

LITIGATION 101
A PRIMER FOR NEW MANAGEMENT
AVOIDING LIABILITY &
PREPARING FOR LITIGATION

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I. INTRODUCTION – GOALS

- A. Avoiding/minimizing liability
- B. Understanding the litigation process
- C. Dealing with lawyers and the courts

II. AVOIDING/MINIMIZING LIABILITY – BEFORE A LAWSUIT IS FILED

- A. Recognizing situations that could lead to liability
 - 1. Dealing with co-workers – employment claims;
 - 2. Dealing with the public – tort/administrative claims;
 - 3. Exceeding your authority – taxpayer lawsuits;
 - 4. Contractors and subcontractors – contract claims;
 - 5. Maintaining a safe workplace – tort liability;
 - 6. Discretionary activities – tort liability.

Working with Special Districts Association of Oregon, your local attorney and insurance agent is an important part in avoiding or at least minimizing your liability. SDAO Pre-Loss Program was created for this specific purpose.

Full disclosure and specificity is a must. Don't tell us what you think we should here. Tell us the good, the bad and the ugly. It is better to provide us this information early in the process, when we can better make a strategic decision that will result in a sound legal and economic approach. The further in the litigation process that this information is disclosed, the harder it makes a reasonable economic resolution.

- B. Record keeping/filing practices

Maintaining good records that can be easily located if litigation ensues can be critical to the successful defense of a lawsuit. Make a record of events that may need to be recalled months, or even years after the fact. Prepare file memos to document meetings, events, telephone conversations, etc. Remember, though, that everything you put in writing may be discovered by the other side in litigation. So be careful of what you say and how you say it.

You can assume that employees, taxpayers and third parties will not only have detailed recollections of the events, but that they will also have detailed records and dates of conversations, events and statements.

C. Hints that litigation is likely

Look for hints that litigation is reasonably likely to occur; tort claim notice; complaint letter to supervisor; threat to sue; threat to contact an attorney; internal statements made within (consider the tone); uncharacteristic conduct by employees. If you get a hint that there may be litigation, contact and seek advice from either your local counsel or SDAO. If the matter could lead to a potential employment related claim, a deductible could be imposed for failing to seek pre-loss advice.

D. Investigations

Contact SDAO in advance if litigation is reasonably likely to occur as a result of the incident being investigated. Reports and findings may be subject to disclosure and used as evidence in litigation. If at all possible, you want your investigation to be privileged as attorney work product, confidential attorney-client communication or anticipation of litigation.

The initial planning should include designating one person to oversee the file. Set up a special file. Do not use a personnel file. Label the file and identify it as the "investigation file of 'XYZ' incident," "prepared at the request of attorney XYZ."

1. Set realistic timelines for completing the investigation. Specify the location and the person or persons with access to the investigation file;

Exception to Sexual Harassment Allegations: Here the courts are clear that you have to begin the investigation within 2–3 days and complete it within 2–3 weeks.

2. Document facts only (who, what, when and where).
3. Do not list or state your personal opinions, conclusions and theories.

Exception to internal employment related issues: Where you may have to come to a conclusion one way or the other.

4. Identify witnesses and locate real evidence*. Isolate the real evidence, secure it and protect it.

* Including property, equipment, failed parts.

5. Note the location of other files and documents and if necessary, duplicate or copy key portions of those other files or relevant documents.
 - a. We do not want to risk a spoliation instruction to the jury.
6. Be aware of and avoid bias, prejudice and exaggeration.
7. Employment related investigations may require more preparation and planning depending on the issue(s) at hand.

E. Preparing the "Incident File"

If properly done, the investigation file may be exempt from disclosure under ORS 192.501(1). This exemption will last only until the litigation is concluded.

ORS 192.501(1) states "The following public records are exempt from disclosure ... unless the public interest requires disclosure in the particular instance: ... (1) Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation:"

1. Identify and separate the investigation file from all other files. Label it "confidential and not for public disclosure." Code color or code label the file "incident report/do not disclose." If necessary, designate on the file only those entitled to review its contents. Tab the file as follows:
 - a. Summary of incident;
 - b. Witness statements;
 - c. Incident report(s);
 - d. Pictures;
 - e. Chain of custody report.
2. Identify the investigator or the person initiating the file. Place this person's name on the file label and, if necessary, identify the relationship of this person to the district.

