Defense litigation strategies for public Entities

(how to win cases, minimize verdict amounts and be prepared for court)

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DISCLAIMER

The following presentation contains general information and is provided as a courtesy to our clients and friends. It should not be relied upon in any particular factual situation without consulting your legal counsel for specific advice.

Outline of session:

- **The initial responses to occurrences, including present public inquiry.**
- **The prelitigation process, including present public statements and responding to plaintiff attorneys and their statements.**
- **The pre-litigation investigation, how the conducted and how to best attempt to keep it privileged.**
- **In litigation, how to best present yourself in the discovery process, addressing and combating the reptile theory and the trial jury presentation.**
- **Use of mock juries, focus groups and consultants.**
- **Settlement procedures and strategies.**

These strategies apply to all civil cases:

- Injury cases.
- Employment and harassment cases.
- Sexual assault and molestation cases.
- Public entity business and debt cases.
- ADA and statutory accommodation cases, school special-education court cases.

An initial response to the incident (an incident occurs, is reported or otherwise brought to public attention, and we must decide upon a response).

- Do we make a public statement?
- Do we yet have enough information that we are comfortable stating that we have taken action (example: Memphis police case).
- Who makes the statement, does the statement become admissible, and what message does it send? Who is the audience and what is the purpose/goal of the statement?

In responding to an initial incident, do we have reporting obligations?

- Is this child mandatory report (Cal. Penal Code Section 11165 et seq.).
- Other reporting requirements, such as reporting a violent act to the police, reporting to an insurance carrier, Title IX reporting, internal reporting to supervisors, or to HR by policy or CBA.
- We have to follow all legal requirements, but additionally, if we have policies or practices in place for reporting and addressing (such as reporting the someone supervisor and making them aware, reporting immediately to transportation for repairs), we have to be sure that in trial we can say that we follow those specific policies and practices.

Win our case in the pre-litigation process.

- Cases are won and lost in the pre-trial discovery process.
- Testimony is preserved by video, written questions are answered under oath, and perceptions are created, all before trial.
- We need our employees to be prepared, present well, and articulate our theories in the discovery process.

We must understand the plaintiff “Reptile” theory tactics in pre-trial discovery. If we wait for trial to refute them, it will be too late.

- The plaintiff attorney are using this theory to get the jury away from the facts of the case and evoke:
- ANGER toward the defendant.
- SYMPATHY to the plaintiff.
- The key to the reptile theory is to get the jury angry at a perceived carelessness by a public entity for not focusing on safety, following policy or showing its concern for the people it serves.

To evoke this anger, the plaintiff attorneys ask a series of questions that are a bit off-fact, such as:

- Is safety your biggest concern?
- Your duty was to keep plaintiff safe?
- There were more things you could have done to keep plaintiff safe/meet your biggest concern, right?
- Do you, as a supervisor/employee with safety for the plaintiff as part of your job, take responsibility for this incident?

Our witnesses need to be completely prepared to address and answer these questions BEFORE they are deposed.

- If we wait to prepare them until trial, it will be too late. Their deposition testimony can be used against them.

- We need to be prepared to refute the reptile theory questions in our written discovery answers as well.

Pretrial discovery is admissible at trial.

- Deposition testimony taken by video can be played to the jury at trial, without even calling the deponent as a live witness (CCP §2025.620b).
- Deposition testimony taken only by a court reporter, and not by video, can be read to the jury without calling the deponent as a live witness (CCP §2025.620b).
- The plaintiff can come to trial, simply cut and slice selective clips of the deposition testimony of our employees, and play those deposition clips to the jury, without even calling the witness live at trial, to make their case and pre-condition the jury to dislike our employees (evidence code §776).
- The plaintiff will can actually play the video testimony of a single question and answer, or simple questions and answers taken out of sequence, and have the written transcript testimony sync'd to the video, so the jury see it, hearing and read it, all of the same time.

