

Avoiding Liability One Step at A Time

**Risk Management and Liability Management
Working Together to Reduce Litigation**

Avoiding Liability One Step at A Time

Session Objectives:

- Define concepts of risk and risk management
- Apply the four steps of a risk management process to a city operations
- Identify potential liabilities and develop mitigation strategies to minimize the impact of these
- Identify litigation management strategies
- Case studies

Why Practice Risk Management?

- To avoid injury to citizens and employees
- To protect their business operations from financial or physical ruin
 - protecting against damage to property, damage to reputation, and any financial impacts occurring from litigation by practicing this twofold approach

The practice suggests that risk management:

- Reduces the likelihood of an unwanted and unplanned event
- Reduces the consequences of the event
- Enhances your ability to access comprehensive and cost-effective insurance

Theoretical concepts of risk

- Real risk - the actual statistical likelihood of an incident occurring
- Perceived - risk is the perception of risk by those undertaking or evaluating something
- Inherent risk - is the risk that must exist for the activity to occur

Risk Management Process

- Four stages:
 - 1) Risk Identification
 - 2) Risk Analysis
 - 3) Risk Control
 - 4) Risk Treatment

Risk Identification

- Systematically identifying risks facing the organization
 - On-site inspections and discussions with management and staff
 - Review of products, services, processes, and contracts
 - Review of historical activities and losses
 - Identification of possible risk scenarios

Risk Analysis

- A typical risk analysis compares the probability (frequency) of any risks occurring by the consequence (severity) if they do occur
 - can be done either in a qualitative or quantitative manner, with either numerical values or descriptors applied

Risk Control

- Implementing mitigation strategies
 - Exposure avoidance
 - Loss reduction

Risk Treatment

- Concept of risk transfer and risk retention
 - Contract
 - Insurance
- Risk retention
 - Retained by the city

What Drives Agency Litigation?

- Tort Law and Negligence - “body of the law which will allow an injured person to obtain compensation from the person who caused the injury”
- Examples
 - Sidewalks Trip and Fall
 - Excessive Force
 - Pot Holes
 - Harassment, Discrimination, Hostile Work Environment
 - Wrongful Termination
 - Dangerous condition of Public Property
 - ADA

- Contracts - Common types of contracts include contracts for service, employment agreements, rental agreements, and legal releases (waivers)
- Examples
 - Professional Services Agreements
 - Temporary Help Agreements
 - Engineering Agreements
 - Construction Agreement
 - Recreational Leaders

- Waivers - waiver is a form of contract that transfers acceptance of the risk to the participants by requiring them to acknowledge the risks present in the activity.
- Examples
 - Recreational Waiver
 - Right of Entry
 - Volunteer Waiver
 - Employment Agreements

Litigation Avoidance

- Risk Management plays a vital role in litigation avoidance

Risk Management Enhances:

- Good governance
- Brand & reputation of the City and of individual managers and decision makers
- Communication around risk issues and opportunities
- Reliability of decisions and of outcomes
- Decision-making
- Ability and confidence to take on new opportunities while clearly understanding the risks involved

Risk Management Reduces:

- Hasty, rash or poorly considered decisions
- Uncertainty around objectives
- Inconsistency in decision-making
- Procrastination due to uncertainty
- Adverse events or negative consequences; i.e. the unanticipated or unplanned
- Embarrassment or discredit from poor outcomes

Break

Goal

Familiarize ICRMA members with the basics for risk-reduction relative to claim handling to avoid liability, litigation and their pitfalls.

Michael L. Wroniak, Rebecca E. Hunter & Adam A. Ainslie |
February 28, 2019

Michael L. Wroniak

Michael L. Wroniak is a trial attorney and the managing partner of the firm's Orange County office. Mr. Wroniak's litigation practice focuses on general liability; professional liability including the representation of architects and engineers, general contractors and construction managers; and public entity liability. Mr. Wroniak has represented service professionals in matters relating to personal injury, property damage, breach of contract, professional liability, and construction disputes. He has represented public entities in matters involving dangerous conditions of public property, civil rights violations, inverse condemnation and wrongful termination, harassment and retaliation in the workplace. In the process, Mr. Wroniak has handled personal injury matters ranging from simple trip and falls to traumatic brain injury and wrongful death. Mr. Wroniak routinely counsels his clients on risk management issues, including contract development and negotiations, developing strategies and programs to mitigate risk and creating systems and procedures for ensuring proper handling of litigated matters.

