Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

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I. Introduction

Lawsuits happen. This is the unfortunate reality of being an employer. Generally speaking, there are procedural and tactical considerations that are common to most employers, public and private, when they are defendants in a lawsuit. For example, regardless of whether you are a private or public employer, litigation inevitably results in discovery, appearances in court, filing motions, and constant evaluation and reevaluation of the case.

However, there are also a number of legal intricacies involved in representing a City in litigation, which normally involves advising the legislative body (i.e. City Council). Among other things, those who represent public entities are limited by the Brown Act in their ability to communicate with and obtain direction from the City Council about a pending lawsuit. Additionally, there are often multiple persons within a city who have some control over and input regarding the litigation aside from the City Council, such as any individual defendants, the Mayor, City Attorney, City Manager/Administrator, Human Resources Director, Risk Manager, Department Head and insurer. Thus, counsel representing a city must be mindful of these other persons who will also want to weigh in on litigation decisions and strategy, while keeping in mind that the client is normally the city.

The purpose of this paper is to provide practical guidance on navigating legislative bodies through lawsuits. In it, we cover important topics such as identifying the client, working with stakeholders, and ensuring compliance with the Brown Act. We also provide an overview of the entire litigation process and offer strategies that we have found to be helpful when communicating with elected officials about litigation.

II. Who is the client? Who are the other stakeholders?

Public agencies act through their legislative bodies, which will be the City Council for a city. The City Council, for example, creates rules, binds the agency, and often delegates its authority where permissible under the law.[1] In the context of legal actions, the City Council plays a significant role in the litigation from start to finish. Among other things, the City Council has the power to commence a lawsuit, authorize settlement, and give direction to City employees. Thus, when a city is named as a defendant in a lawsuit, the municipal organization is "the client" which acts through the legislative body.[2]

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[1] *See*, Gov. Code, §§ 37100 *et seq.*, 50001 *et seq*.

[2] *See*, Cal. Bar Rule 3-600, defining the client as "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting

A. Designated Representatives

Lawsuits against cities also frequently require participation from a number of individuals other than the elected officials. First, there is typically at least one high level City employee that makes the day-to-day decisions regarding the litigation ("Designated Representative" or "DR"). The City Attorney often serves as the DR. The Designated Representative, however, is not necessarily an attorney; he or she can be the city's risk manager, the director of human resources, a department head or the city manager. In many instances, there is not a single designated representative. Multiple people may serve as the point of contact in any given litigation. It is important for defense counsel to familiarize him or herself with each of these individuals and know what type of authority has been delegated to them by the governing body.

The City Council will rely on the DR to work closely with the attorneys who are litigating the case for the city. This individual who is the DR should have a firm grasp of the facts of the case and he or she should possess a general understanding of the agency's litigation strategy (i.e., early mediation, affirmative defenses, etc.). Additionally, the DR should be advised of and understand the important dates associated with the litigation (e.g., dates for depositions, important hearings, etc.), and work with defense counsel to update the City Council on significant developments in the litigation. The City Council and/or charter or municipal code may delegate some form of settlement authority to the DR, and if there is a mediation, the DR may serve as the city's representative.

B. Individual Defendants

When individual defendants (i.e., employees of the public agency) are named in a lawsuit, they are also important stakeholders and decision-makers. Depending on the allegations made and the facts of the case, the attorneys representing the agency may also represent the individual defendant. Before this determination can be made, the attorneys must conduct a thorough conflict assessment to determine if joint representation is permissible or if the individual should have his or her own counsel. Defense counsel must obtain written permission from the City and the individual defendant when their interests potentially conflict vis-à-vis a conflict waiver before offering any legal advice to either defendant.[3] Joint-representation alters the dynamics of the litigation because it adds an additional decision-maker—the individually named defendant—into the mix.

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through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

[3] Rules Prof. Conduct, rule 3-310.

1. Member of the City Council as a Defendant

Occasionally, a member of the City Council will be named as a defendant in a lawsuit. Conflicts of interest can arise in the litigation setting when an elected official is also named as an individual defendant in the litigation. Being able to identify potential conflicts of interest is critical and the legislative body must address them. Conflict of interest law is governed by statute and common law.[4] Actual conflicts of interest need not exist in order to preclude a Councilmember from participating in a discussion or decision regarding a matter. In some instances, the mere appearance of a conflict may be enough to require the Councilmember to recuse himself or herself from the matter.[5] As with any other individual defendant, if there is a potential conflict, defense counsel must obtain written permission from the agency and the individual Councilmember defendant through a conflict waiver before offering any legal advice to either party.[6]

