

What To Do If You Are Sued?

By Gene King, Law Enforcement Action Forum Coordinator



If one day you have a knock on your door and upon answering the door, a person hands you a Summons and Complaint, you are now a defendant in a civil court action. The most important thing is not to panic or get mad and throw the document in the trash. Doing so can have consequences that may be very expensive and not very pleasant. Those papers are important and require action within a specific period of time. This edition of the LEAF Newsletter will outline your responsibility if you are served a Summons and Complaint and explain what action may be needed and steps that may be taken in defense of the action.

So, You've Been Served!

The very first and most important thing you must do, no matter what level you are in the organization, if you are served with a Summons and Complaint is, as soon as it possible, notify your top-level manager. As soon as it possible, the manager must notify the entity's legal counsel and insurance carrier. The reason for the urgency is that once the Summons and Complaint are served, a clock starts ticking on a deadline the court has imposed in the Summons for the defense to answer the allegations in the Complaint. Failure to meet the deadline can cause a judgment by default. If the judge grants the judgment, it can be for the full relief demanded by the plaintiff. This can prove to be very expensive and could cause significant grief to the entity and anyone named in the complaint as they work to try to get the default set aside.

Legal counsel will handle answering the complaint but will need participation from the municipal entity, department and any employees named so they can respond with the appropriate information. Plaintiffs can be anyone, including co-workers. It is important for everyone involved not to take the court action personally and to keep a professional mindset when dealing with those who are or may be involved in the action. Top-management will be expected to ensure employees and records are available and require all to participate with legal counsel to mount an appropriate defense.

Where Do We Start?

Once the incident that has caused the court action is identified, it is important for the department and those involved in the action to not discuss the incident with anyone but their legal counsel and the designated

contact person in the municipal entity. Remember, “Anything you say can be used against you in court.” Often these cases are charged with emotion and employees do not like being accused of wrongdoing. It may feel good to vent anger, disparage the plaintiff or joke about the incident with friends and colleagues but any one of them now may become a witness to statements that were made.

Departments must ensure nothing is posted on social media pertaining to the incident or allegations in the Complaint. Only the person designated by the municipal entity, usually defense counsel, should make any comments on anything that has to do with the case. If top-management believes a statement should be made, defense counsel should be consulted as to the tone and content of the statement.

The next challenge is to take an introspective look and gather all the information held by the department and/or employees that pertains to the incident and put it in chronological order. This includes all video/audio recordings, photos, reports, notes or forms. The department should also gather the same documents from any other department/agency/service that assisted or participated in the incident. This may include the identification of “undocumented” participants that just may have wandered on scene.

In addition to the incident documentation, command should gather any complaint/internal investigation, discipline, personnel and training records of those who are named in the Complaint. The municipal entity’s insurance provider will be sending a claims and legal team that will want to review the materials and interview management and the named employees. It is important to be thorough and gather all personnel documentation including management memos and notes involving the employee, no matter who holds the document.

Of particular importance is to identify any Freedom of Information Act requests that may have been filed about the incident before or after receiving the Summons. It is important to know what the department has released and to whom. Once served with the Summons, any FOIA request pertaining to the incident should be referred or cleared through the assigned defense counsel.

Let’s Talk About Training Records!

Training records should include all opportunities employees were given to learn, develop and become further educated. This includes more than an officer sitting in a class or formal training environment. Training includes reviewing and discussing the rules, policies, procedures, philosophy, and practices of the organization and current case law applicable to their performance and while performing their essential job tasks as employees. Examples may include employee briefings, videos, periodicals, magazines, bulletins, newsletters, books or lectures. Training may also include discussion of current events and public policy issues, incident debriefings and performing mechanical and motor skills important to the job.

If the organization has not captured the opportunities for employees to participate in this type of activity, documentation of this information should become a priority going forward. Each activity is a training opportunity missed if not documented. Employees need to be reminded that the department provides many training opportunities that do not revolve around traditional classroom training methods but may be accomplished by discussion and electronic or printed materials. Efforts should be made to legitimately reconstruct the occurrences of this activity in the past and obtain copies of articles or the descriptions, a syllabus or source for the training.

More importantly, if a department is not providing the above-described training opportunities and documenting them, they are significantly behind industry standards for law enforcement and are doing a disservice to their employees and the people they serve. Training is the baseline for becoming a police officer in the State of Michigan. In-service and ongoing training in the areas that an employee can regularly be

expected to perform job tasks is the foundation for the defense of allegations of deliberate indifference for failing to train an employee as outlined in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989) and its progeny. Training is an important responsibility of an employer. So much so that for law enforcement training is Pillar Number Five in the 2016 President's Task Force for 21st Century Policing and an Accreditation Standard in Chapter 1.9, of the Michigan Association of Chiefs of Police, Michigan Law Enforcement Accreditation Program.

What Is Alleged And What Policy, Procedure, Rule, Order Or Practice Does It Involve?

Scrutiny should be made of the Complaint to identify the specific allegations and actions that are aggrieved. Once identified, the particular conduct complained about should be identified. Associated minutes, records, reports and recorded materials should be reviewed to identify any reported activity that corresponds to the allegations in the Complaint. With these two components, the department can identify the policy, procedure, rule, order or practice in place at the time of the incident that gave guidance or directed the action taken.

