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## CLIENT ALERT

August 6, 2019

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FROM: Bruce D. Praet, Attorney at Law

RE: **AB392 Use of Force Legislation [Penal Code §835a]**

Although Governor Newsom has yet to officially sign AB392 into law, our hats off to him and his staff for their willingness to listen to realistic compromises proposed by law enforcement and to reject the extremism advocated by Assemblywoman Weber and other law enforcement critics who flatly refused to negotiate. Had law enforcement once again defeated this legislation (e.g. AB931 last session), the issue could have been placed on the ballot for an uncontrollable vote by the uninformed public. In any event, given the media reports and widespread speculation about how AB392 will impact law enforcement, here's a realistic perspective illustrating how it will have little, if any, negative effect on how officers perform their daily jobs. Notwithstanding a few benign changes (outlined below), the good news is that we've managed to fully retain the "reasonableness" standard so artfully established by the U.S. Supreme Court back in 1989 in *Graham v. Connor*.

Starting with the changes to Penal Code § 196 (justified homicide), the law is now very simple – homicide by a peace officer is justified either pursuant to a lawful judgment of a court or as set forth in (the new and improved) Penal Code § 835a. As you'll see, officers will not be exposed to potential criminal prosecution arising from the use of deadly force unless it was completely unreasonable.

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So, what does the new Penal Code § 835a say and what are the changes?

(a)(2) – critical in the Legislature’s declaration that deadly force only be used “*when necessary*” was our ability to qualify that phrase with “*As set forth below*” (i.e. “*below*” fully incorporates the objective reasonableness standard).

(a)(2) – also requires officers to evaluate and use other available resources and techniques, but is once again appropriately qualified by “*if reasonably safe and feasible to an objectively reasonable officer.*” As qualified, this is not an unreasonable consideration in today’s environment.

(a)(4) – this is the key to the entire statute in that it essentially mirrors the reasonableness standard established in *Graham*, including “*totality of the circumstances*”, “*without the benefit of hindsight*” and in recognition that “*officers may be forced to make quick judgments about the use of force.*”

(a)(5) – given the increasing recognition that many law enforcement encounters involve individuals suffering from a variety of mental health issues, this is nothing more than a legislative acknowledgment/reminder of this as a factor to consider.

(b) – this is the pre-existing state standard for when officers may use force and essentially remains unchanged except to now appropriately incorporate the “objective reasonableness” standard.

(c)(1) -- now specifically addresses the use of deadly force, but is again linked to only when an officer “reasonably believes, based on the totality of the circumstances” that it is necessary:

(A) To defend against an imminent threat of death or serious bodily injury.

Two important observations here:

- We were fortunate to convince the Legislature to utilize “imminent” vs. “immediate” threat, with “imminent” now being defined in (e)(2) as the perspective of a reasonable officer believing that the subject has the present ability, opportunity and apparent intent (Note: However, a purely subjective fear is not sufficient.)

- Unlike SB1421 (amending Penal Code § 832.7) and AB748 (amending Govt. Code § 6254f) which reference ill-defined “great bodily injury”, we were able to incorporate the much more definitive “serious bodily injury” in AB392 which is already well defined in Penal Code § 243f(4) [e.g. concussion, bone fracture, extensive suturing, etc.]

(c)(1)(B) – sets forth the “fleeing felon” rule pretty much mirroring the original *Tennessee v. Garner* standard, requiring a warning, if feasible. [Note: Although common sense would suggest that a uniformed officer pointing a gun and yelling “drop the weapon” would constitute a warning, some naïve courts and juries seem to think that a warning must include the obvious consequences for non-compliance – i.e. “drop the weapon *or I’ll shoot*”. While we recognize that such specific language may not come to mind in the heat of battle, such a formal warning on BWC recordings will always help.]

(c)(2) – perhaps stating the obvious, this section now prohibits the use of deadly force to prevent someone from killing/harming themselves (unless the pose an imminent risk to others). Bottom line, if the subject wants to kill themselves, don’t do the job for them. If, on the other hand, the individual presents an imminent threat to you or others, you’ll still be justified in using reasonable force.

(d) – we were pleased to have retained key language which makes it clear that officers need not retreat and will not be deemed the aggressor or lose the right to self-defense when using objectively reasonable force. However, your lack of duty to retreat doesn’t mean that consideration shouldn’t be given to “tactical repositioning” or “de-escalation”, where feasible.

(e)(3) – as we’ve previously reported on the California Supreme Court’s expansion of “negligence” to include consideration of officer tactics in *Hayes v. Cty. Of San Diego*, 57 Cal.4<sup>th</sup> 622 (2013), the Legislature took this opportunity to now incorporate this consideration into statute. However, we are very pleased that we were able to convince the Legislature to add that the conduct of “the subject” must also be taken into consideration as a part of the “totality of circumstances”.

The final version of AB392 represents the tireless effort of law enforcement, lobbyists, attorneys, associations and others to work closely with reasonable legislators and the Governor to craft language which will highlight some key issues

while still permitting officers to act under the “objective reasonableness” standard trained for the past 30 years. As an aside, SB230 (law enforcement’s originally proposed alternative to AB392) will also likely pass, but will not go into effect until 2021. Addressing many of the same issues, this will provide funding for POST to develop training on these issues and require agencies to adopt policies in conformity with the legislative intent (Don’t worry – Lexipol is way ahead of the game and all subscribing agencies will have compliant policies long before required.)

As always, we will continue to remain available (at no cost) at (714) 953-5300 to provide our best perspective and interpretation as questions arise. However, you should always consult with your local legal counsel for final guidance. For our Lexipol subscribers, all impacted policies will be updated in advance of effective dates of these changes and if you have any Lexipol questions, please don’t hesitate to call at (844) 312-9500 or (949) 309-3894 or visit us at [Lexipol.com](http://Lexipol.com).