Mr. Wroniak earned his Bachelor of Arts in Political Science from California State University, Long Beach in 1997, and went on to obtain his Juris Doctor, *cum laude*, from Chapman University, Dale E. Fowler School of Law in 2000.



Michael L. Wroniak

Rebecca E. Hunter

Ms. Hunter is a trial attorney in the firm's South Pasadena office. She predominantly handles general business litigation, general casualty litigation, public entity liability, and professional liability including the representation of architects, engineers and legal professionals. Ms. Hunter handles all aspects of civil litigation, with a focus on counseling design professionals and public entities through complex lawsuits. Ms. Hunter's extensive experience with general liability and with public entities provides her a unique ability to evaluate complex issues, investigate and assess tort claims, and defend cases through trial.

Ms. Hunter received her Bachelor's degree in Policy, Management and Planning from the University of Southern California, and her Juris Doctor from the University of the Pacific, McGeorge School of Law.



Rebecca E. Hunter

Adam A. Ainslie

Mr. Ainslie is a trial attorney at the firm's South Pasadena office. Mr. Ainslie's practice primarily focuses on public entity liability with an emphasis on constitutional right violations, dangerous conditions of public property, and labor and employment litigation. Mr. Ainslie also handles matters of general business litigation and professional liability including the representation of design professionals in complex multi-party litigation.

Mr. Ainslie received his Bachelors of Interdisciplinary Studies in Socio-Legal Studies and Ethics from Arizona State University in Tempe, Arizona and his Juris Doctor from Southwestern Law School in Los Angeles, California.



Adam A. Ainslie

Disclaimer

This is intended to be a general overview of legal issues. Nothing in this presentation is intended to be legal advice as to any specific person, company or situation. The most important part of any legal issue is the specific facts, and you should consult with an attorney about your specific situation before directly acting on the information gained in this seminar.

Topics to Be Covered

- Case studies for tips to avoiding risk and litigation

Sexual Harassment

- Two types of sexual harassment claims:
 - Quid Pro Quo
 - Hostile Work Environment



MICHAEL LOCCISANO/GETTY IMAGES; NORTH AMERICA/GETTY IMAGES

Sexual Harassment (Hostile Work Environment) | Liability

- Government Entities are liable for acts of non-supervisory employees only if the employer knew, or should have known of the harassing acts and failed to take immediate and appropriate corrective action.
- Whether an employer is responsible for the torts of its employees under *respondeat superior* rests on the question of whether the tortious conduct falls within the course and scope of employment. If an employee's conduct substantially deviates from his duties for personal purposes, *respondeat superior* is inapplicable.
- Sexual misconduct typically falls outside the course and scope of employment because it is so wholly disconnected from most employers' enterprises'.

Case Study Example – Sexual Harassment

- Sarah Beth works at the County in the Special Projects Division with Marco. Both Sarah and Marco work under Sam. The three enjoy a close friendship and go out to lunch, have been to each others' houses and their respective spouses are friends.
- Marco and Sam have recently acted inappropriately at the office. Both Marco and Sam were fooling around with another co-worker at the office and rolling up architectural plans into a phallic shape and gyrating around the office. Sam also made a snowball and put it down the back of Annabelle's shirt.
- Additionally, Marco has been making sexually explicit comments to Sarah lately. He tells her how much her lipstick makes him want to kiss her. He also gave Sarah a Viagra pill to give to her husband as a joke. Marco has also been touching Sarah in a very inappropriate manner in front of some of their co-workers.

Case Study Example – Sexual Harassment cont.

- Sarah Beth convinces her co-workers to submit declarations attesting to the harassment. Sam finds a copy of the declarations on the fax machine. Sam e-mails human resources and tells them what he found. Neither Sam nor the County respond in any way to Sara Beth's claims.
- Sarah has filed a lawsuit against her employer and Marco. In preparation of depositions, Sam tells counsel that he was not aware of Marco's alleged sexual harassment until the lawsuit was filed.
- Human resources never gives a copy of Sam's e-mail to counsel for review.