In the context of a police department, this is the point where requiring police officers, at the time of the incident, to clearly articulate the facts and observations in their reports become critical. The report provides an outline of events, giving a complete picture of the incident from the officer's point of view. The picture must establish the when, what, why and how that lead to the decision to take the specific action by the officer. The officer's words paint the picture by clearly articulating what the officer saw; the actions of others; any active aggression observed and resistance encountered; the conclusions and decisions the officer made as a result of what he observed; the facts that created probable cause to seize or search; the specific action taken to control a subject; and how the officers used de-escalation techniques to bring the incident under control.

This is important because the courts evaluate whether officers acted reasonably given the information they had at the time of the encounter and the articulated facts that they knew or observed that led them to choose their course of action. Of course, having the officers' words supported by video just adds to the credibility of the defense.

Following a records retention process is critical to maintaining a historic archive of policy, procedures, rules, orders and practices that may have been updated since the incident in question. Rarely does any person have good recall of what policy or rule was in place years ago when the incident occurred.

How Do You Know?

It is important to identify how the department audits activity to ensure the employees were/are following the intent of the directives, performing to expectations and behaving appropriately. The audit can include regularly reviewing reports, comparing report and video for consistency, a random questionnaire mailed to people who have contact with the department or peer review by supervisors or field trainers. In all cases, documentation of the audits must exist, including observations/outcomes and any action taken because of the audits. The outcomes can include praise, awards, acknowledgement, training, remediation or discipline. The goal is to prove "we know what we are doing" and that action is taken to praise, remediate or correct behavior as identified.

During the information gathering portion of the court process called "Discovery", questions will be asked about how the department does business and information will be requested about employees including an accounting of their activity through reports, video recordings, radio communication, email and text communication and telephone recordings. Departments often retain all this information for retention periods. The material represents an ever-growing mountain of data that a plaintiff can mine for evidence as they try

to prove their facts are true. This same data, if regularly audited and acted upon, provides the defense a track record of how the department and their employees do business and how they ensure their actions are appropriate and fair.

Participate In Your Defense

LEAF turned to their Legal Advisor, Audrey Forbush, Plunkett Cooney PC, and asked what employees should do if they find themselves named in litigation. She said, even though it may be difficult, do not to take the action personally and to look at the dispute as a professional. She recommended employees should participate in the defense of the litigation by helping the defense counsel understand the specifics and subtleties of the incident.

Forbush commented she liked the named defendants to have some “skin in the game” by taking the time to go to the depositions of the plaintiffs and other significant witnesses. She opined that by attending the depositions there is an opportunity to listen to the plaintiff’s rendition of the facts of the incident. They also get to listen to the comments of experts who may have been called to analyze the actions of the participants and render an opinion on how those actions influenced the outcome and established cause. The defendants are listening to the evidence in real time and can be available to provide detail or information to defense counsel as the process moves forward.

Forbush said an employee being sued should be knowledgeable about the incident and the specifics of the allegations. The next step is to read and absorb their incident report as it was written and to know it inside and out. Defendants must also be able to speak intelligently about the department’s policy and procedures as well as other legal standards the allegations represent. Examples may be Fourth Amendment freedoms from unreasonable search and seizure, freedom from excessive force, freedom from discrimination or false arrest.

The reason for all the preparation, Forbush said, is that the plaintiff attorney is going to have an opportunity to ask all defendants questions in deposition about all sorts of things that can be personal, reflective and specific to the incident including the legal support for the actions. Questions asked may include background, education, training, other participants, opinion and facts about the incident.

Things do not happen in a vacuum, commented Forbush. Participating in the defense of a claim will provide an education of how a day’s work has purpose and there is a reason to specifically account for one’s action should that action have to be recalled and defended three to five or more years in the future. The outcome of litigation can affect the reputation, financial well-being or even criminal culpability of an officer’s life. When the stakes could be that high, Forbush remarked that it is in the best interest of the named defendants to stay informed of the progress of their defense and assist as required.

Remember, Forbush assured, defense counsel is involved at every step of the litigation process. The defense counsel will be at the deposition and will work to make sure everyone is prepared for being deposed. Defense counsel will raise objections if the plaintiff is unreasonable, inappropriate or does not ask relevant questions. It is important to listen to the question and not jump to answer questions right away but to think about what the question is actually asking. This technique also gives defense counsel an opportunity to react to the question. Do not volunteer information or opinion. Only answer the questions that are asked. Do not anticipate the next question. If the question is not understood, ask that it be repeated or rephrased before answering. The witness should be aware they have a right to take a break at any time to consult with counsel unless a question is pending. Do not get angry and remain calm even if asked the same question repeatedly.

Forbush said that the most important things a person being engaged in litigation can do is remain positive, be professional, be patient and let the system do its work. Each defendant's contribution is to be prepared, stay involved and participate as needed. A successful outcome is to make the defense facts the most reasonable for the courts to accept.

Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, [now compatible with any browser](#), to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund
1675 Green Road, Ann Arbor, MI 48105 ph - 800-653-2483
Contact information: Gene King, gene.king@meadowbrook.com ph - 800-482-2726 ext. 8040*