Aside from a potential conflict of interest associated with having multiple defendants in a case, there are other circumstances where litigation may present conflicts. Occasionally, one or more the Councilmembers are friends with or a relative of the plaintiff who is suing the public agency. Or, it is not uncommon that a Councilmember has some other connection to the Plaintiff, be it business-related, social, or an indirect relationship (e.g., their children attend the same school, they are a member of the same social organization, they sit on another board together, they work together, etc.). Moreover, in some instances the Councilmember will actually have an interest in the matter that is outside the scope of his or her duty as a legislator. This happens, for example, when a business entity sues a City and one of the members of the City Council works for that business. Another conflict may arise when the City Council actually supports the plaintiff's position in the litigation. These are only a few examples, among many, of potential conflicts of interest.

Consequently, defense counsel will likely need to assess if the defendant Councilmember shall be restricted from participating in closed session discussions and other decision-making regarding the litigation. This will generally involve an analysis of Gov. Code section 1090, the Political Reform Act, and common law conflict of interest cases. Depending on the outcome of the conflict analysis, the defendant legislator may need to abstain from voting on anything tied to the pending litigation, or only certain issues, or he or she may need to leave the closed session meeting when the other legislators

[4] *See, e.g.*, Gov. Code § 1090 et seq.; Gov. Code § 87100; 67 Ops.Cal.Atty.Gen. 369, 381 (1984).
[5] *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.
[6] Rules Prof. Conduct, rule 3-310.

discuss the litigation. Regardless, this determination must be made early on to avoid any potential conflict of interest issues or the appearance of a conflict of interest.

If there is any question as to whether a potential conflict of interest exists, there are extremely important legal considerations that must be addressed immediately. Among other things, the governing body will ultimately need to decide in consultation with its legal counsel, if a conflict of interest (or potential conflict or appearance of a conflict) exists that may prohibit the individual legislator from taking part in any communication regarding the case or voting on something pertaining to the litigation (i.e., settlement).

2. Attorney-Client Privilege

An important consideration in deciding whether to jointly represent the City and individual employees of the City is that there is no attorney-client privilege between them in regards to the litigation[7]. This can be difficult for a City Council to accept or understand, as the individual defendants are entitled to get the same legal advice from the lawyer as the City Council regarding the lawsuit. Thus, any decision to provide joint representation should carefully evaluate whether the City Council will be comfortable with the ability of individual defendants to learn information the City Council may be aware of regarding the litigation.

3. Duty to Defend

Government Code section 825 requires a public entity to defend a current or former public employee, upon his or her request, for claims and actions arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity. Section 825 also allows the public entity to conduct the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity. Consequently, a city is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the city.

However, section 995.2 also authorizes a public entity to refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following: (1) the act or omission was not within

[7] *Nowell v. Superior Court for Los Angeles Cnty.* (1963) 223 Cal.App.2d 652, 657, finding, "Where two or more persons engage an attorney to represent all of them, the privilege is waived as between the parties, but it remains as to strangers."

the scope of his or her employment; (2) he or she acted or failed to act because of actual fraud, corruption, or actual malice; and (3) the defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee.

4. Indemnification

There are special indemnification provisions applicable to claims of intentional torts by elected officials. Government Code Section 815.3 provides that public entities are not liable to a plaintiff for the intentional torts of elected officials, unless they are co-defendants in a lawsuit. If they are co-defendants, and the elected official is held liable for an intentional tort, other than defamation, the trier of fact must determine if the intentional tort arose from and was directly related to the elected official's performance of his or her official duties" and if so, the public entity shall be liable.[8] If not, the plaintiff shall first seek recovery of the judgment against the elected official's assets, but if the court determines those assets are not adequate to satisfy the entire judgment, the court shall determine the amount of the deficiency and plaintiff may seek to collect the remainder of the amount from the public agency.[9] If the public agency pays any portion of the judgment where there has been a finding that the official's conduct did not arise from or directly relate to performance of his official duties, the public entity is required to pursue all available creditor's remedies against the elected official for indemnification, including garnishment, until the elected official has fully reimbursed the public entity.[10]

The City can choose to indemnify a member of the City Council or employee for punitive damages. However, the decision to do so can only be reached at the conclusion of the litigation.[11] Importantly, section 825 of the Government Code does not require the public entity to pay for punitive or exemplary damages of an employee, rather it authorizes a public entity to pay that part of a judgment if the City Council makes certain findings set forth in the Code. Those findings include that: (1) the judgment is based on an act or omission of the employee acting within the course and scope of his or her employment as an employee of the public entity; (2) at the time of the act giving rise to the liability, the employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity; and (3) payment of the claim or judgment would be in the best interests of the public entity.[12]

