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TIPS FOR DEFENDING GOVERNMENTAL ENTITIES



TIPS FOR DEFENDING GOVERNMENTAL ENTITIES IN COURT AND IN THE PRESS

By Liani Reeves

Representing a government entity presents unique challenges when it comes to high profile litigation. Open records and meetings laws expose the actions of a government office to public scrutiny before, during and after an action is taken. We govern in the open and we litigate in the open, and often under an intense microscope.

Adding to the scrutiny that comes with representing a public body, today's media and court technology have vastly changed the accessibility of legal proceedings to the press and to the public. Media is instant and everywhere. It used to be that court proceedings were reported on the evening news or in the next morning's edition of the local newspaper. Today, journalists and interested citizens alike are tweeting about courtroom proceedings in real time. Government offices are expected to answer questions and react instantaneously.

We all know that dealing with lawsuits against government entities is inevitable. Most lawsuits are reasonably managed as part of the day-to-day work of the agency. However, many lawyers understand that there is always the possibility of the Big One — a major lawsuit that will send your agency into chaos. A high profile lawsuit can cause disruption in operations, detract from the public mission, and impact the morale of your employees.

While you can never avoid being sued altogether, you can take steps to ensure that your agency is best prepared to navigate a very public and disruptive litigation process.

This article will provide an overview of issues and responses to those issues that you should consider before, during and after a major lawsuit hits your agency. These tips are also applicable to major events that have the potential to disrupt the work of the agency, such as accidents, natural disasters or initiation of a criminal investigation.

Expect the Expected

Help your client minimize risk by taking steps to avoid being sued altogether.

It's your job to know your client by developing a thorough understanding of day-to-day activities and projects. What is your agency working on that may cause heightened interest? For example, is your agency about to terminate a high level executive or cut ties with a major vendor? If so, discuss ways to minimize risk. Have discussions started to go south such that you or your

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client has a gut feeling that litigation may ensue? Step in and figure out if there's a way to find early resolution before the parties run to the courts.

Constantly assess the work of your agency, its risk and its potential liabilities. Act proactively and creatively to avoid litigation.

Expect the Unexpected

While the exact nature of a crisis may not be predictable, inevitably a crisis will develop. Don't wait until that crisis wakes you up in the middle of the night to plan a response. A crisis can quickly escalate into chaos if there is no plan. You and your client should take proactive steps so that when a crisis develops, you have a game plan on how to react and how to move forward in a productive way.

Steps that you should take to prepare your agency for major litigation or crisis include the following:

Build Relationships

Build relationships with reporters, legislators and other constituents so that when a crisis develops, the relationship is not automatically adversarial or distrustful. Good relationships may turn legislators or constituents into allies. Goodwill with a reporter may buy you time to help manage a story.

Also, think ahead and have contracts in place with outside vendors — such as outside counsel, media relations firms and other consultants

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— that you may need in a crisis. The last thing that you want to be doing during a crisis is reviewing requests for proposals for outside lawyers who will already be late to the show.

Develop a Communications Plan

Develop an internal crisis communications plan so that the right people are notified immediately. This can be done through an agreed-upon calling tree in which each person has one or two others that he or she is responsible for notifying. Or you can choose one single person who has responsibility for notifying everyone on the list. The key is to have already compiled a list of crucial players who must be notified.

Establish a Crisis Management Team

Establishing and training a team of the key players who will provide an immediate and coordinated response to a crisis is vital. The team will vary depending on the agency, but, generally, it should include the chief executive responsible for managing the policy and day-to-day

operations; in-house counsel and perhaps outside counsel, depending on the situation; a risk manager or insurer; the human resources director; the director of communications/media relations; and possibly the legislative director or constituent affairs director. The goal is to have representation from all of the key components of the agency.

It may seem like overkill to have all of the top managers on the team. However, this team is not in place for a run-of-the-mill lawsuit. This is a team that will only be convened to deal with a lawsuit or other crisis that has a realistic threat of interfering with the overall mission of the agency. When a crisis rises to this level, a team must be in place with the authority to make decisions about significant developments that occur.

You've Been Sued. Now What?

After your agency has been sued, you should follow a set protocol: convene the team, prepare the team for litigation, develop an action plan, develop a routine for ongoing coordination and manage employment issues.

Convene the Team

The key purpose of the initial crisis management team meeting is to understand why and how the litigation occurred and identify short and long-term goals.

Gather the facts. The team must have a common understanding of the background surrounding the litigation. Not all facts will be known at first, but you should have the right people present to report the facts necessary to understand the who, what, when, why and how of events underlying the litigation.