3. Interview co-employees and others who have personal knowledge of the incident. Do not allow those employees to review statements given by other employees.
4. Preserve original documents. If necessary, enclose those documents in a plastic cover, seal them, and note their original location.
5. Put a chain of custody label on the file. Clearly mark who has possession of the file or is entitled to possession and its location.

F. Preserving Real Evidence

This is evidence that may be collected after an accident, such as fragments of a tail light or a portion of a car. Clearly mark this, tag it, and identify it as being related to the accident of that date. Do not alter this evidence; secure and protect it. Put together a log which outlines the chain of custody by name, date and location of the evidences possession.

G. Publicity about the incident

1. Avoid public exposure if at all possible.
2. Limit disclosure of the investigative information only to those with a "need to know." This may include only those district employees listed with access to the file, legal counsel, or SDAO. Update this list and keep it current.
3. Avoid discussion with all others, including other co-employees.
4. If you make copies of this investigation, limit or consecutively number these copies and place in bold letters: **Do Not Photocopy**. It is best to have only one original copy of the investigation and it is best to keep that one original copy in one location.
5. Avoid the "no comment" statement if asked about the incident. Prior to any public inquiry by any media representative, develop a plan for response to specific questions. Designate one person within the district or, if necessary, transfer the file to counsel to reply to the news media. On many occasions, it is best to prepare a written statement outlining the facts of the incident and limiting those facts only to those that are truly public information. However, before disclosing, have the release reviewed by counsel and/or SDAO.
6. A positive response to news media inquiries is much preferred to a negative response. Give short, simple statements regarding the incident.

Avoid damaging statements about others not involved in the incident. Do not emphasize technical or legal arguments, or technical or legal defenses.

7. It is best to acknowledge that the investigation is ongoing. Avoid categorical statements. Do not make any statements that are "off the record" and avoid all categorical or empirical sounding statements.

H. Preserving electronically-stored data

When a district has reason to believe that litigation is likely, it has a duty to preserve evidence, including electronically-stored information. Normal document destruction schedules should be suspended. Electronically stored information (email, etc) must be preserved. Sanctions for failing to comply can be severe.

III. LITIGATION OVERVIEW

A. Civil litigation in general

Civil lawsuits are commenced by filing a written complaint, and serving the complaint along with a summons. Service of process must be accomplished in accordance with the rules defining who may be served and the method of serving the papers. Districts should never agree to "accept" service. If papers are delivered to the office, they should be date stamped with the date of receipt, the method of service (delivery, mail, fax) should be noted, and the papers should be delivered IMMEDIATELY to SDAO with a copy to your insurance agent.

B. Jurisdiction

Oregon circuit courts generally have jurisdiction to resolve most types of civil lawsuits. In some instances, a federal court-usually, the US District Court for the District of Oregon-will have jurisdiction. The Oregon Court of Appeals generally has jurisdiction to review final judgments issued by circuit courts.

There are significant differences in procedure between state and federal courts. For example, in cases brought in state court under the Oregon Tort Claims Act, individual state employees are not proper defendants. Historically, most circuit courts would substitute the State as the named defendant if individual employees are named in the lawsuit. This practice however is no longer likely to prevail with the recent decision of the Supreme Court in *Clarke v. OHSU*. Now, the issue with whether to substitute, will be whether the plaintiff will still have an adequate remedy under the law. In federal court, individuals may be named as defendants under many federal statutes, such as the Civil Rights Act.

C. Types of claims

Some of the more common types of lawsuits filed against special districts or employees include: tort claims; employment claims; declaratory judgment and injunction claims or contract claims. These types of claims are described below.

IV. TORT CLAIMS-THE OREGON TORT CLAIMS ACT

The term "tort" as used in the Oregon Tort Claims Act (ORS 30.260(8)) includes any non-contractual breach of common law, statutory or constitutional duty... if that breach results in injury to a particular person or persons and if the law provides a civil judicial remedy for the injury, regardless of the particular form of remedy which is sought to redress that injury.

Tort claims can be based upon negligence, intentional conduct, or violation of statutory or constitutional duties. Claims based upon the breach of a duty created by federal law may also be a "tort" subject to some of the provisions of the Oregon Tort Claims Act.