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[8] Gov. Code, § 815.3.
[9] *Id*.
[10] *Id.*
[11] Gov. Code § 825
[12] *Id.*

C. Insurance Carrier or JPA

The insurance carrier or joint powers authority (JPA) is often another stake-holder in the case. Additionally, in many cases there may be an "excess carrier" in addition to the primary insurer or JPA who only gets involved in the litigation if the liability exceeds a certain amount, typically at least one million dollars. The carrier or JPA may be able to assert control over the litigation, to a large extent, because of their ability to force a settlement depending upon the terms of their coverage or JPA agreement. The legislative body, the DR, and individual defendants should have a clear understanding of the carrier/JPA's authority to control the litigation and to force a settlement, and what, if any excess coverage exists, at the onset of the litigation.

Each should also know the carrier/JPA's general litigation temperament—i.e., are they committed to early settlement, do they want to "fight until the end," etc. Additionally, the legislative body should be made aware of any coverage limitations that may exist. For example, back wages or intentional conduct may not be covered by the JPA or carrier. It is important to identify and resolve all possible issues regarding coverage of the litigation and who will pay for any settlement or judgment at the outset of the litigation to avoid surprises for the City Council and to enable the City Council to make good decisions about litigation strategy. This may require the city to retain and consult with separate insurance coverage counsel.

Finally, there may be circumstances where it is appropriate for a representative from the insurance carrier or JPA to attend the closed session meeting where the litigation will be discussed. However, if the city is adverse or may become adverse to the carrier/JPA, then it may not be appropriate for the carrier/JPA to be present during closed session.

III. Communications with the Elected Body and the Brown Act

Public agency clients often ask:

(1) Who should communicate with the legislative body regarding pending litigation?
(2) How often should there be a communication with the legislative body about pending litigation and what should they be told?

A. Who should communicate with the legislative body about the litigation?

The overwhelming majority of the communications with the legislative body regarding the litigation should come during closed session via the "pending litigation"

exception to the Brown Act.[13] Importantly, closed sessions are permitted to allow the City Council *to confer with, or receive advice from its legal counsel* regarding pending litigation when discussion in open session of a matter would prejudice the position of the local agency in the litigation.[14] Prior to discussing pending litigation in closed session, the legislative body must state on its agenda the title of or otherwise specifically identify the litigation to be discussed, unless to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or jeopardize its ability to conclude existing settlement negotiations to its advantage.[15]

The DR should be present and an active participant during the closed session discussion regarding the pending litigation. This is the opportune time for the legislative body to provide direction to the DR, give the DR settlement authority, and to ask questions about the case. However, the City Council must be cautious not to misuse the pending litigation exemption to discuss matters outside of the purview of the litigation. Doing so could result in a violation of the Brown Act. Moreover, all closed session participants should be reminded that what was said in closed-session should remain in closed session; both the Brown Act and the attorney-client privilege demand this.

The DR can also have discussions with members of the legislative body regarding the litigation outside a noticed meeting if certain precautions are observed.. For instance, less than a quorum of the City Council might be established to oversee the litigation, and those members can meet directly with the DR and/or the city's litigation counsel to discuss matters relating to the litigation. Also, the DR and/or the city's litigation counsel can communicate with individual members of the legislative body, for instance to explain in greater detail or answer questions of members. Since these communications will take place outside of a regular or special meeting, they are not agendized and do not enjoy any closed-session privilege under the Brown Act. However, those discussions will likely be covered by the attorney-client privilege. In the event the DR and members meet outside the presence of litigation counsel, then those discussions are still privileged if the DR is relaying attorney-client communications to the members.

It is important that the DR, litigation counsel, and City Council members are cognizant of potential serial Brown Act violations when engaging in the above communications. That is, if the DR communicates with a member of the legislative body about the litigation, the elected official should refrain from communicating with other City Council members outside of a regular or special meeting about what the DR said. Similarly, the DR should not tell other City Council members what a particular member's

[13] Gov. Code § 54956.9.
[14] *Id.*
[15] *Id.*

views are regarding the litigation which were conveyed outside the meeting. Doing so could result in a serial Brown Act violation if it reaches a quorum.[16]

B. How often should there be a communication with the legislative body about pending litigation and what should they be told?

At the onset of the litigation, litigation counsel should provide the legislative body with a detailed assessment of the case in closed session. This could include going through each cause of action with the City Council and identifying the strengths and weaknesses of the case. Counsel should also provide the City Council with an early valuation of the case, be upfront about the cost associated with litigation, and determine if early mediation is desirable. Counsel should be forthright with the legislative body and provide them with an honest assessment of the lawsuit. This helps set the legislative body's expectations early on, and it allows the body to make informed decisions regarding the trajectory of the litigation, potential exposure, early settlement, etc.