Questions Presented – Sexual Harassment

1. What could have been done to prevent this type of litigation?
2. Is the County exposed from this type of litigation?
3. What were the real, perceived, and inherent risks of Sam contacting human resources but not telling counsel?
4. What are the real, perceived, and inherent risks of human resources not giving counsel a copy of the e-mail from Sam?

Dangerous Condition | Elements of Liability

1. The property was in a **dangerous condition** at the time of the injury
2. The injury was **proximately caused** by the dangerous condition
3. The dangerous condition created a **reasonably foreseeable risk of the kind of injury** which was incurred, and
4. Either:
 - a. A negligent or **wrongful act or omission of an employee** of the public entity within the scope of his or her employment created the dangerous condition; or
 - b. The public entity had **actual or constructive notice** of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

“‘Dangerous condition’ means a condition of property that creates a **substantial** (as distinguished from a minor, trivial or insignificant) **risk of injury** when such property or adjacent property is used with due care [by the public generally] in a manner in which it is reasonably foreseeable that it will be used.”

Design Immunity | Purpose

- The Legislature created a path for disposition of case without a jury (MSJ, motion for nonsuit and motion notwithstanding the verdict).
- Rationale: “To prevent the jury from simply reweighing the same factors considered by the governmental entity which approved the design.” *Cameron v. State* (1972) 7 Cal.3d 318, 326.
- Even if there is a dangerous condition, if the entity can meet the statutory requirements, it is immune from liability.
- Not just limited to physical road design, but also speed limits, signing and striping.
- The time for preparing a design immunity defense is **now**: *before* construction.

Design Immunity | Elements

No liability if the public entity proves:

1. A causal relationship existed between the plan/design and the accident;
2. Discretionary approval of the plan/design prior to construction; and
3. That there is any substantial evidence supporting the reasonableness of the plan/design.

Loss of Design Immunity | Elements

Design immunity can be lost if the plaintiff proves:

1. Design has become dangerous because of a change in physical conditions (not merely the passage of time or change in design standards or technological advances);
2. Actual or constructive notice of the dangerous condition; and
3. Either a) reasonable time to obtain funds and carry out necessary remedial work; or if remedial work is a practical impossibility, then the entity b) had not reasonably attempted to provide adequate warnings.

Case Study Example – Dangerous Condition

- Car 1 crashes into guardrail at 1:30 a.m. Public Entity employee receives a call from CHP to check out the damage. Employee arrives at 2:00 a.m. to place traffic cones and barricades to alert public of damage. Employee leaves at 3:00 a.m.
- Car 2 crashes into exact same guardrail at 5:00 a.m. 2 passengers killed because guardrail was not in its designed condition.
- Public Entity had approved design plans for guardrail that was constructed, and plans stamped “as-built”. Entity also had a guardrail damage plan in effect, which the employee followed.
- Damage Plan did not require “crash cushions” because those were engineered devices needing to be approved by a traffic engineer prior to placement.

Questions Presented- Dangerous Condition

1. Is the guardrail a dangerous condition?
2. Did the employee act reasonably?
3. Does the Public Entity have design immunity?
4. Was design immunity lost?
5. What are the real, perceived, and inherent risks of not having corrective action plans in place?

Case Study Example – Dangerous Condition 2

- Public Entity built pursuant to approved plan several wood shade structures over the picnic tables in park. Public Entity employee is responsible for maintaining park facilities.
- Employee inspects the structures visually each month during a “walk by” where the employee looks for obvious damage and pushes on the structure to see if it is sturdy.
- Public Entity has no documented policy or guidelines for inspections, does not train employee to do anything but the visual “walk by”, and employee does not have construction background, nor is that required for the job.
- Public Entity report states that based on build year of shade structures they are “well beyond their life expectancy”, but employee does not know what to do with report so just keeps it in the office.
- 2 years after report, shade structure collapses due to wood rot on a family having a picnic, injuring all.

