



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,  
5<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90045  
T: (310) 981-2000  
F: (310) 337-0837

135 MAIN STREET,  
7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94105  
T: (415) 512-3000  
F: (415) 856-0306

5250 NORTH PALM AVENUE,  
SUITE 310  
FRESNO, CALIFORNIA 93704  
T: (559) 256-7800  
F: (559) 449-4535

550 WEST "C" STREET,  
SUITE 620  
SAN DIEGO, CALIFORNIA 92101  
T: (619) 481-5900  
F: (619) 446-0015

400 CAPITOL MALL  
SUITE 1260  
SACRAMENTO, CALIFORNIA 95814  
T: (916) 584-7000  
F: (916) 584-7083

# **LEAGUE OF CALIFORNIA CITIES 2016 ANNUAL CONFERENCE CITY ATTORNEYS TRACK**

## **Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives**

*10/6/2016*

*PRESENTED BY:*

**Elizabeth Tom Arce & Brian P. Walter**



# Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

League of California Cities 2016 Annual Conference | October 6, 2016


*Presented by: Brian P. Walter and Elizabeth Tom Arce*

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Guiding Legislative Bodies  
Through Trial: City and Trial  
Attorney Perspectives

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Overview

- Who are the stakeholders and decision-makers for the City in litigation?
- Complexities of public agency litigation:
  - When the City and members of the City Council are both named defendants
  - Councilmembers as witnesses
- Communications with the City Council during litigation

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Who's the Client?

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### Who Makes the Decisions Regarding the Lawsuit?

- Stakeholders
  - City Council
  - Individual Defendants
  - Insurance Companies, Risk Pools, JPAs
- City Council should be informed:
  - Competing interests can arise
  - Control over litigation may be impacted by other stakeholders (e.g. insurance)

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### Potential Conflicts of Interest

- Councilmember may be a defendant
  - Indemnification for torts and punitive damages
- Councilmember may have personal or business relationship with plaintiff
- Review to determine if Councilmember should recuse himself or herself from the matter
  - What if Councilmember refuses to recuse?

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### Councilmembers as Witnesses

- Depending on the nature of the case, the elected official may be required to testify
  - Elected officials and top-level government executives are typically not subject to deposition
  - Top government officials may only be deposed under two conditions:
    - (1) the official has direct personal factual information regarding material issues in the lawsuit; and
    - (2) a showing that the information to be gained is not available through any other source

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Councilmembers as Witnesses

- Inquiry into an elected official's legislative motive (deliberative process) is generally not permitted
- Exceptions:
  - Non-renewals and terminations of employees who serve at the pleasure of the Council
  - Council terminates a contract
  - Councilmembers are percipient witnesses

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Councilmembers as Witnesses

- Preparing the Councilmember for testifying
  - Public statements may be a source of impeachment
  - Difference between "knowledge" and "recollection"
  - No guessing or speculating
  - Testifying as an individual legislator
  - Privileges that apply
    - Privacy of third-party personnel or private information
    - Attorney-client communications
  - Confidentiality of closed session - Brown Act

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Communicate Early & Often

- Attorneys ethically required to:
  - Keep client reasonably informed
  - Promptly notify client of amount, terms and conditions of a written settlement demand
- Identify Recipients of Ongoing Communications re Litigation
- Claims adjusters, insurance representatives, risk/litigation managers

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**Communicate Early & Often**

- Brief Legislative Body At Periodic Events:
  - Prior to Filing of the Lawsuit
  - After Key Depositions/Discovery
  - Before/After Mediation or Mandatory Settlement Conference
  - Before/During/After Trial
- Avoid surprises
- Build rapport and trust

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**Communicate Early & Often**

- Explain entire litigation process
  - Settlement procedure and discussions
  - Litigation unpredictable and time consuming
  - Discovery process
  - Exposure and Litigation Costs
- Litigation based on admissible evidence
  - The “facts” or “the truth” may be different
- Dealing with the Media

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**Keeping Information Confidential**

- Brown Act provides authority to go into closed session for anticipated or pending litigation
  - Confidential
  - Disclosure of recollection normally cannot be compelled
  - Members of legislative body or others present are not authorized to disclose
- Avoiding leaks of confidential information
  - Memos that are retrieved at end of closed session
  - PowerPoint presentation in closed session
  - Explain implications of leaked information

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Questions?

**Brian P. Walter**  
Partner | Los Angeles Office  
310.981.2024 | [bwalter@lcwlegal.com](mailto:bwalter@lcwlegal.com)  
[www.lcwlegal.com/Brian-Walter](http://www.lcwlegal.com/Brian-Walter)

**Elizabeth Tom Arce**  
Partner | Los Angeles Office  
310.981.2000 | [earce@lcwlegal.com](mailto:earce@lcwlegal.com)  
[www.lcwlegal.com/Elizabeth-Arce](http://www.lcwlegal.com/Elizabeth-Arce)

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