



IACP NATIONAL LAW ENFORCEMENT POLICY CENTER

Response to Civil Litigation

Concepts and Issues Paper

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I. INTRODUCTION

A. Purpose of the Document

This paper was designed to accompany the *Model Policy on Response to Civil Litigation* developed by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their community and their law enforcement agency.

B. Background

Traditionally, law enforcement agencies have maintained what can best be described as a reactive attitude towards civil litigation brought against the agency as a result of law enforcement actions. As in all professions, the tendency has been to focus on what is known best — their own job of enforcing the criminal laws — while leaving the litigation to the lawyers. As a result, law enforcement agencies have played a reactive role by confronting the problem of civil litigation only after a cause of action has been filed against the department.

The past 25 years have witnessed a virtual explosion of civil litigation aimed at law enforcement agencies. Million-dollar judgments against municipalities and other governmental units have become almost common. Such judgments have created a veritable insurance crisis for local governments that have been forced to either pay skyrocketing premiums, provide self-insurance, or join

insurance pools with neighboring vicinities.

Some insurance companies have responded by making municipal insurance coverage contingent on a review of policies and procedures for legal and technical soundness. While these are important measures that each law enforcement agency should initiate to decrease the chances of being sued, the model policy advocates an even more aggressive program.

Departments must take an active part in reducing the growth of civil litigation. The focus must be shifted from an exclusive response to the lawsuit alone. First, the department must focus on the law enforcement action that allegedly caused a rights violation, and determine how similar incidents can be prevented or minimized in the future. This should not be taken to mean that all law enforcement agencies involved in such litigation are rights violators. However, even those agencies that are unjustly accused may learn steps to better prove their innocence in court.

Second, after the department has taken active steps to “manage” liability, then it may turn its attention toward the actual courtroom battle. Again, a proactive stance is necessary. Police officers are trained in criminal law yet many continue to ignore or diminish the significance of civil law. With increased civil litigation exposure, departments need to become familiar with those civil laws that are the focus of many large judgments.

Some police agencies have operationalized the concepts of proactive litigation control by establishing a special litigation unit that responds exclusively to litigation demands and those specific incidents that form the basis for potential litigation. By providing special investigative and documentation techniques for these incidents, it has

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been shown that such units can substantially reduce their involvement in civil litigation.

While not every department can afford to have such a specialized unit, almost all can adopt a heightened level of awareness and develop a more proactive approach by making all officers aware of the potential impact of civil litigation and the important role they can play in reducing its incidence and impact.

C. Focus of Model Policy

Law enforcement agencies and their attorneys are divided on how to best approach civil litigation. This split has been engendered by the litigation-process itself.

One strategic approach to litigation is to “hide the ball.” Courtroom scrutiny of subpoenaed departmental policies, memoranda, and other special reports has often led to liability for the department, where evidence of a violation of policy, not law, was uncovered. Thus, some agencies and attorneys advise that the best way to combat litigation is to leave undocumented, or vague, as much departmental policy as possible.

While the above strategy may appear attractive, it can also have disastrous consequences. Failure to provide clear instruction to staff regarding roles and responsibilities can be interpreted as deliberate indifference to the protection of civil rights in many police-citizen encounters. Moreover, it fails to provide the guidance necessary for the development of effective training, supervision, personnel performance evaluation, and discipline.

Lack of documentation can also make the department appear as if it is covering up its mistakes. For example, a popular record to be subpoenaed is a citizen’s complaint that forms the basis for the lawsuit. Where no citizen complaints are recorded, the plaintiff’s attorney can effectively skewer the department on insinuations that the department knowingly ignored both citizen complaints of misconduct and other relevant data that might reveal the magnitude of the misconduct problem. This perception can be made even worse where the department documents some incidents, but not others. The perception of wrongdoing here is underlined by lingering doubts concerning the reason for the selectivity.

Lack of documentation can be used to imply that the department is negligent in its own procedures. While it may be uncomfortable to be quizzed on the details of a written policy, the department looks worse if it is unable to produce any relevant policy. This leaves room for questions concerning adequate guidance and training of officers, departmental condonation of negligent acts, and ultimately the negligence of the agency regarding the incident forming the basis for litigation.

