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# LEAGUE OF CALIFORNIA CITIES 2016 ANNUAL CONFERENCE CITY ATTORNEYS TRACK

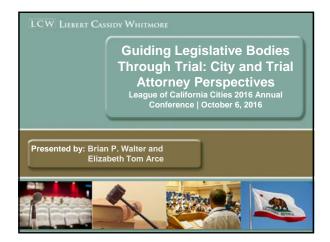
# Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

10/6/2016
Presented by:

Elizabeth Tom Arce & Brian P. Walter

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

Presented by: Brian P. Walter and Elizabeth Tom Arce



# 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

	Who's the Client?
3	LCW LIEBERT CASSIDY WHITMORE

LCW	LIEBERT	Cassidy	WHITMORE
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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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