Preventive Law
an excerpt from

Law Practice
in
Modern Educational Administration

An Expanded Perspective for
College and University Presidents and Chancellors
and Superintendents of School Districts and Governing Boards

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ISBN 978-1-888215-22-9
Library of Congress Control Number: 2013947697

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Anchorage, Alaska 99520-0448
Telephone 907-272-3305

Chapter VI
Preventive Law — What Is It?

A. Crisis management or preventive law?

There are two ways a CEO can use legal services:

- In responding to crisis, or to service of summons and complaint; commonly called the "knee jerk" response or,
- By being "pro-active" and hiring legal counsel in advance of a lawsuit or impending crisis, and engaging in what is called "preventive law" practices.

From my experience as a lawyer at the K-12 level and also at the college level, I highly recommend the preventive law approach. In the long run, it is more cost effective, and it gives the CEO and the governing board some "legal peace of mind."

There will always be the occasional overly aggressive attorney who will serve you with a lawsuit without prior notice. But, for public institutions, if state law imposes the requirement for the prospective plaintiff to make a prior claim for damages subject to a government claims statute*, you have already had one opportunity to investigate the basis of the claim and prevent it from blooming into costly and time consuming litigation.

B. Innovation in claims management saves attorney's fees

I developed an innovative approach to claims management working as house counsel for a California community college. Working closely with the risk manager, we coordinated

* An example is Cal. Gov. Code §§ 910-913.2 et seq.

a due diligence investigation into every tort claim filed over a six-year period. When the investigation was complete, I would ask myself the following question:

"Is the district liable for the injury and damages complained of?" If the answer was "yes," I engaged in a negotiated settlement of the claim before it matured into a lawsuit.

If liability appeared to be shared between the claimant and the district, e.g., there was an element of contributory negligence, I would engage in a negotiated settlement making sure that the percentage for plaintiff's contributory negligence was factored into what I recommended the district pay to settle the claim.

If it did not appear from the investigations that the district was the legal cause of the plaintiff's injury and damages, and after making sure an unrepresented claimant did not want to obtain legal counsel, I would communicate directly with the claimant. I would explain in some detail why I didn't believe the district was liable for the claimant's injury. I would end this conversation with the caveat, that should the claimant choose to pursue the claim further in litigation, I was prepared to file a cross-complaint for abuse of the court's process and for what the law calls malicious prosecution.

If the claimant had an attorney, I would communicate only with claimant's counsel, and not the claimant, using the same approach as described above. This approach would typically end the matter with a satisfactory resolution acceptable to both parties.

In my six years with this community college district, only one claim was turned over to the Joint Powers Agency (JPA) (insurance provider) for defense by one of the contract attorneys. We handled between five and ten claims each year for six years, resolving all of them at the district level except one.

Why can't other school districts and colleges and universities handle their claims the same way? They might but they often don't. If they have a liability policy with an insurance company, it is likely that the policy requires that any claims brought against the institution must be denied and turned over immediately to the company that will hire a defense attorney and litigate the claim.

There is often a set procedure for taking all claims brought to the district to the governing board where they appear on a separate section of the public agenda. The standard procedure is to have the board take action on all claims presented to it by denying them and turning them over to the district's insurance provider to be resolved or litigated.

The problem with this standardized approach is the "automatic denial" of each and every claim and turning it over to the insurance company, when the vast majority can be resolved at the local level.

C. Sticking points in the claims handling process

First, there is the insurance company agreement which has not been fully negotiated and closes the door on in-house resolution of meritorious claims.*

Second, is that many "lay people are afraid to admit liability." Attorneys are not if it is something that is clearly the legal fault of the client.

When lawyers admit liability on behalf of the client, they do so very carefully and within the legal protections of negotiating a settlement. A skilled trial lawyer will communicate to the claimant, after getting the client's authority for settlement, the following:

> *"For purposes of settlement only, (and pursuant to Federal Rules of Evidence 408 and California Evidence Code Section 1152), we are authorized to enter into negotiations trading some litigation dollars for some settlement dollars. So would you please give us your best and most reasonable demand and explain the basis for the demand."*

In many States (e.g., California Evidence Code Section 1152) and under federal law (Federal Rules of Evidence 408), there are provisions in the law that your attorneys will reference as part of the foregoing offer to enter into settlement negotiations. These provisions give legal protection to the qualified admission of liability for settlement. Should, for any reason, the settlement negotiations not result in a settlement without any admission of liability, Sections 1152 and 408 prevent either party from referring to the terms of the failed settlement or anything discussed in the settlement negotiations in later court proceedings including at trial to prove liability. Statements may be used for other purposes — to prove notice, malice and the like.

Once settlement is reached and the terms of the settlement are reduced to a written agreement, your governing board needs to approve the agreement including approval of any waivers of rights to attorney's fees (if applicable) and of any and all future claims arising out of the same facts and circumstances forming the basis for the disputed claim (see Cal. Civil Code § 1542).

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* Consider being self-insured, for example, for the first hundred thousand dollars, funded through an interest bearing retention fund from which claims may be settled. Then purchase an umbrella policy for claims exceeding your retention fund to cover excess liability, say up to $10,000,000.