As courts have become more familiar with law enforcement procedures, they have also become less

willing to accept minimal documentation without lingering doubts. Similarly, more and more municipal insurance agencies are basing their insurance premium estimates on the law enforcement agency’s maintenance of professionally sound policy and procedures.

The model policy encourages active documentation of all critical incidents by law enforcement agencies as a proactive approach. Documentation of an incident provides strong evidence at a later date that no policies were broken, and gives an accurate record of the events as they occurred. This type of uniform and comprehensive documentation is far more constructive and responsive to a police agency’s requirement for accountability to the public and the courts, and this level of effort alone can go a long way in demonstrating good faith in these and other regards.

Finally, illegal activity by the department should not be condoned or hidden. Thus, the model policy approach is to provide an open and active attitude, with daily documentation of police activities, especially for those incidents that present a high risk for potential liability.

II. AGENCY CIVIL LIABILITY

The increase in civil litigation targeted at law enforcement agencies and their employees has required law enforcement executives to become increasingly conscious of liability. Today’s law enforcement executive must fully understand numerous legal concepts pertaining to this type of litigation. While municipal liability is an extremely complex and constantly evolving area of the law, a brief explanation of its main concepts is appropriate. Civil litigation has also begun to erode the traditional confidentiality of internal police records, as more and more courts have deemed this information imperative to prove a case.

The dramatic increase in civil litigation affecting law enforcement agencies can be traced to the landmark Supreme Court decision of *Monell v. Department of Social Services*¹ in combination with the legal revival of Title 42 U.S.C. 1983 as a civil cause of action.

This statute, known for brevity’s sake as Sec. 1983, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party in an action at law, suit in equity, or other proper

¹ *Monell*, 463 U.S. 658 (1978).

proceeding for redress.”

While Sec. 1983 does not create any substantive rights, it provides a means for individuals to gain redress from the governmental unit and the government officials who have used their position of authority to deprive the individual of a federally protected right. For example, the Constitution guarantees each individual the right to be free from unreasonable searches and seizures. Where a law enforcement officer makes an unlawful arrest, a deprivation of that constitutional right has occurred. The subject of the unlawful arrest may seek damages for this violation of rights through use of the federal courts under Sec. 1983.

Thus, Sec. 1983 provides a broad vehicle for litigating the spectrum of rights guaranteed by the federal Constitution and statutes.

When discussing governmental liability, it should be clarified at this point that the law enforcement agency is an arm of the city or county for which it is authorized to act. Thus, where the executive promulgates policy for his officers, it is generally attributable to the city.

Traditionally, governmental bodies have been immune from liability. The *Monell* case began the process of lifting this immunity, holding that a municipality could be held liable in certain instances for an employee's actions.

Since *Monell*, several Supreme Court cases have clarified and created guidelines on when a municipality may be held liable under Sec. 1983. Most importantly, the city or village may not automatically be held liable for the employee's actions, using the common-law doctrine of respondeat superior. To be held liable, the city or police department must have promulgated some policy or held to some custom of operation that the officer act upon, and that caused the rights violations.² For example, where a law enforcement agency has a policy that violates federal guidelines on use of force, and an officer injures a person while following that policy, the city may be held liable. Thus, for a city to be held liable, the city itself must have contributed to the rights violation.

Neither the parameters for what constitutes a “policy” nor clearly defined guidelines pertaining to which governmental employees may set official policy for Sec. 1983 purposes have been clearly established by the Supreme Court. However, a few broad principles have been formulated.

First, policy makers are government officials whose decisions or choices for action may fairly be said to represent final, official municipal policy.³ Second, policy may include rules of general applicability and conduct, and decisions by policy makers that will be applied to one

specific instance.⁴ Policy need not be written to hold the city liable. Where a law enforcement agency, through long practice, has done something in a certain way, a custom has arisen. Liability may be based on this custom, even if written procedures would have prohibited such actions.

Finally, municipal policy may be expressed through training, supervision, and discipline. A municipality may incur Sec. 1983 liability for negligence in training, supervision, or inadequate discipline.⁵

Establishment of a municipal policy of negligent training sufficient to hold the municipality liable under Sec. 1983 was addressed by the Supreme Court in *City of Canton v. Harris*.⁶ A city may be held liable for constitutional violations caused by its failure to adequately train employees where the failure to train amounts to “a deliberate indifference to the rights of persons with whom the police come into contact.”⁷ A municipal policy would not be established solely on the basis that one officer was inadequately trained, or that some better type of training could have been used that would have eliminated the actions that caused the injury.

