name alone, one might assume that if the attacker doesn't die, then the deadly force rules won't apply, but that's actually not the case. Typically, the term "deadly force" means a level of force which is likely to cause, or could cause, the death of the other person, regardless of whether or not he or she actually does die. Therefore, the prosecutor gets to decide whether or not

he or she thinks death could have resulted and whether or not the deadly force rules should apply. That fact alone causes us to strongly recommend against warning shots. Prosecutors can easily refer to your warning shot as a “miss,” and they can make a case to the jury that you actually did attempt to kill the alleged attacker – even if you claim that you only fired into the ground (a bad idea) or into the air (an even worse idea since you’ll have the responsibility for wherever your bullet eventually lands). If the judge instructs the jury to view your case under the deadly force rules rather than just the reasonable force rules, you’ll suddenly have a much, much steeper hill to climb since you’ll need to prove that all of the deadly force rules (in addition to the reasonable force rules) were true. Finally, it’s important to understand that for us to be legally authorized to use deadly force, each of the deadly force rules must be in place and must remain in place at every single moment when we use, or attempt to use, deadly force. As an example, in the opening stages of an attack, we may have no ability to escape (Rule No. 4) because the attack may have occurred quickly and in very close quarters. But if we are able to wound the attacker such that an opening to escape suddenly becomes available, we must retreat at that point rather than continue our use of deadly force. On the following pages, we’re going to look at each of the deadly force rules in detail, including what the rules typically mean and don’t mean. We’ll also use a real-life scenario to illustrate how each rule might be followed or broken.



■ The four deadly force rules must be in place during every single moment when you attempt to use deadly force. As scary and as threatening as this individual looks, count on the prosecutor to second-guess your decision whenever deadly force is used.

THE RULES GOVERNING THE USE OF DEADLY FORCE

- 1 Must be in immediate fear of death or great/grave bodily harm for yourself or another person.** The threat must be immediate and must be so serious that a reasonable person would fear death or great/grave bodily harm. Great or grave bodily harm is a significant or life-threatening injury.
- 2 Must be an innocent party.** You cannot be seen as the person who started or escalated the conflict.
- 3 No lesser force is sufficient or available to stop the threat.** If you can stop a threat with something less than deadly force, you are required to.
- 4 Must have no reasonable means of retreat or escape.** If you can retreat, you must. However, you are not required to place yourself or a loved one in greater danger by retreating.*

**The obligation to retreat has been removed in a number of states through enhanced “Castle Doctrine” laws. However, it is your obligation to understand your rights and obligations under your state’s laws.*

1 REASONABLY IN IMMEDIATE FEAR OF DEATH OR GREAT/GRAVE BODILY HARM FOR YOURSELF OR ANOTHER PERSON

What It Usually Means:

- You must pass the “reasonable person” test. The prosecutor must agree that a reasonable person would have also felt that he or she would have been in immediate fear of death or great/grave bodily harm in the same situation.
- This rule applies whether protecting yourself or another person.
- The threat must be immediate. The attacker must have the immediate means and opportunity to carry out his or her threat. A verbal threat to injure or kill you is not enough.
- Great or grave bodily harm is a legal measurement that implies injuries so great that death is likely or possible (or that you’ll be disfigured or crippled permanently or for a significant period of time).
- The condition of the victim matters. For example, in most cases, if a smaller man is punching a larger man in the chest, it would not be considered great/grave bodily harm. However, if the larger man had a pacemaker, the criteria might be met, even though the attacker had no knowledge of the condition.

What It Usually Doesn’t Mean:

- It is not necessary that the attacker has a weapon. Depending on the relative size and strength of the attacker – or the number of attackers – and the victim (what would be called a “disparity of force”), the measurement of great/grave bodily harm might be met even though the attacker is unarmed.
- Distance is not critical. If you cannot retreat, you are not required to wait until an attacker is close enough to injure or kill you before you are authorized to use deadly force. Remember the “Tueller Drill” (and remind your lawyer about it).

SCENARIO 1

1 Pulling into your apartment complex, you notice a neighbor standing on his third-floor balcony.

2 You exit your vehicle and head toward the front door of your first-floor apartment.

3 Leaning over his balcony, your neighbor (who has threatened you in the past) pulls a knife from his waistband and shouts, “You’re a dead man!”

4 Fearing death or great bodily harm, you shoot your neighbor.

! While you could claim that you feared death or great bodily harm, you’d fail on the “immediate” portion of this rule. Since your neighbor was on the third floor and you were on the first, the threat most likely would not be perceived as “immediate” by the prosecutor.

2 MUST BE AN INNOCENT PARTY

What It Usually Means:

- In a deadly force situation, you must be the innocent party. You cannot be seen as the aggressor (that is, you must not be the person who started or escalated the conflict).
- Shoving someone at a bar obviously violates this rule, but how about flipping someone off on the freeway? If the situation escalates, don't be so sure what the prosecutor will think.
- The prosecutor will not only analyze the timeline of the incident itself but also want to go back in time before the incident occurred to understand whether or not you knew the attacker, whether there was bad blood between you and if there are any witnesses or evidence (prior arrests, etc.) to suggest that you're not as innocent as you claim to be.