Questions Presented- Dangerous Condition 2

1. Did Public Entity have notice?
2. Did the employee act reasonably?
3. How did Public Entity fail?
4. What should Public Entity have done instead?

CONTRACTS

Why do public agencies enter into contracts?

What is the purpose of a contract?

Does the type of contract matter?

CONTRACTS

Professional Service Agreements

Temporary Help Agreements

Engineering Agreements

Construction Agreements

Recreational Leaders

CONTRACTS

KEY PROVISIONS

1. Parties
2. Scope of Work
3. Indemnification Clause
4. Defense Clause
5. Insurance Clause
6. Termination Provisions and Associated Remedies
7. Limitation of Liability Provisions
8. Waiver of Consequential Damages
9. Dispute Resolution

CONTRACTS

Section 18

Tenant's Indemnity. Tenant shall indemnify, defend and hold Landlord harmless from and against all loss, cost and expense, including attorneys' fees, arising from any injury or damage to any person or property, occurring in or about the Building or Premises as a result of any negligent act, omission or willful misconduct of Tenant or its employees contractors, licensees, agents, guests or visitors, or arising from any breach or default under this Lease by Tenant. The foregoing provisions shall not be construed to make Tenant responsible for loss, damage, liability or expense resulting from injuries to third parties caused by the negligence or willful misconduct of Landlord, or its officers, contractors, licensees, agents, employees or invitees.

Nothing in this Lease shall be construed to waive, limit, or supersede any of Tenant's rights or immunities under the California Labor Code, including but not limited to a waiver pursuant to section 3864 of the Labor Code.

CONTRACTS

Section 10: REPAIRS AND MAINTENANCE

Landlord Representations...

Landlord represents, and Tenant acknowledges, that the Premises and Building contain lead paint, asbestos and asbestos containing materials. Tenant hereby agrees that Landlord shall not be liable for, and shall hold Landlord harmless, from any claims of injury to Tenant's business or any loss of income therefrom or for damage to the goods, wares, merchandise or other property of Tenant, Tenant's employees, invitees, customers, or any other person in or about the Premises, nor shall Landlord be liable for injury to the person of Tenant, Tenant's employees, agents or contractors, caused by or as a result of the presence of lead paint, asbestos and/or asbestos containing materials in the Premises and/or Building.

CONTRACTS

Section 10: REPAIRS AND MAINTENANCE

Landlord Representations...

Tenant hereby agrees to indemnify, defend and hold Landlord harmless from and against all loss, cost and expense, including attorney's fees, arising from any injury or damage to any person or property, occurring in or about the Premises and/or Building as a result of the presence of lead paint, asbestos and/or asbestos containing materials in the Premises and/or Building. Finally, Tenant acknowledges and agrees that Landlord shall have no obligation to abate any lead paint, asbestos and/or asbestos containing materials in the Premises and/or Building. Nothing in this Section 10 shall be construed to waive, limit, or supersede any of Lessee's rights or immunities under the California Labor Code, including but not limited to a waiver pursuant to Labor Code section 3864.

CONTRACTS

Questions Presented

1. What are the risks associated with these provisions?
2. Would you have agreed to the Indemnity Provision?
3. Would you have agreed to the Repairs and Maintenance Provision?
4. Did the person who agreed to these provisions exercise proper risk management?

Questions?



Thank You!

Michael L. Wroniak

Rebecca E. Hunter

Adam A. Ainslie

1100 El Centro Street

South Pasadena, CA 91030

T 626-243-1100

F 626-243-1111

ccmslaw.com |
mwroniak@ccmslaw.com
rhunter@ccmslaw.com
aainslie@ccmslaw.com

**COLLINS COLLINS
MUIR + STEWART^{LLP}**

**NORTHERN
CALIFORNIA
(510) 844-5100**

**INLAND EMPIRE
(909) 581-6100**

**LOS ANGELES
COUNTY
(626) 243-1100**

**ORANGE
COUNTY
(714) 823-4100**

**SAN DIEGO COUNTY
(760) 274-2110**

**[www.ccmslaw.
com](http://www.ccmslaw.com)**