III. FRAMEWORK OF THE POLICY

The model policy is set up to provide a proactive approach to civil litigation through a two-pronged approach. First, the department should target those areas that generate the most amount of litigation, and address them through strengthened procedures. Second, the model policy addresses the control of documents flowing from civil litigation in the form of subpoenas and requests for discovery.

A. Recognition of Incidents Producing Litigation

Some of the more prevalent law enforcement procedures forming the basis for both Title 42 USC 1983 and state law actions are vehicular pursuit, uses of deadly and non-deadly force, and searches and seizures. While this fact should come as no surprise, the truly important aspect of this statement is the recognition that departments can manage better by focusing more strongly on those law enforcement actions that cause the greatest number of problems. Agencies can begin this process by selecting those policies and procedures that are employed most frequently by police officers and that have the greatest potential for litigation.

The model policy targets five types of law enforcement actions that continuously appear as the basis for civil

⁴ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986).

⁵ *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985).

⁶ 57 U.S. Law Week 4263 (1989).

⁷ Id. at 4271.

² Id.

³ Id.

litigation for consideration. However, these areas are generalized from the experiences of many law enforcement agencies. Police agencies should examine their own local situations to determine if this pattern holds true for them or whether other issue areas should be targeted for consideration. Moreover, law enforcement agencies should continually monitor citizen complaints, officer disciplinary reports, and legal actions filed against the agency, among other similar matters, to determine if new areas of police operations deserve closer scrutiny.

1. *Uses of force.* Law enforcement powers include the right to use force in order to gain compliance or to preserve order. Each day, an officer may use force several times without consciously identifying it as such. While some law enforcement personnel equate a use of force with the use of deadly force only, the definition is much broader. Use of force runs the gamut of physical coercion from a gentle nudge or a firm “come-along hold” to the use of a firearm.

Use of force also extends to indirect coercive activities beyond physical contact between the officer and the suspect. Use of a cruiser to ram a car, or to force it off the road, will be considered a use of force. Recently, much attention has been focused on the use-of-force potential of canine units. The use of OC spray, a Taser, or other indirect means of gaining compliance or controlling a suspect should be recognized as an element of force.

While these examples are not an all-inclusive list of what constitutes a use of force, they serve to illustrate the fact that a broad range of daily law enforcement actions may constitute a use of force. Thus, while shooting incidents may not occur daily, many other uses of force are available to serve as the basis for a civil rights suit do.

Force incidents prove attractive fodder for the media and attorneys. It is only natural that some persons who have been involuntarily directed to follow a police officer’s order will automatically claim that excessive force was used. Unfortunately, abuses of police authority by a few in the past have produced a presumption that those practices continue to occur by all law enforcement officers in the present.

Given the high profile of use-of-force incidents, law enforcement agencies should follow the special investigative and documentation procedures outlined in the model policy. (See also IACP National Law Enforcement Policy Center *Model Use of Force Policy*.) An important first step will include recognizing the full continuum of use of force. Training of officers and supervisors should be initiated to reinforce thinking about uses of force on this continuum, and special documentation needs.

An indispensable first step in the documentation process involves developing departmental policy and procedures on force reporting. Agencies must be clear as to what types of actions their officers are required to report

and how this reporting should take place. The *Model Policy on Use of Force Reporting* developed by the Policy Center in 1996 is a recommended approach to meeting this need.

2. *Vehicular pursuit.* The model policy targets vehicular pursuits resulting in personal injury or property damage as high-liability risk incidents.

Clearly, most law enforcement agencies recognize the danger to the public and the officer in high-speed pursuits. Many departments have formulated pursuit policies that require an officer to consider a broad range of critical factors before initiating pursuit, such as weather conditions and the potential for serious injury and damage if the pursuit is continued, not only to the officer and perpetrator, but to innocent bystanders and surrounding property. (See the Policy Center’s *Model Policy on Vehicular Pursuit*.)

As vehicular pursuits have been held in certain instances to be uses of force and seizures, they provide ample bases for the constitutional torts under Section 1983 used in civil litigation. Given the frequency of different types of vehicular activity by law enforcement officers, these incidents merit special procedural attention and documentation. Some states mandate reporting of vehicular pursuits on a statewide level. Agencies in such states therefore habitually collect information in this area. Most agencies in states that do not have such requirements will have to develop reporting protocols and procedures to meet this information and monitoring requirement.