Following the initial assessment, the attorneys litigating the matter should keep the legislative body reasonably informed about the case.[17] The frequency of the communication depends on the occurrence of significant events or milestones in the litigation. Aside from the initial briefing, the City Council may need to be briefed about important case filings, key depositions, and before and after mediations or settlement conferences. If there is a settlement offer or if there are significant changes in circumstances regarding the litigation, counsel should notify the City Council as quickly as possible.[18] Depending on timing issues, this may require a special meeting if the next regularly scheduled meeting is too far out. Counsel should also update the legislative body as trial nears to prepare the City Council for trial and explore final settlement possibilities.

Counsel can also communicate with the legislative body about the case via a memorandum. This allows counsel to update the City Council without having to appear at a meeting in closed session. However, many legislative bodies and litigation counsel do not prefer this method for a number of reasons. First, the legislative body cannot ask questions to counsel when they go this route. It is essentially a "one-way communication." Moreover, this route has its risks; it is not uncommon for members of legislative bodies to mishandle counsel's memorandum (i.e., the elected official shares the memorandum with

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[16] *See*, Gov. Code § 54952.2.

[17] Rule Prof. Conduct, rule 3-500, "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

[18] *See*, Rule Prof. Conduct, rule 3-510 regarding communicating settlement offers to the client.

people outside of the legislative body, which then raises breach of attorney-client communication concerns). For this reason, we caution the use of this technique, and it should be limited to communications that are not highly sensitive regarding the case (e.g., it can be used to update the legislative body on upcoming hearing dates, depositions, other procedural matters, etc.)

IV. When a member of the Legislative Body Is Also a Witness

Members of the City Council are sometimes witnesses who are called to testify at a deposition or during trial. Depending on the nature of the case, the elected official may or may not be allowed to testify. As a general rule, the fact that an elected official will be a witness in the litigation does not, without more, create a conflict that requires the official to be recused from participating in litigation closed sessions and decisions.

A. High Ranking Government Official

Absent extraordinary circumstances, elected officials, agency heads and top-level government executives are not subject to deposition.[19] The rationale for this policy is that such officials must be free to conduct their jobs without the constant interference of the discovery process.[20] The general rule that high-ranking government officials should not normally be required to sit for a deposition is based upon the recognition that:

> [A]n official's time and the exigencies of his everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, were allowed to take his oral deposition. Such procedure would be contrary to the public interest, plus the fact that ordinarily the head of an agency has little or no knowledge of the facts in the case.[21]

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[19] *Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910-911; *Kyle Engineering Co. v. Kleppe* (9th Cir. 1979) 600 F.2d 226, 231.

[20] *Church of Scientology of Boston v. I.R.S.* (D. Mass. 1990) 138 F.R.D. 9, 12 *citing United States v. Miracle Recreation Equip. Co.* (S.D. Iowa 1987) 118 F.R.D. 100, 104; *Community Federal Savings and Loan Assn. v. Federal Home Loan Bank Bd*. (D.C.D.C. 1983) 96 F.R.D. 619, 621 (deposition of agency official permitted only when official has relevant first-hand knowledge of matters not available from another source); *Capitol Vending Co. v. Baker* (D.D.C. 1964) 36 F.R.D. 45, 46 (oppressive to require government official to submit to interrogation that would disturb government business).

[21] *Union Savings Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962); *see also Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468.

Further, limiting depositions of high-ranking officials prevents a party from seeking discovery from the official without first establishing that the official has personal knowledge of a specific incident or event at issue in the case.

As such, top government officials are only subject to deposition under two conditions: (1) where the government official has "direct personal factual information pertaining to material issues in an action" and (2) "upon a showing that the information to be gained from such a deposition is not available through any other source."[22] If the Councilmember is directly involved in the matter, such as in an employment case in which the Councilmember made an employment decision at issue in the litigation, the Councilmember will normally be subject to deposition.