The reason for the plaintiff to take selective clips of testimony and present them to the jury without calling the witness live is to vote prove the plaintiff's case, but also to paint a public entity in a very negative light, hoping that the public entity can never overcome that perception.

Public entity defendants have to be completely prepared for their depositions, ready and expecting their testimony to be played to the jury, and calm and composed in giving answers.

Preparation of witnesses, for their depositions and deposition testimony, is more important now than it has ever been previously.

Our witnesses must expect that their video testimony will be played back to the jury, including being taken out of sequence, and they must undergo a deposition as if it were the life trial testimony.

Preparation for a public entity witness deposition includes:

- Before the deposition, the witness needs to understand both our theme and theory of the case, and the plaintiff's theme and theory, as well as how the plaintiff will attempt to use the testimony to prove certain points. This way, the witness will understand why questions are being asked, and will be prepared to properly answer the (for example, in a slip and fall case, our witness should know that the plaintiff's theory is that we did not follow sweep policies, so that when the plaintiff asks about policies and procedures and not about the fall itself, the witness will know what the plaintiff attorney is trying to prove).

- Our witnesses need to go through practice sessions of answering difficult questions while they are prepared for their depositions.
- Our witnesses need to know to address properly for their depositions because they will be videotaped.
- Our witnesses need to know that they need to be composed, not get angry and not give flippant responses to questions, because their answers will be played to the jury, and the video will show their demeanor.

In addition to reptile questions, our witnesses need to be prepared to adequately and accurately discuss at their depositions:

- Prior instances or incidences.
- Relevant policies and procedures.
- Training.
- Our witnesses need to be prepared such that either they know this information, or if the information is outside of their scope they can testify as to what the policy is and who should know that information, but they should never testify dismissively or say that they have "no idea".

- A good deposition for the public entity witness is one where the plaintiff leaves the deposition room and decides not to play any of the clips back at trial (because it does not help the plaintiff to do so).

- In response to plaintiff playing selective clips of the videotaped during their case in chief, the defense can also play helpful clips of testimony as a "cross-examine" immediately after the plaintiff does so.

- A witness whose deposition is played during the plaintiff case in chief can be called live to testify before the jury later, in order to give a more full set of testimony. We are most successful in doing so when the demeanor and presentation of the witness is positive in the video clip, so that the jury has not formulated any opinions as to whether they like the person on the video or not. If the jury like to the presentation of the witness in the video clip, then the witness comes to trial live a week later and presents a good explanation, the plaintiff can be seen as having been underhanded for playing just short clips.

- Interrogatory answers can be read to the jury at trial as well, without having to ask any questions of the witness or district (CCP §2030.410).

- In answering pretrial interrogatories, write them as if they were to be read to the jury. Think about how the jury will respond to the wording of your answer.

- For contention interrogatories (ex: state all facts which support your denial of the allegations) consider putting forth a full defense of the allegations, such that the plaintiff would never want to read the answer to the jury.

In pretrial discovery, should you approve undercover videotape of the plaintiff?

- Consider the sympathetic characteristics of the plaintiff. A plaintiff attorney could use the fact that you videotaped the sympathetic plaintiff against you, driving up anger against the public entity.

- Ex: a special-education student as a plaintiff, and the district decides to follow the student around (through its counsel and retained investigator) to videotaped the student and try and prove that the student has exaggerated symptoms. The plaintiff may convince the jury that this violated the student's privacy, to play into the reptile anger and sympathy.

Winning the case at trial:

- Defense cases must have a credible theme and theory.
- Theme: something creative to present our story (ex: in a very minor impact auto accident case with the plaintiff claims great injuries, the theme may be "making a mountain out of a molehill"; and a case where the city took extra steps to try and make a part more safe, putting in extra lighting which was not necessary and went above and beyond a lighting required by law, but get sued because some of the extra lights went out so that only the required lighting was in operation at the time of the incident might have the theme "no good deed goes unpunished").
- Your theme must be consistent with the evidence and match well to your witnesses. Do not have your theme rely on a witness who may not be credible.
- Theory: your specific theory of the facts which support your theme (and the auto example of a minor impact, that the force of impact was not hard enough to have caused the injuries alleged; in the city park extra case, that even without the light it was still bright enough for everyone to see clearly).