3. *Searches and seizures.* The complexity of Fourth Amendment case law causes searches and seizures to be another area of potential litigation. Warrantless searches or seizures are particularly vulnerable, as the court must determine whether the circumstances that would permit a warrantless search/seizure were present in each particular case. This has become a serious problem in many jurisdictions with regard to warrantless vehicle searches involved in drug investigations and seizures. While suppression of evidence is the main remedy at a criminal trial for an illegal search or seizure, concurrent civil actions for a civil rights violation under Section 1983 are increasingly being filed in order to additionally seek a monetary remedy for the illegal search/seizure. (See the *Model Policy on Executing Search Warrants*.)

4. *Failure to take law enforcement action.* Several jurisdictions have experienced a surge of civil actions based on a citizen’s charge that an officer should have taken, but failed to take, a specific law enforcement action that would have protected the person. The Fourteenth Amendment due-process clause does not impose on states and municipalities a duty to protect specific individuals from the harmful acts of others, unless the person has involuntarily been taken into custody.⁸ Thus,

⁸ *De Shaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998 (1989)

a municipality could incur Section 1983 liability where officials take no steps to prevent harm to their prisoners.

Aside from this specific situation, the question of whether a law enforcement officer owes a duty to protect specific individuals from harm is controlled by state law. Generally, law enforcement officers are considered to owe a duty only to the public to exercise their law enforcement powers. Most jurisdictions hold that there is “no duty” to protect any specific person, unless a specific duty has been authorized by law. For example, once a perpetrator is taken into police custody, the officer does have a duty to protect the life of that perpetrator. Failure to take action to protect that individual would be a breach of duty, and give rise to a cause of action. Unless a duty to take action is specifically established, these jurisdictions would hold that an officer has no duty to protect particular individuals. However, once an officer undertakes to protect an individual, the officer must continue to do so, and any negligence in such protection will give rise to a cause of action.

By contrast, some jurisdictions do not follow the “no-duty” rule, and hold that officers do have a mandatory duty to protect specific individuals.

Directly related to this issue, however, is that of liability for failure to act based on an individual’s race, religion, or similar criteria. If a police agency follows either a written policy or unwritten custom of failing to protect certain classes of citizens based on their gender or race, for example, the agency is dramatically increasing the likelihood of a liability suit under Section 1983 for a violation of the equal-protection clause.

This issue has become evident not just with regard to race or religion but with regard to gender in the context of domestic violence cases. A police agency becomes liable under the Civil Rights Act if the police follow a formal policy or informal custom of providing less protection to women or to married persons than they would provide to males or to people who are unmarried. Under these conditions, a pattern of discriminatory service delivery may be established.

5. Rendering medical assistance. Law enforcement officers have a duty to ensure that medical assistance is provided to those in their custody. This duty would extend both to the arresting officer and jail personnel. As the prisoner cannot voluntarily care for his medical needs while in custody, the government must provide access to special medications, medical procedures, emergency treatment, or first aid for both injuries received prior to and during the arrest incident, and for already existing medical problems, such as diabetes.

Closely related, and an active subject area for civil litigation, is providing psychological assistance to prisoners, which has been brought on by an increased number of jail suicides.

B. High-Risk Incident Procedures

The model policy requires officers to follow certain special procedures when involved in an incident that would be considered a high-liability risk incident. While some of these procedures are specific to a particular incident, such as the special report required after a high-speed pursuit, most are generally applicable.

Not every high-risk incident will produce civil litigation. Certain scenarios, such as firearms discharges resulting in death, often end up the focus of litigation, and officers will almost automatically provide careful and thorough documentation of events. As there is no way of knowing which incident will later erupt into a lawsuit, supervisors and officers should treat all high-risk incidents as if they will go to court. This extra early preparation may save time and money at the onset of litigation.

The key focus for the officer is to begin a process of detailed documentation of the events surrounding the incident. All officers involved in these incidents are required to submit a fully detailed memorandum concerning the incident to their supervisor by the end of their shift.

The officer should begin on the scene, while his memory is fresh, to note all relevant information, no matter how obscure, such as weather conditions that obscured visibility, broken street lamps, and crowd conditions.