B. The Deliberative Process Exception

As a general rule, inquiry into a public official's legislative motive is impermissible.[23] This privilege has been coined the "deliberative process" doctrine.[24] The concept of deliberative process is rooted in the constitutional doctrine of separation of powers, which has regularly been addressed by both Federal and California courts.[25] The deliberative-process privilege exists to protect the integrity of the legislative decision-making process. The privilege ensures that any attempt to internalize one's thoughts is mitigated; the privilege is intended to encourage open debate.[26] The deliberative-process privilege "rests on the policy of protecting the decision making processes of government agencies," and "the key question in every case is whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion in the agency and thereby undermine the agency's ability to perform its functions."[27]

The quintessential act that is subject to the deliberative process exception would be a decision to vote on a particular piece of legislation. An elected official cannot be subject to judicial inquiry to probe why he or she voted the way he or she did. That is part of the deliberative process. Whether the deliberative process privilege applies to particular

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[22] *Westly, supra*, 125 Cal.App.4th at 911 *citing to Church of Scientology of Boston, supra*, 138 F.R.D. at 12.
[23] *Soon Hing v. Crowley* (1885) 113 U.S. 703, 710.
[24] *Regents of Univ. of Cal. v. Superior Court* (1999) 20 Cal.4th 509, 540.
[25] *See, United States v. O'Brien* (1968) 391 U.S. 367, 377; *People v. Bigler* (1855) 5 Cal. 23, 35; *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727.
[26] *Rogers v. Superior Court* (1993) 19 Cal. App.4th 469, 478.
[27] *San Joaquin Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 170-71.

decisions is a fact-based inquiry that the Court must evaluate on an individualized basis.[28] "Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence."[29]

C. Preparing the Councilmember to testify

In some matters, the deliberative process privilege may not prevent members of the City Council from having to testify in a lawsuit regarding a decision made by the legislative body. This is common when an employee who serves at the pleasure of the legislative body has filed a lawsuit after being non-renewed or terminated with or without cause. Another example is when the legislative body has approved a contract and then later decides to terminate the contract. Because the legislative body likely made this decision to not renew or to terminate the contract, they are percipient witnesses to the case, and there is a strong argument to be made that the deliberative process privilege does not apply. Additionally, the public agency may need to have the legislators testify to prove that the public agency acted lawfully in that situation.

Like any other witness, Councilmembers must be well-prepared to before they testify. Counsel will need to meet with each Councilmember who is called to testify in order to prepare them for either their deposition or giving testimony at trial. Councilmembers are particularly dangerous witnesses because they often have a vast body of public statements that they have made as part of their election campaigns, City Council meetings, public events, and media inquiries. Those statements often provide a wide variety of potential impeachment material that counsel must anticipate and plan for.

The Councilmember should understand their role as witnesses and they should know the types of questions that may be asked during the deposition or trial. It is extremely important to emphasize that there is a difference between knowledge and recollection. Councilmembers are accustomed to providing answers to the public in many situations and are often uncomfortable stating they do not have knowledge about a topic affecting their agency. They need to feel comfortable with providing a response indicating that they "do not know" if they truly do not know the answer. Witnesses should never guess or speculate. Additionally, Councilmembers may need to be reminded that they are testifying as an individual legislator and not as the "voice" of the City.

Finally, though attorneys will make necessary objections, witnesses should still be cognizant of privileges that may apply. For example, if employee X sues the City, that person is probably not entitled to *other employees' personnel or private information*. Nor

[28] *California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, 172-173.
[29] *Id.*

are they entitled to information or documentation that may be protected by the attorney-client or work-product privileges. The Brown Act and deliberative process exception will limit what can be said by the legislative body as well.

V. The nature of litigation and communications with the media

It is important to walk members of the legislative body through the nature of litigation early on. Frequently, the City Council is unaware that lawsuits can take quite some time before they actually make it to trial (if they ever get to that point). Depending on which court the plaintiff filed the case in, the actual trial date may be set for a year or more after the filing of the complaint.

A particular concern throughout the life of the litigation will be communications with the media and the public about the litigation. Normally counsel for the agency will not want individual Councilmembers commenting on the litigation. Additionally, lawsuits often involve sensitive or confidential matters, such as private personnel decisions or police officer personnel information, that could lead to further legal issues for the City if those matters are disclosed to the public. But Members of the City Council often feel a strong obligation to communicate with and answer questions from their constituents and the media about litigation against the entity. Although ideally a single point person will be identified for all litigation communications, that approach is not always acceptable to elected officials who have to be able to respond to questions at community and other public events. Thus, agency counsel may need to work with legislators to develop talking points that do not damage the agency's position in the litigation and will help communicate the agency's case theme.

VI. Closing thoughts

Litigation can present a number of issues ranging from potential conflicts of interest to whether the opposing party is entitled to testimony from a member of the City Council. Moreover, lawsuits require, among other things, ongoing communications between counsel, stake-holders, and the City Council. Consequently, remaining mindful of the various laws and legal principles applicable to public entities and elected officials in litigation will help counsel navigate the City Council through trial.