Expect the reptile theory to be used against you and trial.

- Your witnesses must be prepared to answer those same reptile questions (do you take responsibility, is safety the most important thing for your job, did you apologize to the plaintiff, etc.).

- Public employee witnesses need to be prepared to testify, prepare for the cross-examination, and prepared to tell their stories.

- We counter the reptile theory and push back against plaintiff efforts to mount up anger against public entities, by telling the background stories of our witnesses to ingratiate them to the jury and make them likable.

- Plaintiff will want to use our witnesses to stir up anger against public entity.

- We need our witnesses to tell their very likable backgrounds. They need to look at the jury, smile, and be comfortable explaining facts that will make the jury warm up to them and I understand that they did everything they could to avoid the situation leading to the case.

Making our witnesses likable to the jury:

- Our witnesses need to give their background, including family, ties to the community and other likable characteristics.

- Our witnesses need to describe why they love their job and why they got into the job field.

Examples: in school cases, teachers and administrators should look the jury in the eye and describe why they became teachers, why they dedicate themselves to the kids, all the extra things they do for their kids, and why they want nothing but the best for their students in their community; in a sexual harassment or wrongful termination case against the public entity, our administrators and human resources employees need to tell their background stories about their families and their connections to the community, and describe all of these areas of their jobs that help people, from hiring and recruiting to making sure safety steps are in place, from educating employees on reporting violations to instructing and correcting employees of behavior that might lead to violations, from scheduling parties to making sure birthdays are celebrated, and everything in between.

- While plaintiff's try and direct anger towards our employees, we encounter with showing that our employees are people just like the jurors, who are good individuals and work hard for the community.

- Our employee witnesses need to be appropriately dressed, and they all need to have gone through practice sessions where they both recite they are helpful testimony, and practice responses to the difficult questions.

- Witness consultants: for our witnesses that have difficulty on the stand, or just can't get past their own nerves, there are consultants who will work with witnesses to give them strategies to state calm during testimony, and to best prepare themselves to reflect well to the jury.

Accept responsibility for those things for which we clearly are responsible.

Part of the plaintiff's effort to get the jury angry at the public entity, and feel sympathy for the plaintiff, is to argue that the public entity will not accept responsibility for whatever it did to cause the incident, so therefore the incident will repeat itself unless a big verdict is delivered.

We counter, and pushed back, on this reptile theory argument that we won't take responsibility, by accepting responsibility for all those things for which we clearly should be responsible.

Example: in a sexual molestation case, if one of our employees failed to make the mandatory reporting call after the molestation, we tell the jury right from the start of the case, and with each witness, that we accept full responsibility for that failure to call law enforcement after the molestation. We are sorry we did not call law enforcement and we will make sure that we always do in the future. However, our failure occurred after the molestation, so we are not liable for the molestation itself. It is important that the jury hear our contrition and acceptance of responsibility, so that they are not angry with us.

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- If we accept responsibility for those failures that we had in the matter, right from the start, and have that flow through each of our witnesses, we take away the plaintiff's big argument about the lack of responsibility and the need to send us a message.

- We need our employees to be credible and likable in accepting responsibility for those things we must accept, then point out the evidence how we are not liable and certainly did our best on all other issues.

Mock Juries and Focus Groups

- Mock juries hear an abbreviated version of each side of the case, equally, and render verdicts.

- Mock juries are completed in one day most often, and a large group of jurors hear the entire case, presented either live or by video, with the main evidence (about 2-3 hours), then split into different jury rooms to deliberate. The deliberations are watched, and 4-8 jury verdicts are returned (one per split group).

- Outside services are used for mock juries.

- The plaintiffs are using mock juries much more than the defense, but public entities may need to use them more.