A supervisor should immediately be summoned to the scene, and a thorough processing of the scene for evidence should be conducted according to departmental procedures.

Color photographs and videotapes can be a valuable tool in preserving an exact record of the scene and the witnesses. Often, officers do not have time to note all the people on the scene or at the perimeter. Photographs can later be used to retrace the event and identify all possible witnesses.

There has been a recent increase in state legal actions against law enforcement agencies for false arrest and false imprisonment. A similar problem of law enforcement actions undertaken based on mistaken facts often arises during residential searches, where the search warrant provides an ambiguous or vague description of the residence to be searched. The model policy requires that a supervisor conduct an independent review of all relevant facts prior to the search in order to eliminate such incidents.

The booking process should also be used to discern the mental and physical status of the suspect. The booking officer should document whether the officer gave the suspect any first aid, or transported the suspect to the hospital for medical attention prior to arrival for booking. The suspect should be questioned as to whether medical attention is currently needed, or whether he has any special medical problems that will need attention while he is in

jail. The transporting officer should provide information whether the suspect ever lost consciousness or complained of chest pains, dizziness, nausea, or lightheadedness during arrest or while being transported. Where a neck restraint hold has been used, these symptoms can mean that the suspect is in physical trouble.

A color booking photo of the prisoner should be taken to document both injuries and lack of injuries. This can be used to dispel claims by a prisoner that injuries were received by jail officials or the arresting officers.

Finally, to help eliminate jail suicides, the booking officer should document any information that suggests psychological instability and seek psychological counseling for the prisoner. Where drugs are suspected to be the cause of such instability or are causing ultra-aggressive behavior, drug counselors should be consulted.

C. Post-Incident Procedures

The model policy requires officers involved in a high-risk incident to submit a detailed report to their supervisor before concluding their tour of duty. The supervisor is initially responsible for ensuring that this report is a meaningful documentation of the incident. The supervisor should ensure that the report includes the names of all officers, suspects, and witnesses involved; any injuries sustained; a complete explanation of what happened; and any statements given on the scene. This will provide the agency's chief executive with the full details required to discuss the incident with the press should that be necessary.

The model policy suggests that the chief submit a memorandum concerning the incident to department legal counsel as soon as possible, and meet to discuss the incident. This is a proactive damage-control measure. Should the incident result in litigation, legal counsel will need to be informed of all details of the incident. Thus, the law enforcement agency should work with legal counsel to assess each incident beforehand. The agency should be prepared to discuss both the correct and potentially incorrect measures the officers or department took during the incident. Department legal counsel may also be able to provide the department with direction as to the types of information and documents to be gathered in preparation for trial.

The status of an officer involved in high-profile incidents is often overlooked by departments. Even where an initial assessment of the officer's actions shows they were correct, an air of impropriety remains. While accident review boards, use-of-force hearings, or other internal investigations may be standard operating procedure, these procedures often leave the officer feeling castigated by the department. Media coverage of high-profile incidents may, as a result of a lack of accurate information, misrepresent the officer's actions and make

the officer appear and feel like a wrongdoer. Thus, some attempts should be made to circumvent this problem. The officer should be reminded that any internal investigations are standard procedure, and that a full review of the incident is designed as a protective measure.

The officer should be reminded that he is not required to discuss the incident with reporters, or any attorneys not associated with the case unless subpoenaed to testify. Comments made after an incident are admissible evidence in court. The officer may be feeling vulnerable after an incident, and confused as to whether he acted properly. The persons who should listen to those doubts are the department psychologist or chaplain, not the plaintiff's attorney.

Arrangements generally must be made for the legal defense of any officers named in civil litigation as defendants with the department for actions arising out of their employment. Usually, municipal attorneys or attorneys hired by the governmental entity will act as the officer's legal counsel. Where there is some doubt as to the propriety of the officer's actions, and the department is arguing that they have no liability for the officer's acts, a conflict of interest arises for the department's legal counsel. Counsel cannot assert that the officer acted improperly and defend the officer at the same time. Thus, officers are generally required in these situations to seek separate counsel. Retention of legal counsel, whether private or through the department, should be discussed early in the process with the involved officers.

D. Record Retention

Two factors important to managing civil litigation in a proactive manner are organization and analysis. These are especially important in the intelligent management and storage of departmental records and records pertaining to litigation.