What It Usually Doesn't Mean:

- It doesn't mean that you are barred from everyday disagreements, but it does mean that if you see the situation escalating, you must disengage, allowing the situation to de-escalate.
- You are not barred from coming to the defense of another person, but unless you can clearly identify who is the attacker and who is the innocent victim, a prudent course of action would be to call 911 and be a good witness. Don't assume that the guy who has the upper hand in the fight is the bad guy.

SCENARIO 2

- 1 After entering a bar, another individual steps on your toes.**
- 2 You mutter "asshole" under your breath.**
! *You failed the "innocent party" rule.*
- 3 The individual bumps into your shoulder, knocking you back.**
- 4 You shove the individual to the floor.**
! *You failed the "innocent party" rule again.*
- 5 The individual jumps up from the floor and charges you with a knife.**
At this point, you are in immediate risk of death or great bodily harm, but since you've broken Rule No. 2, you should expect to be charged with a crime.
- 6 You shoot the individual charging at you.**

3 NO LESSER FORCE IS SUFFICIENT OR AVAILABLE TO STOP THE THREAT

What It Usually Means:

- If you can stop a threat with something less than deadly force, you are required to. For example, if a reasonable person would have expected that you could have stopped an attack with your hands (or the pepper spray that you carry), the prosecutor may not agree that deadly force was authorized.
- You are required to stop using deadly force as soon as the threat of death or great/grave bodily harm has ended. If three bullets stop an attack, the fourth bullet could be considered a crime.
- Relative size and strength of the attacker(s) and the victim matter. For example, a large man being attacked by an unarmed, much smaller woman may have lesser-force alternatives rather than resorting to deadly force. In the reverse scenario, the disparity of force may mean that the smaller woman might have no alternative other than immediately resorting to deadly force.

What It Usually Doesn't Mean:

- You are not required to try other methods before using deadly force. You are simply expected to consider alternatives and to only use deadly force when no other option is sufficient or available.

SCENARIO 3

1 You leave a busy city street and turn down an alley to take a shortcut to your car.

! *Your first mistake. While you haven't broken one of the rules yet, you've put yourself in a risky situation that could have been avoided if you'd stayed with the crowd.*

2 An individual approximately half your size steps from behind a dumpster and pulls his shirt aside while reaching for a semi-automatic tucked into his waistband.

3 You shout, "Don't hurt me!" and draw your firearm from its holster. You leave your pepper spray in your pocket.

! *At this point, you would probably get most prosecutors to agree that you had no alternative other than to immediately resort to deadly force and that you would not have been expected to try your pepper spray first.*

4 The individual draws his firearm from his waistband and elevates it in an effort to shoot you.

5 You fire two rounds at him and one strikes him in the shoulder. He immediately drops his firearm and it slides under the dumpster.

! *After your first shot struck the individual, he no longer had control of his firearm (and was injured), and your pepper spray would most likely have sufficed to have stopped any continued threat. In addition, a prosecutor might argue that you've now broken rules No. 1 and No. 4.*

6 Bleeding, the individual stumbles toward you.

7 The individual refuses your further commands to stay back, and he steps into what you consider to be your "danger zone," so you shoot him again.

4 MUST HAVE NO REASONABLE MEANS OF RETREAT OR ESCAPE

What It Usually Means:

- Many states' laws require that, if you can do so safely, you should seek to escape from a potential attack (if an avenue of escape is available and practical) before standing your ground and defending yourself with deadly force.
- Reasons for an inability to retreat or escape can include: The attacker has physical control over you and you are simply unable to escape; the attacker is already too close and you have no ability to outrun him or her; the attacker has a firearm and it would be impossible to try to "outrun the bullet;" or you are in a location which offers no ability to escape, such as a room where the attacker is blocking the exit.
- The obligation to retreat never ends. For example, if you are able to wound an attacker such that it opens up an opportunity to escape safely, you must retreat at that point.

What It Usually Doesn't Mean:

- The "escape" rule doesn't mean that you cannot have been traveling in a forward direction at any point during the timeline (for example, it doesn't bar you from moving toward a person whom you believe has committed, or is about to commit, a crime, although it's good practical advice to avoid that type of situation). It simply means that at the moment a threat materializes, if you still have an ability to escape the situation, you should escape.
- You are not expected to retreat from a bad situation to a worse one. For example, if your only means of retreat is across a busy road, you are not expected to put yourself in greater danger by retreating.
- You are not expected to retreat and leave behind a companion in a dangerous situation (that is, if you can outrun the attacker, you are not expected to do so if it means leaving a companion behind).

SCENARIO 4

1 On your way home from work, a dog runs in front of your car on the freeway. You slam on your brakes and are rear-ended.

2 Your car is fine, so you continue on until you can pull onto the shoulder, but the other car is out of commission and pulls over several hundred feet behind you.

3 The other individual jumps out of his car with a machete and charges your vehicle, screaming that he's going to kill you.

4 You exit your vehicle and take up a position behind your driver's door. You shout commands continuously for the 40 seconds it takes the other individual to reach you.

! *At this point, you are in immediate risk of death or great bodily harm, but you had plenty of time to drive off (remember that your car was fine in this scenario) and leave the deranged individual behind.*

5 You shoot the individual as he gets within 20 feet of you.