A. Claims based upon negligence

Negligence is generally the failure to act reasonably under the circumstances, causing unintended damage to a legally protected interest. Whether conduct is "reasonable" depends on the circumstances; in some cases, the standards of care are established by law or professional standards. Examples of negligence claims:

1. Claims arising from the negligent operation of motor vehicles, boats, airplanes, machinery and/or power tools and equipment.
2. Claims arising from the unintentional release or discharge of toxic substances into the environment.
3. Claims arising from the unintentional release of privileged or legally protected information (i.e. privacy claims).
4. Claims arising from the unintentional trespass to or unsafe condition of real or personal property.
5. Claims arising from the overflow of water from a canal.
6. Claims arising from the discharge of ones employment.
7. Manner in which a district responds or acts at an event or emergency.

B. Claims based on intentional conduct

Intentionally causing harm to another may result in tort liability. Examples of intentional torts include:

1. Claims for assault and battery by placing an individual in fear of physical harm and/or physically accosting a person. This is a frequent charge where a law enforcement agency is involved and may arise from the use of excessive force or simply the use of any force to subdue and take someone into custody.
2. Claims for false arrest and false imprisonment. These claims are also associated with law enforcement activities and use of the judicial or administrative process.
3. Claims for sexual harassment or misconduct.
4. Claims for defamation and the issuance of defamatory statements about others.
5. Claims for interference with property rights, including trespass and damage to real and personal property.
6. Claims based upon fraud and/or misrepresentation.
7. Claims arising from the interference with a commercial or advantageous business relationship.

C. Constitutional and/or statutory claims

These are claims based upon the violation of duties established or rights created by the laws or Constitution of the State of Oregon. These claims may include:

1. Claims for violation of an obligation imposed by statute or administrative rule.
2. Claims for wrongful discharge or other unlawful employment practices. These claims usually involve the breach of a legal duty imposed upon employers by law.
3. Claims for unfair or unlawful trade practices. These are generally business related and involve consumers and the retail providing of products or services.

4. Claims based upon the failure to comply with or obey statutory or regulatory standards enacted to protect the welfare of certain persons or the public at large.
5. Claims based upon the breach of a fiduciary duty imposed by law on a public officer or agency.
6. Failure to comply with or violation of the requirements of a statute may, in some circumstances, be negligence per se. This means that, to prevail, the plaintiff need only show that the statute was violated or the conduct of the defendant was in direct contravention of the statutory requirements.

D. Federal claims

Claims arising under federal law may be treated as "tort" claims under the Oregon Tort Claims Act, at least for some purposes. In general, the procedures for defense of tort claims described below will apply. Statutory notice provisions and limits on liability however, may not apply. Federal statutory claims typically include:

1. Employment based claims: discrimination in employment based on race, gender, ethnicity, age or national origin; sexual harassment; discrimination based on or failure to accommodate a disability.
2. Civil rights claims: individuals acting under color of state law in violation of rights protected by federal law or the United States Constitution.

E. Declaratory judgment and injunction claims

Under the Declaratory Judgment Act, a court may issue a declaratory ruling to resolve disputes over rights and obligations under the law. The court may grant injunctive relief to halt unlawful activity or preserve the status quo pending resolution of the dispute. All persons involved in the dispute must be joined as a party to the lawsuit. This type of claim is commonly used to resolve disputes over the meaning or validity of a statute, or to enjoin the State from enforcing a law alleged to be invalid.

Declaratory judgment claims typically involve allegations that a district/employee, agent or board member, is not complying with a statutory, constitutional, or other requirements imposed by law. As a result, such claims are generally considered "tort claims" within the meaning of the OTCA.

F. Defense of tort claims

Entitlement to defense and coverage under the OTCA depends upon whether the employee's act or omission occurred in the course and scope of

employment and was not in direct contravention of an established district policy.

Generally, an employee's acts or omissions will be within the scope of employment if:

1. The conduct occurred substantially within the time and space limits authorized by the employment.
2. The employee was motivated, at least partially, by the purpose to serve the employer.
3. The act was of the kind that the employee was hired to perform.

G. Denial of defense/indemnification

Defense and indemnification of district employees under the OTCA may not be provided if the employee acts outside the course and scope of employment; if the acts are intentional; if the acts involve willful and wanton misconduct; or if the employee does not cooperate in the defense.