- Focus Groups are small groups of people, usually who match the typical juror in the venue of the case, who can give opinions on specific issues.

Example: they may give their opinions on a key evidence issue and how it affects them, or what they think of a witness, or clothing impressions.

Plaintiff firms sometimes actually use focus groups to watch the entire trial by live feed and report on their impressions of matters each day. Public entity defendants can use focus groups more than we have been.

Effectively using settlement opportunities:

There are many methods to attempt to settle the case other than direct communications with the plaintiff firm. They include the court ordered mandatory settlement conferences, mediation, nonbinding arbitration and the use of statutory settlement offers.

Mandatory settlement conference: these are ordered by the court, usually occur very shortly before trial, and are usually one of several court matters going on at the same time. In many courts a judge runs them, but in some courts local attorneys are brought in to handle settlement conferences.

- The benefit for mandatory settlement conferences is that the plaintiff has to actually show up to the courthouse and go into the courtroom, which can make the plaintiff nervous (as opposed to sitting on zoom and their house with the TV in the background).

- The negative factors are that: these settlement conferences usually occur very late in the case, after substantial cost and disruption have already occurred; the judges were local lawyers assigned to the mandatory settlement conference won't spend a lot of time getting to know your case and are not completely invested in the settlement of your case, and there is no follow-up or extra time afforded.

Mediation: these are private settlement conferences where you hired a private mediator to conduct the discussions. These can be held at any time, before filing and right up to trial.

- The benefits of mediation: you control the process; you can hold a mediation when everyone and where everyone; mediations can be done cost-effectively by zoom; the mediator is paid by you and is completely invested in trying to settle the case, considering in a failure if the case does not settle; you can go after court hours on a mediation and follow-up sessions.
- The negatives for mediation are: the expense, and the fact that mediations (especially zoom mediations) don't always put fear into plaintiffs.
- However, mediations are strongly favored is more effective than settlement conferences.

Arbitration: it is a hearing held by a private attorney or judge, who years of a trial of the case and renders a judgment. Binding arbitration is a final judgment, with no appeal. Non-binding arbitration is a process in which each side puts on their case, and the arbitrator renders a judgment, but either side can reject the judgment and proceed to trial.

- Binding arbitration may be effective if you are afraid of a runaway jury, as the arbitrators rarely give excessive judgments. However, the arbitrators rarely deliver defense judgments, as well. They often come down in the middle.

- Non-binding arbitration was used 20 to 30 years ago by the lot of state court counties as an effort to settle cases. It was generally been noneffective, so it was dropped in favor of mediations an early settlement conferences. Parties either simply demanded trial and rejected the arbitrator's award if they did not like it or held back on giving their best evidence in the non-binding arbitration because they knew the other side would reject a one-sided award in their favor. Non-binding arbitration is not recommended.

Statutory offers can be used in state or federal court to attempt to settle cases.

- A statutory offer is one that is made pursuant to statute (CCP §998 in state court, and F.R.C.P. 68 in federal court), which must be left open for a period (10 days to one month, depending upon the type of offer and the timing of the offer). If the other party does not accept the offer, then proceeds to trial and does worse than the offer, the party who made the offer can recover costs of suit, to include expert fees. If the plaintiff has a case where the plaintiff is entitled to recover attorney's fees, when the defendant issues a statutory offer and beat stepped offer at trial, the defendant can cut off the plaintiff's ability to recover any attorney's fees.

- Statutory offers are effectively made in state court when the plaintiff is not reasonable, or to cut off the plaintiff's ability to recover attorney's fees in the case. In state court a statutory offer can be issued and accepted by execution of a release and dismissal only, and not by a judgment.

- Statutory offers are also effective in federal court when the plaintiff is not reasonable, or to cut off the plaintiff's ability to recover attorney's fees in the case, but in federal court the plaintiff who accepts a rule 68 offer obtains a judgment to be entered by the court.

Questions?

The End.