1. Litigation documents. Lawsuits generate a seemingly endless flow of paper among the parties to the action, the court, and the witnesses. Most of these documents — such as requests for production of documents, interrogatories, answers and motions — have established time limits within which they must be honored, or the court will penalize the late party. Each document, when properly reviewed, contains clues as to how the other party will be conducting their case, what they think they will be able to prove, and who will assist them.

These concerns may seem to be more in the province of the legal profession than that of law enforcement executives. However, in taking a proactive approach, law enforcement executives need to become more active, participative clients. Many agencies have little understanding of civil liability and the litigation process, and leave these matters to their legal counsel. A better

knowledge of civil liability causes of action, and how they are proved will help the law enforcement executive mount an intelligent case. Knowing that a document request for certain internal records is inevitably going to be on its way to the department after litigation is filed places the department on better strategic footing than not knowing and being surprised.

The model policy provides for a more focused approach to the litigation process by creating one central repository for copies of litigation documents. This may be in the chief's office, under his coordination, or that of a designee. The main point is that one person or unit should take responsibility for custodianship of all litigation documents.

These may include the complaint and answer, motions for summary judgment or dismissal, answers on all motions, subpoenas, settlement offers or agreements, a copy of the final decision, and copies of any media coverage of the case. In addition to these court-type documents, the model policy requires that copies of certain department documents be placed in the litigation file. This will ensure that certain vital information will be present in one place, and thus facilitate review. Since most of this information will be needed for court, having it readily available will facilitate case preparation. For example, the model policy requires that any relevant departmental policies be in the file. In a shooting incident, the department will need to show that the departmental use-of-force policy was valid, and that the officer's actions either fell inside or outside of its parameters. Copies of dispatch tapes can prove vital in hot-pursuit cases, or to prove response time. Enlargements of photographs of the scene or of booking photos can prove useful to recall events that happened several years ago.

The model policy also recommends that the discipline and training records of those officers involved in the incident be included in the file. These are generally requested by plaintiffs in negligent training or supervision cases and excessive use-of-force actions. The department will need to review all of this information itself to assess strong or weak aspects of the department's case.

Finally, the model policy requires that a copy of the criminal docket from any criminal case arising out of the incident be included in the file. This can prove useful both for the listing of witnesses and the collateral estoppel value of any findings of fact or law in the criminal case.

As part of the litigation file, an accounting process should be developed for the documents. Many agencies served with orders to produce documents or evidence send the documents down the chain of command, where they may gather dust in in-boxes until the day they are due. Under such circumstances, agencies may not be sure who has custody of the information needed to fulfill the request.

The accounting process should document such information as the date received and the due dates of any action required. Where a document requires that action be taken, the proper employee to fulfill that request should be immediately assigned this task. Department legal counsel should then be notified that the person will be responsible for working with counsel to fulfill the request. For example, should the department receive an order to produce evidence stored in the property room, personnel assigned to that function would fulfill that request. At a later date, the litigation file can be checked, and information on evidence released will appear.

Implementing a litigation file and accounting process will accomplish several important goals. First, it will reduce the possibility that important court deadlines will be missed, or that documents or evidence will be thrown together at the last minute in order to comply with the request. Addressing such problems as document production requests in a timely manner will provide department legal counsel with adequate time to review the requested documents and mount any necessary challenges to the request.

Second, better organization and knowledge are achieved, and the agency will move towards court with more exact knowledge and an offensive rather than a defensive approach. Department members will understand the law under which they are being sued, the exact nature of their defense, the significance of the evidence, and how it will be used by the department and the plaintiff in proving the case.

The model policy requires the chief or his designee to conduct a regular audit of civil litigation affecting the department to determine the need for revisions to training or policy. Thus, the litigation files can be an important evaluative tool by preserving a complete history of each civil cause of action targeting the agency.

Review of the files may show that the majority of cases filed against the agency stem from one specific type of activity, such as arrests. Continual involvement by certain officers may show the need for better training and discipline. Often, litigation will point up the need for increased documentation procedures. For example, the department may realize that a case concerning citizen complaints could have been won much easier if the department had only required all such complaints to be recorded. By spotting weak areas, the department can begin to analyze whether increased training or better policy development is needed.