1. Actions not within course and scope of employment include conduct outside normal work hours, unrelated to work activities, or conduct that personally benefits only the employee.
2. Conduct is "intentional" and thus, outside the OTCA, if both the act and the harmful consequences of that act are intended.
3. Willful, wanton misconduct includes a repeated pattern of violating an established policy, or willfully taking actions in direct contravention to established policy.
4. An employee has a duty to fully cooperate with the employer, SDAO and counsel assigned to the defense of the case.

H. Possible defenses to claims in litigation

1. Jurisdictional defenses. The District may seek dismissal if the court lacks jurisdiction to resolve the claim on the merits. These defenses include: standing; ripeness; mootness; lack of personal or subject matter jurisdiction; insufficient service of process; or failure to give timely notice under the OTCA.
2. Absolute immunity. Certain public employees and officers are immune from certain tort liabilities because of a public policy favoring the public

official's freedom of action. For example, board members are absolutely immune for statements made by them during the course of an official board meeting.

3. District immunities under the OTCA. Public bodies are immune from liability for specific types of claims under the OTCA:
 - a. Claims covered by Workers' Compensation law;
 - b. Claims based on the assessment and collection of taxes;
 - c. Claims based upon the performance or the failure to exercise or perform a discretionary function or duty (see below);
 - d. Any claim which is limited or barred by the provisions of any other statute, including the statute of limitations;
 - e. Claims based on acts taken under the apparent authority of a law, rule or regulation that is found to be unconstitutional or invalid.
4. Discretionary function immunity.

ORS 30.265(3)(c) provides immunity from liability for any claim based upon the performance or failure of the district employee to exercise or perform a discretionary function or duty, whether or not the discretion is abused. This immunity does not apply to liability based on ministerial acts. If the actions of the employee involve carrying out or implementing a public policy, then the actions of the employee and the district are probably immune from liability.

Routine decisions which every employee must make or negligence during the course of carrying out the discretionary policy however, generally do not qualify as a discretionary function. Budgetary and policy considerations are very important. Decisions regarding installation or design of road services, cattle guards or median barriers based on budgets are probably discretionary decisions. Some examples:

- a. The adoption of standards for certifying day care facilities involve policymaking and are therefore discretionary decisions. The application of those standards, however, may or may not be ministerial and immunity may or may not apply to decisions involving the application of those standards.
- b. The following decisions have been determined to be generally within the discretionary function immunity:

- (1) Posting warning signs for cattle crossings;
 - (2) Establishing a Design Review Board for the processing of building permits;
 - (3) Selecting a site for school related activities, or prison activities;
 - (4) Authorizing certain medical treatment or establishing a treatment program;
 - (5) Designing highways, bridges and other thoroughfares;
 - (6) Decisions to alter previously approved highway or bridge designs;
 - (7) Decisions on whether to authorize funds to modernize or implement certain safety features.
3. Activities that are generally considered ministerial and thus outside the discretionary function immunity include:
- a. Performing maintenance at a school;
 - b. Maintenance of a highway;
 - c. Maintenance of existing traffic signs or the pruning of vegetation around that traffic sign;
 - d. Removal of accumulated debris resulting in flooding or damaged property.

V. CONTRACT CLAIMS

Districts are subject to suit for breaching the terms of an express, written contract duly executed by a person with authority to enter into that binding contract. When a breach of contract suit is filed or is anticipated, the complete contract should be copied and forwarded to district counsel immediately. Some contracts may require a third party to defend and indemnify the district for any resulting liability. The district may also be able to tender defense of the suit to a third party.

VI. DEALING WITH LAWYERS (OURS AND THEIRS)

At some point, you will become involved with lawyers. The lawyers will either be representing the individuals suing the district or defending them. The attorneys representing the injured parties will most likely be private lawyers who may or may not be well versed in the various defenses that can be asserted on behalf of public entities.

- A. The attorneys representing your district will either be from SDAO or from the list of outside counsel approved by SDAO. If a conflict of interest arises, additional counsel may be assigned from SDAO.
- B. The attorney client privilege. OEC 503 grants an attorney client privilege for those communications between the district and counsel. Full disclosure and candor is needed in confidential communications with the attorney representing your interests. The privilege can be waived if confidentiality is not maintained. For this reason, do not release any statements or communications with counsel and when faced with such a request, refer the inquiry regarding that information directly to the attorney defending the case.
- C. Information maintained in district files may be subject to disclosure under the Public Records Act. The Act contains many exceptions to the disclosure requirement. If you receive a request under the Public Records Act for information related to a matter in litigation, you should immediately contact SDAO and/or your outside attorney. Discovery of information related to matters in litigation is governed by the Oregon Rules of Civil Procedure.
- D. Never communicate directly with opposing counsel. Refer any communications to SDAO or the attorney assigned the defense.