Share goals. Understanding the individual goals of different aspects of the agency's management is vital. Everyone on the team will not have the same goals. In fact, some of the goals may appear to conflict with other goals within the agency. The executive's goals will be tied to policy and keeping the work of

the agency moving forward. There could be specific policy that will be perceived to have priority over any litigation-related goals. The insurer's goals will likely be to find the easiest and most efficient path to resolution. The communications/public relations person's goals will be focused on managing the message with the media, the public and other constituencies; reassuring the public through media statements; and being responsive to the press. The human resources representative will be concerned with keeping employees focused and dealing with personnel actions if the lawsuit implicates employee misconduct. And, as the lawyer, you have responsibility over all of these areas, as well as the overall goal of assessing and mitigating litigation risk. Ensuring that everyone understands each other's goals and concerns is critical so that inadvertent actions that may undermine another's goals are avoided.

Prepare the Team for Litigation

Immediately discuss with the team issues that are crucial to managing litigation.

The attorney-client privilege. Lawyers often assume that clients understand attorney-client privilege. Don't make that assumption. Especially when dealing with high profile litigation, it is essential that your clients understand the scope of the attorney-client privilege and the ways that privilege can be inadvertently waived. They should also be advised about discussing with others matters pertaining to the litigation and what it means to have a discoverable conversation.

Litigation holds and preservation of documents. At the initial meeting, carefully explain the clients' responsibilities to preserve potentially relevant documents and the possible sanctions for loss of documents.

Difficulty of the process. Explain that there is no easy way to get through litigation. The expenditure of time, money and human resources is significant. The litigation process is adversarial and lengthy. Agency

employees will feel attacked and overwhelmed. Help them understand that this will be a challenging process professionally and personally, and serve as a point of contact to answer questions and address concerns.

Develop an Action Plan

At the end of the initial meeting of the crisis management team, it is critical that each person leaves with an understanding of his or her respective action items. Crisis easily drives people to indecision and inaction. The more specific and focused tasks can be, the easier it will be to keep the agency moving forward.

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Early on, not all actions will be known. However, there will be an understanding of what work must be achieved immediately and by whom, what must still be learned, what steps should be taken to gather that information, and any impending timelines or deadlines. Create a tracking system to make sure that the respective action items are completed.

Develop a Routine for Ongoing Coordination

The team should schedule regular coordination meetings to check on progress and goals. One person should have overall responsibility for coordinating the team. The agency's top lawyer is an ideal candidate to take on this role because his or her portfolio covers all aspects of the agency's work and the coordination can be protected by work-product and attorney-client privileges. Understand that team members will be resistant to the amount of time and energy that is being asked of them. Keep the team members organized and accountable while assisting members in managing goals and coordinating work.

Coordination of actions is especially critical. For example, ensure that the office doesn't inadvertently hold a press conference announcing a high priority policy project on the same day that a significant brief is filed or a hearing is held that will





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attract media attention. The positive aspects of the big project will quickly be overshadowed by the more salacious aspects of litigation. As a general matter, the communications team should be alerted any time there is some action in the litigation that may spark interest so that it is prepared to respond effectively.

Manage Employment Issues

Agency employees dealing with a lawsuit may find it intimidating and draining, either because employees' actions are at issue or because they are participants in the litigation process. The myriad of employment law issues that arise in litigation could be the focus of an entire article. The

following is an overview of issues related to individually named defendants and employee witnesses that you and your human resources department should consider.

Individually named defendants. Determine whether an individually named defendant was acting within the course and scope of employment. This will inform questions of whether the agency will defend and indemnify the employee or whether independent counsel should be hired for the employee. Consult your state tort claims and indemnification laws and state bar ethics rules on conflicts of interest between clients.

Employee witnesses. To help manage employee morale and unrest, issue proactive guidance to employees about what they should do if they are contacted by an attorney, investigator or reporter about the litigation.

Be mindful that any written guidance to employees may be leaked outside of the agency. Therefore, make sure that it is objective and practical advice and issued from the human resources department, not from general counsel, so that there



Lawyers Versus Communications Team

Inevitably, tension arises between lawyers, who are inclined to say nothing, and the communications team, which will want to say something to defend the agency. The lawyer's duty is to ensure that the communications team understands the risks involved with issuing statements about opposing parties or the merits of the litigation. These types of statements can expose the agency to harmful admissions or other types of claims, such as defamation or interference with business relations. Help the communications team craft a message, even if it is simply, "We don't comment on ongoing litigation." Consider whether the lawsuit pleadings can deliver the agency's message within the context of litigation. Write answers or motions in a more narrative form. While you may still give the standard "no comment" response, the media can be directed to the publicly filed documents that will provide a full and accurate picture of the agency's response to the lawsuit.

