

SCOPs and Legal Accountability

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The laws you must obey depend on *who you are*:

- Americans must obey American law but not French law.
- The French must obey French law but not American law.

The *obligation* to obey American law (both federal and state) does not automatically give rise to liability for disobedience. Liability depends on both *who you are* and *the circumstances of the disobedience*:

- Some individuals will be immune from liability while others must pay damages.
- Some individuals must pay damages while their employers will be immune.

Therefore, to understand the legal liability that may flow from Virginia's SCOP program, we must consider:

- The laws that SCOPs and related persons must obey.
- The liability that flows from disobedience.

Potential Defendant

Privately Employed
SCOP

Potential Defendant

Privately Employed
SCOP

Potential Liability

Virginia tort law:

- Privately employed SCOPs must obey Virginia tort law and can be sued for any torts they commit.

Federal constitutional law:

- Privately employed SCOPs very likely must obey federal constitutional law because they (1) act in ways that have been traditionally and exclusively the function of the state and (2) sometimes act as an agent of the state.
- Privately employed SCOPs may be sued for damages under 42 U.S.C. § 1983; will probably lack immunity normally granted to police officers; will be responsible for plaintiff's attorney's fees if lose.

<u>Potential Defendant</u>	<u>Potential Liability</u>
Privately Employed SCOP	
Publicly Employed SCOP	

<u>Potential Defendant</u>	<u>Potential Liability</u>
Privately Employed SCOP	Virginia tort law: <ul style="list-style-type: none"> Publicly employed SCOPs must obey Virginia tort law. Such SCOPs are immune from suits for simple negligence but are liable for gross negligence and intentional harms.
Publicly Employed SCOP	Federal constitutional law: <ul style="list-style-type: none"> Publicly employed SCOPs are state officers and must obey federal constitutional law. Publicly employed SCOPs may be sued for damages under 42 U.S.C. § 1983; will have qualified immunity enjoyed by police officers; will be responsible for plaintiff's attorney's fees if lose.

<u>Potential Defendant</u>	<u>Potential Liability</u>
Privately Employed SCOP	
Public Employed SCOP	
Private Supervising Entity	

<u>Potential Defendant</u>	<u>Potential Liability</u>
Privately Employed SCOP	Virginia tort law:
Public Employed SCOP	<ul style="list-style-type: none"> A private entity supervising an SCOP is vicariously liable for torts committed by SCOP.
Private Supervising Entity	Federal constitutional law:
	<ul style="list-style-type: none"> Private entities supervising SCOPs are liable if the constitutional violation results from the entity's (1) official policy, (2) custom, (3) failure to train, (4) failure to supervise or (5) failure to screen in hiring. Private entities have no immunity and will be responsible for the plaintiff's attorney fees upon an adverse judgment.

Potential Defendant

Privately Employed SCOP
Public Employed SCOP
Private Supervising Entity
Public Supervising
Entity

Potential Liability

Potential Defendant

Privately Employed SCOP
Public Employed SCOP
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Public Supervising
Entity

Potential Liability

Virginia tort law:

- Liability of public entity will depend on the nature of the entity. Cities, counties and towns are immune. The Commonwealth and state-wide departments are not immune and will be vicariously liable for SCOP torts, but only up to \$100,000 and never for punitive damages.

Federal constitutional law:

- Liability depends on nature of entity. The Commonwealth and state-wide entities are not subject to damages actions. Cities, counties and other local entities that supervise SCOPs are liable if the constitutional violation results from entity's (1) official policy, (2) custom, (3) failure to train, (4) failure to supervise or (5) failure to screen in hiring.
- Local entities have no immunity and will be responsible for the plaintiff's attorney fees upon an adverse judgment.

A Primer on Failure to Train

- An entity will be liable for a constitutional violation committed by an officer under its supervision if the violation was an “obvious consequence” of the officer’s lack of training.
- An “obvious consequence” will exist where a pattern of prior violations has been shown, or even if no pattern can be shown, because training is obviously needed.

A Primer on Failure to Train

Examples of liability based on a pattern theory:

- Officers’ repeated removal of children from parental home without prior hearing put county on notice that training was needed to avoid due process violation. *B.S. v. Somerset County*, 704 F.3d 250 (3d Cir. 2013).
- Investigators’ repeated practice of obtaining confessions from women by threatening to have their children removed from their home put City of Chicago on notice that training was necessary to avoid future violations. *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006).
- City was liable for excessive force of police officer where district attorney informed city of six police encounters involving deadly force over a six week period; city’s attempt at training fell far below the generally accepted practice in the field. *Zuchel v. City and County of Denver, Colo.*, 997 F.2d 730, 738-741 (10th Cir. 1993).