VII. DEALING WITH THE COURT PROCESS

A. Preliminary matters

After a lawsuit is filed and served, the attorney assigned to defend the case will contact you. After a preliminary investigation into the facts and the law, the attorney will ordinarily prepare and file an Answer to the complaint, or a Motion to Dismiss. The grounds for seeking dismissal on a motion to dismiss are limited; do not assume that the case will be dismissed at the outset even if the claims are completely meritless.

B. Emergencies-TROs and Preliminary Injunctions

A plaintiff sometimes seeks to halt district action while the case is pending by filing a motion for a Temporary Restraining Order (TRO) or a motion for a Preliminary Injunction. TRO and Preliminary Injunction proceedings can occur on an expedited basis; they may require fact finding and some limited discovery. Generally, a plaintiff seeking a TRO or a Preliminary Injunction must show (1) a reasonable likelihood of success on the merits, and (2) that the plaintiff will suffer irreparable harm if relief is not granted.

C. Discovery

Under the Rules of Civil Procedure that govern lawsuits in state and federal courts, parties to litigation are entitled to review and make copies of documents and other evidence in the possession of the other side. They may also serve written Requests for Admission to require the other side to admit or deny certain facts. In federal court, they are also entitled to submit written "interrogatories" that must be answered under oath.

The discovery process is time-consuming, expensive, and disruptive to districts. It is also extremely important. Courts will not hesitate to sanction parties for failing to comply with the rules regarding discovery. Districts should designate a "point person" to coordinate the district's responses to discovery requests. The designee should work closely with the counsel assigned to the case throughout the discovery process.

D. Depositions

Part of the discovery process includes the opportunity to obtain the statements under oath of the parties and various witnesses to the incident. This occurs in a deposition. In a deposition, the witness will be required to answer questions posed by the opposing lawyer. In some instances, a district may be required to designate a witness to testify "for the district" at a deposition. Before a deposition, witnesses should meet with the attorney assigned to the case to prepare for this process. Witnesses should NOT take any action to "prepare" for a deposition without first consulting with the assigned attorney.

E. Pretrial conferences

These are conferences that are conducted by the court and sometimes involve the parties, whereby the court reviews with the attorneys and the parties the status of the case, the possibility of its settlement, and issues to be raised at trial.

F. Motion practice

Parties in litigation may file pretrial motions to resolve issues that are in dispute. These can be valuable tools for obtaining needed discovery (or limiting discovery), to narrow the issues for trial, or in some instance to avoid the need for a trial.

A motion for summary judgment can resolve some or all of the claims in a case. This procedure is available if the facts are not in dispute. The motion can be supported by sworn affidavits of witnesses or parties to establish the necessary (undisputed) facts. The attorney assigned to the case will assist the district in preparing affidavits. SDAO will consider filing a motion for

summary judgment where appropriate, but this procedure is not appropriate in all cases. In some cases, a trial is necessary to resolve the case.

G. Settlements

Many civil lawsuits are resolved through settlement. SDAO negotiates settlements directly with opposing counsel, and through formal mediation or judicially-supervised settlement processes. SDAO is ultimately responsible for approving and paying monetary settlements of claims covered by the OTCA.

Districts may participate in settlement negotiations, and may have decision-making authority on settlements that involve either an action on the part of the district or a voluntary contribution to the settlement. District's should never try to "settle" a lawsuit directly; all settlement discussions should be handled through counsel.

H. Trials

Trials are typically conducted before a jury. Administrative and declaratory/injunction cases are typically tried to the court without a jury. Trials involve the presentation of evidence by both sides. Trials can last anywhere from a few days to several weeks and can be very demanding and exhausting upon all parties. Districts should expect to have a designated representative present throughout the trial. District employees called to testify at trial will be prepared in advance by the assigned attorney.

I. Appeals

After final judgment is entered, the losing party may appeal the decision to an appellate court. The attorney and SDAO will consult with the district in determining whether pursuing an appeal in a particular case is in the district's best interest.