

CRISIS HANDLING IN MUNICIPAL CASES

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CRISIS HANDLING IN MUNICIPAL CASES

I. EXAMPLES OF POOR CRISIS HANDLING.

A. DEATH CASE.

We handled a case where a college student was shot and killed by a co-defendant Police Department. Our police were also on the scene and did not provide immediate medical aid to the decedent. They claimed that they did not provide the immediate aid because they did not realize that he had been shot. Originally, the plaintiff's attorney did not sue our Police Department or any of our officers. However, during the litigation against the co-defendant, it was discovered that numerous statements made by our Police Chief in the morning following the incident were either untrue or arguably untrue. The Police Chief did not knowingly lie about any event that transpired but gave his statement before all the evidence was in. In retrospect, it turned out that statements that he made to the press turned out not to be true. The family of the deceased college student was so upset by the Chief's comments that their lawyer added the Police Department's officers that were at the scene and the Police Chief as direct defendants in the case.

We ended up moving for summary judgment after a very lengthy and expensive discovery process and, while the motion was pending, the case settled for a relatively small amount from our clients. However, the deceased college student's family would not settle the case unless a statement was put out on behalf of our Police Department expressing regret for certain statements which did not accurately describe the events that transpired that night. The plaintiff's attorney informed us that this statement was, according to the family, more important than the monetary settlement. The plaintiff's attorney insists to this day that he never would have added our Police Department or police officers as defendants if the Chief of Police had not provided the statement that he did on the morning following the incident.

B. EXCESSIVE FORCE.

We had another case where the Chief of Police stated to the press the day following an incident that the officer who allegedly violated the plaintiff's rights by using excessive force did nothing wrong and that his actions were fully in accordance with the Police Department's Use of Force Guidelines. This statement could have been used by the plaintiff's attorney to establish a Monell claim had the case gone forward as there was a video of the incident which, by itself, was enough to create an issue of fact to submit the case to the jury and in our opinion, most jurors would have believed that the force used, as depicted in the video, was excessive.

C. WHAT IS A MONELL CLAIM?

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

The City of New York, its Mayor, its Department of Social Services, the Department's Commissioner in his official capacity, the City's Board of Education, and the Board's Chancellor were sued by a class of female employees of the Department and the Board. The gravamen of the complaint was that the Board and the Department had, as a matter of official policy, compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, and that the defendants were thus liable under *42 USCS 1983*, which imposes civil liability on every "person" who deprives another of his federally protected rights. The Supreme Court held that local governments, municipal corporations, and school boards were "persons" subject to liability under 1983, and thus were not wholly immune from 1983 suits; that as "persons" subject to liability under 1983, local governing bodies could be sued directly for monetary, declaratory, or injunctive relief where the action that was alleged to be unconstitutional implemented a policy statement, ordinance, regulation, or decision officially adopted by that body's officers, or where constitutional deprivations were visited pursuant to governmental "custom," even though such custom had not received formal approval through the body's decision making channels.

II. MANAGING MEDIA IN A MUNICIPAL EMPLOYMENT/HARASSMENT CASE

A. PRE-INCIDENT PLANNING: Hold a crisis planning meeting

1. CHECKLIST:

- a. Appoint a spokesperson or team ahead of time. Police officer or Mayor?
- b. Alert broker/carrier. Assemble list of insurance contacts and cell phone numbers and emails and get information.
- c. Assemble a legal team. Pre-approve experienced municipal law attorneys. Obtain counsel's cell phone numbers.

2. WHO WILL BREAK THE NEWS?

- a. Attorney/legal team? Who on the legal team? Senior or named partner?
- b. The police department? Captain? Detective?
- c. The news media? Does the municipality have a media consultant?

- d. Who will participate in the news conference? In what order?
 - e. Obtain employees involved? No statements from employee involved.
3. HOW, WHEN AND WHERE WILL THE ANNOUNCEMENT BE MADE.
- a. At the scene?
 - b. At police headquarters?
 - c. At City Hall? Mayor's office?
 - d. At hospital?
 - e. Choose a setting.
4. DETAILS OF THE INCIDENT.
- a. LESS IS MORE.
 - b. Defer public statement until more facts are released through a thorough investigation.
 - c. Acknowledge only known facts.
 - d. Do NOT prematurely take a position before all facts are in.
 - e. SAMPLE LANGUAGE:

"This is what we know so far. It's too early to determine the cause, but we are investigating it and are devoting all necessary resources to it. Reasonable and proper safety precautions have been taken, and there is no continuing danger to the public. We will provide updates as we get more information."
5. HOW CLOSE TO ALLOW THE MEDIA TO THE SCENE?
- a. Conference with legal team and employees involved.
6. MANAGE EMPLOYEES' SOCIAL MEDIA.
- a. Put social media policies in writing.
 - b. Constantly train on proper social media usage.
 - c. Monitor social media presence.

- d. Advise employees about their verbal and written communications and/or a letter. They have legal privileges.
 - e. Consider a social media SHUTDOWN or BLACKOUT.
7. CONSIDER SUSPENDING EMPLOYEES INVOLVED, WITH OR WITHOUT PAY.