Dealing with lawsuits is a predictable part of practicing in the public sector. Your job as counsel is to ably navigate your agency through a major lawsuit that threatens to cause chaos and disrupt operations. With proper planning, you can avoid major snafus and guide your client through a disconcerting process. ■

are no arguments around waiver of privilege.

Prepare to answer these employee questions:

- Do I have to talk to an attorney or investigator for the other side?
- May I have agency counsel present if I talk to an attorney or investigator for the opposing party?
- Will I be paid for time spent talking to an attorney or investigator for the opposing party?
- Will I be paid for time spent talking to an attorney for the agency?

When meeting with any employee, be very specific in establishing the scope of the attorney-client relationship at the outset. Clearly state that you represent the agency and that you are not the employee's lawyer. Tell employees whether their communications with you are privileged — and, if so, the importance of maintaining privilege and how privilege can be waived.

Employees who are not named as defendants but who may be fact witnesses can pose a challenge in terms of representation and attorney-client privilege. While management employees are often considered "the client" for purposes of asserting an attorney-client relationship, nonmanagement employees may not be considered "the client." Therefore, opposing counsel may be able to talk to them directly without presence of counsel, and conversations with nonmanagement employees may not be protected by an attorney-client privilege. Check your state bar ethics rules on the definition of represented parties and scope of the attorney-client privilege before interviewing nonmanagement employees.

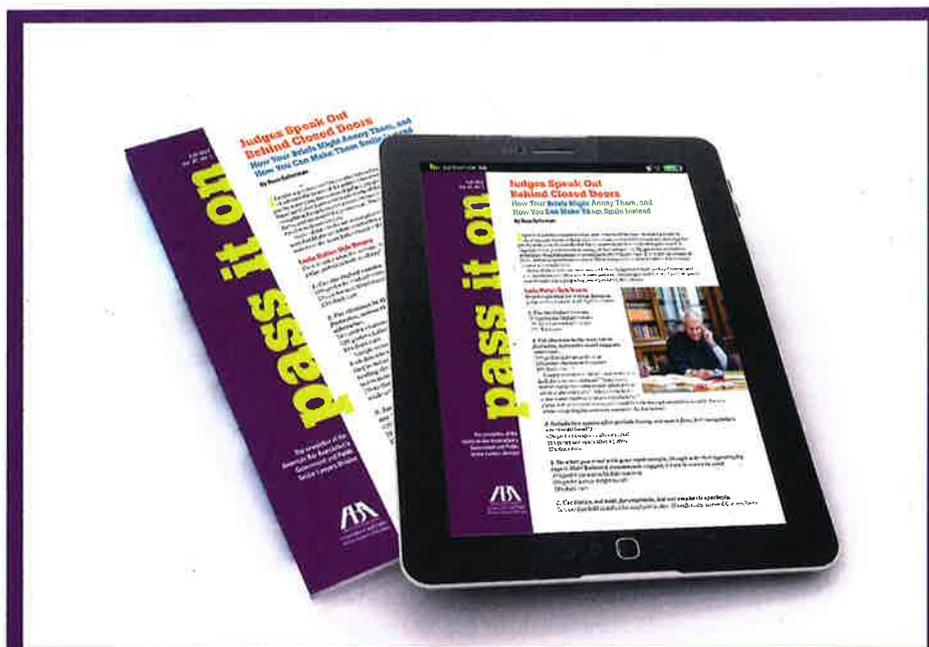
Employee anxiety surrounding litigation is to be expected. Employees may have questions and concerns about job security, the overall functioning of the agency, and the amount of information that they have about the situation. Morale may plummet when employees find out what is happening in their agency for the first time from the media. Consider whether you can reduce this anxiety and uncertainty by

taking steps to make your employees feel informed and part of the team. For example, provide employees advance copies of any press releases that are about to go out. Meet with employees to give updates on procedural aspects of the litigation or on the litigation process generally. Having a workforce that feels informed may keep employee gossip and speculation at bay. Informed employees may also be helpful advocates about the positive aspects of the agency's work.

The Aftermath: Debrief

When litigation concludes, the natural reaction is to physically and

emotionally box it up and move on to the next project or crisis. Instead, use the opportunity to learn valuable lessons from the situation. Convene your team to debrief about the underlying event that caused the lawsuit and review the litigation process. Ongoing issues — such as repairing harm to the agency or managing staff morale or personnel issues — may need to be addressed long after a judgment is entered. Assess whether additional actions are necessary and continue to coordinate any follow-up as needed. ■



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