While such an audit should at least be done on a regular basis, the agency should also be alert for situations that are developing slowly. Thus, a review of litigation over a five-year period may more clearly pinpoint important trends.

Review should consist of not only cases lost, but cases won, filed, or settled. These may serve to identify areas of strength that should be reinforced and sustained.

2. *Record storage.* A broader reading of which records held by law enforcement agencies are considered to be public record or are otherwise subject to disclosure is emerging in state and federal case laws and statutes. This has caused law enforcement agencies to revise their record storage system in order to protect truly personal information.

Generally, personnel records should be stored separately from internal affairs files. Personnel records usually contain personal employee information that is not subject to compulsory disclosure under most state privacy laws. Many smaller agencies store these records together for convenience and security, but they should be maintained in separate, secured areas.

In order to document the individual's disciplinary record in his personnel file, the agency may choose to instead enter only the final disposition of any case in the file. Awards and other departmentally recognized achievements should also be entered in the personnel file.

By separating these files, the argument can be made that internal affairs files cannot be permitted to be disclosed for litigation purposes, since files would only contain ongoing investigation information, opinions, and other evaluative information not generally disclosable.

E. Discovery of Internal Documents

Much like a private business, law enforcement agencies record and maintain vast amounts of information pertaining to their daily transactions. This information may address internal matters, such as firearms qualifications scores or use of sick leave, or external matters such as crime scene reports. In addition, information flows into the department in the form of citizen complaints and informants' tips. While these pieces of information may appear to be of police concern only, they can prove invaluable as proof in a civil case.

Traditionally, internal documents were accorded a near-blanket exemption from disclosure for litigation purposes. However, the recent trend has been to require agencies to produce some of these records. No firm rules may be stated here regarding when a document must be produced, as a case-by-case balancing approach is generally used by the courts. In addition, such decisions may differ from circuit to circuit. Thus, the model policy provides that all discovery requests be fulfilled according to state or federal laws. While projections have been given as to certain documents and their discovery treatment based on the decisions of one jurisdiction, each law enforcement executive should familiarize himself with local case law on this point.

Many law enforcement agencies resent compulsory disclosure of internal documents during litigation. These documents often contain highly private or sensitive information. Compelled testimony from internal affairs hearings may include self-incriminating statements. It is believed that the public really has no need to know parts of this information, and that compulsory production may compromise the integrity of internal and criminal investigations. A better understanding of the discovery or document production process may calm these concerns.

Discovery is the process by which each side in a lawsuit gathers the information that will prove its case. Documentary information is acquired through court order: the subpoena duces tecum. These orders to produce a document have been challenged in several ways by law enforcement agencies seeking to block discovery of internal documents.

1. *Relevancy.* Just as law enforcement officers may not search beyond the areas prescribed by a search warrant, neither may a litigant mount a fishing expedition into his opponent's records, hoping to find incriminating evidence. All admissible evidence at trial must be relevant. A piece of evidence is relevant where it helps to establish the existence or nonexistence of a fact at issue in the trial, or is calculated to lead to other relevant and admissible evidence. Thus, all documents required to be produced must somehow be related to the subject matter of the case, or the order should be challenged on the grounds of relevancy.

For example, documents that relate to an officer's driving record would be relevant where the litigant is seeking to establish departmental knowledge of the officer's poor driving record. Records pertaining to the officer's shooting skills would probably be deemed irrelevant, and the department would not have to release them.

2. *Executive privilege.* Both state and federal laws may, in varying degrees, recognize an executive or governmental privilege that may be used to shield internal documents from disclosure during litigation. A privilege is legal recognition that certain otherwise relevant evidence is entitled to some degree of confidentiality because of a unique relationship through which the information is held. The executive privilege may be extended to information held by the government, the disclosure of which would interrupt the efficient operations of government. It is held that for this information, the public's right to know is outweighed by an important governmental interest.