A Primer on Failure to Train

Examples of liability based on an obvious theory:

- City was liable for shooting of off-duty officer attempting to assist in an arrest because off-duty officers would very likely attempt to assist when present during an arrest. *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4 (1st Cir. 2005).
- City was liable for false arrest when police officer presented a single photo of suspect (rather than photo array) to eyewitness for identification; the city had failed to provide any "training materials giving typical examples of arrests properly based on probable cause." *Clipper v. Takoma Park, Md.*, 876 F.2d 17, 20 (4th Cir. 1989).
- City was liable for wrongful conviction where police officer failed to turn over to prosecutor exculpatory evidence and city had no program instructing officers on the duty to turn over such evidence. *Moldowan v. City of Warren*, 578 F.3d 351, 393 (6th Cir. 2009).

A Primer on Failure to Train

Examples of liability based on an obvious theory:

- County was liable for excessive force where county relied on abridged training program providing officers with only 3-4 weeks of instruction before allowing officers to patrol on their own. *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991).
- City was liable for injury to mentally ill person because city officers received little or no training on how to deal with mentally ill or emotionally upset persons who are armed with firearms. *Allen v. Muskogee, Okl.*, 119 F.3d 837 (10th Cir. 1997).
- Police Department was liable for false arrest because department's "self-training" program, which assigned responsibility to the individual officer for keeping abreast of recent court decisions involving law enforcement, was insufficient to train officers. *Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004).

A Primer on Failure to Supervise

- An entity will be liable for constitutional violations where the violation is a “highly predictable consequence” of the failure to supervise officers.
- Failure to supervise cases are not commonly litigated and sometimes overlap with failure to train cases. Sometimes plaintiffs will argue that the entity failed to discipline a particular officer, which is tantamount to a supervision claim.

A Primer on Failure to Supervise

Examples of liability for failure to supervise:

- City could be held liable for murder of minor by third party while in a city facility because city had no standards for selecting or monitoring persons who administer living programs for such youth. *Smith v. District of Columbia*, 413 F.3d 86 (D.C. Cir. 2005).
- School district could be held liable for sexual assault on student where district knew or should have known that one third of district staff had criminal records and staff members had previously abused students without being disciplined. *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395 (5th Cir. 1996).

A Primer on Failure to Screen

- An entity will be liable for constitutional violations committed by an officer that it failed to adequately screen before hiring only where the violation was a “plainly obvious consequence” of the applicant’s background, had it been considered.
- Failure to screen claims available in theory but are difficult to prove and rarely successful.

Potential Defendant

Privately Employed SCOP

Public Employed SCOP

Private Supervising Entity

Public Supervising Entity

Circuit Court Judges

Potential Liability

Potential Defendant

Privately Employed SCOP
 Public Employed SCOP
 Private Supervising Entity
 Public Supervising Entity
 Circuit Court Judges

Potential Liability**Virginia tort law:**

- Circuit court judges will have no liability under tort law.

Federal constitutional law:

- To the extent circuit court judges perform an administrative screening function in approving SCOP applications, judges could be liable for constitutional violations committed by plainly unqualified applicants.
- These suits are a long shot because of judicial immunity but are far from frivolous.

Potential Defendant

Privately Employed SCOP
 Public Employed SCOP
 Private Supervising Entity
 Public Supervising Entity
 Circuit Court Judges
 Department of
 Criminal Justice
 Services

Potential Liability

Potential Defendant

Privately Employed SCOP
 Public Employed SCOP
 Private Supervising Entity
 Public Supervising Entity
 Circuit Court Judges
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 Services

Potential Liability**Federal constitutional law:**

- The United States Attorney General has the authority to investigate and reform any agency that is responsible for a "pattern or practice" of constitutional violations.
- Any investigation and suit would almost certainly seek injunctive relief, but the cost of compliance could be high.
- Under current circumstances, an investigation is unlikely, but if an incident involving an SCOP were to attract national attention (such as the recent use of force in Ferguson, Missouri), an investigation would become much more likely.

Key Takeaways**INDIVIDUAL SCOPs**

- must obey state tort law and federal constitutional law
- will be liable for any violations (except publicly employed SCOPs will enjoy some immunity)
- liability could be significant given fee shifting in constitutional cases and lack of immunity for private SCOPs

SUPERVISING ENTITIES

- will be vicariously liable for torts (except cities and counties not vicariously liable)
- will be liable for constitutional violations caused by a custom or policy, or a failure to train, supervise or screen (except Commonwealth and state-wide public entities not liable for damages)
- liability could be significant given lack of immunity, fee shifting, and comparatively short training program