B. IMMEDIATELY POST INCIDENT

- 1. SHUT DOWN DEPARTMENT PERSONNEL FROM INTERVIEWING AND DISCUSSING TOPICS ON SOCIAL MEDIA OR HAVING ANY DISCUSSIONS WITH THE MEDIA.
- 2. MONITORING OF SOCIAL MEDIA.
 - a. Consider calling a pre-screened public relations company.
 - b. Carefully choose language in all contact with press i.e., interviewed and press releases.
 - c. Inform employees of the legal status of their communications.
 - d. Explain the risks of “casual” email conversations.
- 3. PRESERVE EVIDENCE.
 - a. Documents:
 - i. Issue document hold orders to suspend routine records destruction (See page 7)
 - b. Duty to preserve electronic mail. Review source of electronic media including emails and other internal data boxes.
 - c. Witnesses:
 - i. Identify and interview witnesses, consider hiring outside law firm or investigator to do so; pre-approve investigator, preferably retired police officer familiar with procedure. The blue line.
 - ii. Instruct employee witnesses on privileges, creation of new documents and email;
 - iii. Determine use of internal investigation;

- iv. Respond to investigative agency requests or subpoenas;
 - v. Collect and manage relevant documents including electronic records.
- d. Videos:
- i. Obtain and preserve.
- e. Spoliation – The Village of Pomona in Rockland County was ordered to pay \$42,940 in attorney’s fees based on a federal judge’s finding last year that two village officials knowingly destroyed evidence in a zoning and land-use case.

The fee award followed the Court’s finding that the Mayor and former village trustee were guilty of spoliation of evidence for destroying a Facebook page and related materials germane to the underlying case. This represented a “rare case where bad faith, and a clear intent to deprive plaintiffs of evidence at issue, was sufficiently clear from the face of the record” for him to grant the sanctions. The fees pertain to the plaintiffs’ cost of pursuing the sanctions for spoliation.

C. GENERAL ADVICE

1. Pre-plan.
2. Control the narrative.
3. Accommodate reporters.
4. Compassion and sympathy to all. DO NOT respond with denials, blame shifting.
5. Never panic, never lie.
6. Never respond “NO COMMENT”.
7. Never use bad language or criticize the media.
8. DON’T SPEAK OFF THE RECORD. There is no “off the record”.
9. Always have a crisis plan.
10. Monell claims prevention.

D. POST CRISIS ANALYSIS

1. Revise existing crisis response plan as needed.
2. Conduct crisis post mortem and make needed changes to procedures.
3. Prepare “lessons learned” evaluation of the crisis.
4. Evaluate insurance needs and policy limits.
5. Consider need for public relations consultant – on retention.
6. Consider additional employee training.
7. Consider additional preventive legal counseling.

E. CRISIS PREVENTION

1. Hold workshops on crisis prevention. Instruct key employees about legal issues arising from what they do on a daily basis.
2. Implement crisis response plan.
3. Conduct crisis response drills.
4. Review and update compliance programs.
5. Conduct audit of “high risk” incidents.
6. Review procedures for document retention.
7. Advise employees how to write business documents.
8. Advise employees on the document retention policy.
9. Advise employees on proper social media usage and media contact.

III. SAMPLE LETTER

1. Preservation of Evidence



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2017

Village East
Attn: Deputy Treasurer

RE: Date of Loss: December 16, 2016

Dear Ms. _____:

Please be advised that _____ has assigned us to represent the Village East in the above referenced claim.

You have received this letter because you have been identified as someone who may have direct knowledge or custody of documents related to this matter. It is incumbent upon you to preserve all documents potentially relevant to this claim. If you are aware of any other individuals employed by the Village East who may have potentially relevant documents, kindly notify this office immediately so that we may send a similar letter to said individual.

The destruction of documents pertinent to litigation, audit or investigation is strictly prohibited. Compliance with this request requires your immediate attention. Employees who fail to comply are subject to disciplinary action, including dismissal, in addition to potential civil or criminal penalties.

Documents may include letters, contracts, memoranda, notes, presentations, spreadsheets, graphs, animations, images, e-mail messages and attachments, voicemail, instant messages, word processing documents and calendar entities, and it does not matter whether these documents are stored on a hard drive, network database, network drive, back-up tape, laptop, thumb-drive, CD ROM, DVD or similar removable storage media, home computer, mobile phone, smart phone or mobile device (such as a Blackberry, iPhone or iPad).

ALL DOCUMENTS MUST BE PRESERVED.

- Do NOT delete e-mails or electronic files relating to the matter (whether sent or received);

- Gather all of your paper documents in one location and remember nothing can be discarded;
- Nothing may be deleted from your network drive or local hard drive (i.e. laptop or PC) relating to this matter; and
- Voicemails related to the matter must be preserved.

When in doubt, DO NOT delete or discard. Be reminded that we are required by law to take these steps. It is important that you adhere to the Legal Hold until you receive further instructions. You are required to conduct a diligent search even if you don't find any responsive documents, electronic files or e-mails. You should not create documents in order to provide the requested information.

If you have any questions or concerns with regard to the Legal Hold, please contact me immediately. Thank you in advance for your cooperation and attention to this important matter.

Very truly yours,