The governmental privilege is not absolute. The majority of federal courts have adopted a balancing test to determine which ordered documents will ultimately be disclosed. As developed in *Frankenhauser v. Rizzo*,⁹ an

⁹ *Frankenhauser*, 59 F.R.D. 339 (E.D. Pa. 1973).

in-camera inspection of the documents is done initially to determine disclosability. An in-camera inspection is a private viewing of the documents in the judge's chambers. The factors looked at in making the determination, used to one extent or another in most jurisdictions, are as follows:

- The extent to which disclosure will thwart governmental process by discouraging citizens from giving the government information;
- The impact upon persons who have given information of having their identities disclosed;
- The degree to which the government's self-evaluation and consequent program improvement will be chilled by disclosure;
- Whether the information sought is factual data or evaluative summary;
- Whether the party seeking the discovery is an actual or a potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- Whether the police investigation has been completed;
- Whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation;
- Whether the plaintiff's suit is nonfrivolous and brought in good faith;
- Whether the information sought is available through other discovery or from other sources; and
- The importance of the information sought to the plaintiff's case.¹⁰

Protective orders may be sought for the purpose of limiting the number of people with access to records that are ordered produced. In addition, names of confidential informants or other critical information may be blacked out of a document under court supervision.

3. *Work-product privilege.* The work-product privilege applies to information that is compiled under the direction of an attorney, in anticipation of litigation. It is generally meant to protect the legal strategy and theories developed on how a cause of action will be conducted.

As internal records and investigations are generally not conducted in anticipation of litigation, but in the ordinary course of business, this strategy for blocking production of records has generally failed. The model policy requires that after a high-risk incident, a confidential memorandum be submitted to the department's legal counsel, detailing the incident. The memorandum should point out the potential for litigation based on the facts and request legal assistance. This will invoke the attorney-client privilege as to communications regarding private legal matters, and set up the defense that further records or communication

regarding the incident were undertaken in anticipation of litigation.

Law enforcement internal records contain sensitive and critical information. The judicial system recognizes this fact, and has developed methods to protect this information. Truly confidential information should not be subject to public scrutiny.

F. Media

The public has a great interest in the daily operations of its law enforcement agencies. While public support of law enforcement is generally high, civil litigation can damage this support and erode public confidence. As media coverage of such litigation and the events forming the basis for the litigation are the prime sources of public knowledge of police affairs, law enforcement agencies should plan a strategy to respond to inquiries by the media.

While the media cannot help law enforcement agencies reduce civil litigation, they can help reinforce public support. The model policy requires that all statements concerning litigation or any incident originate from the chief's office or that of his designee. No statement should be released until the chief is fully apprised of all relevant facts. No officer is thus permitted to give statements to the media concerning a high-risk incident, unless specifically authorized to do so.

This restriction provides the agency with tight control over the quantity and quality of information released and is essential in order to present a fair and balanced account of the facts to the public. Many departments have a separate public information officer or office to provide this coordinated response. Where the agency does not have such a function, public statements should emanate from the logical source: the officer with the most information or the chief executive officer of the agency. However, the information should be carefully reviewed in content prior to release to determine that no confidential or misleading information is released. The model policy requires that public statements concerning civil litigation be reviewed by the department's legal counsel prior to release. Seemingly innocent comments can often be interpreted as admissions of negligence.

G. The Duty to Know the Law

Law enforcement officers and agencies have a duty to remain current with the laws that they enforce. Some agencies have in-house legal advisors who can access all the new and relevant statutes and case law and disseminate it to the officers.

The majority of agencies, however, do not have their own police legal advisors. Most agencies rely on the city or town law department to advise them on necessary changes in the law. Many agencies also subscribe to one of

¹⁰ Id. at 344

many legal publications concerning criminal law.

Legal issues arise daily in law enforcement agencies, not only in criminal law, but contract, labor, and constitutional law. While it would be an optimal situation for each agency to have a legal advisor, this is usually precluded by budget constraints.

Agencies can still maintain familiarity with current legal trends and statute changes through several options. While a small agency may not be able to afford its own full-time advisor, it may be able to join several other small agencies in the area to hire an advisor. Thus, the cost is spread over several agencies, all of whom will receive legal services. Agencies may also consider hiring a part-time legal advisor.

Law enforcement agencies can remain current through subscription to one of the many publications concerning police matters such as *Police Misconduct and Civil Liability* or *Police Labor Monthly*. State bar associations often have a publication service of new, local decisions that can enhance knowledge of state law. The department should arrange with their local legislators to receive copies of any bills that may affect law enforcement operations.

Any pertinent new legal information should be disseminated throughout the ranks so that all officers are operating with current knowledge. A better-informed agency is less likely to take actions that may end up the subject of litigation.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no “model” policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

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