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When Municipal Employees Talk: Unsupervised Statements & the Importance of Getting Control

I. The Problem

When municipal employees make unsupervised and unapproved statements without guidance, major problems can ensue involving claims and litigation relating to the subject matter of the statements. In the best case such statements can be unflattering, and in the worst case, the statements can be used against the municipality in litigation to the detriment of the municipality, and to the detriment of the municipality's position. There are a variety of ways in which statements can be considered "unsupervised," which are addressed below. Additionally, there are a variety of different types of unsupervised statements which are concerning and a variety of specific situations where municipal employees can be vulnerable to making unsupervised statements, also discussed below. Such statements have created exposure for municipal organizations in actual litigation where municipal employees made unsupervised statements. Details of these experiences are also discussed below.

Consideration must also be given to situations unique to municipalities, including rules relating to contact with represented public entities, handling of disgruntled employees, opportunities to correct prior statements, and the usefulness of a press person or designated contact person to act as a liaison for the entity.

Finally, it is critical for municipal organizations to gain control over unsupervised statements. Policies should provide direction to employees who are facing contact from the media, public records requests, and contact by counsel for adverse parties (and any non-entity lawyer or his/her agent). Attention must also be given to the types of instructions employees should receive in order to gain the best protection from unsupervised statements. Finally, special attention is warranted for on-site employees who are potential witnesses in litigation, and special instructions will be addressed.

A. Municipal Employees Making Unsupervised Statements to Outsiders

For purposes of this discussion, the types of statements at issue are those which any employee makes to an outsider (anyone outside of the municipal organization) without supervision, which are not official statements of the municipality, which are unapproved by any management or counsel, which the employee makes without any guidance or advice from management, and which are made without any oversight of any kind.

These statements are generally hearsay statements, meaning they are out of court statements made to prove the truth of the matter. (See Federal Rules of Evidence, Rule 801.) Such statements can also be non-hearsay statements, as with admissions of fault or prior statements (Id.) Because such statements are potential evidence in litigation (including hearsay – see the exceptions), they should be carefully managed to reduce exposure.

B. Statements

Because all statements made by municipal employees to outsiders can be used as evidence against the municipality, every type of statement a municipal employee can make should be monitored. These include:

- 1) Verbal Statements
- 2) Recorded Statements
- 3) Written Statements
- 4) Deposition Testimony
- 5) Declarations
- 6) Court Testimony

Monitoring all such statements can be a challenge for most municipalities, hence the need for strict policies and procedures to guide municipal employees in situations where their statements may impact exposure. Municipalities should consider providing counsel to employees who are going to give recorded statements, written statements, and deposition testimony, as well as declarations and court testimony. Such statements are memorialized and can come back to create problems for municipalities when counsel is not provided.

Setting the Stage

It might be hard for most of us to imagine any of our employees talking to an outside lawyer or investigator, or the like. What happens though is that quite often the lawyer contacting municipal employees is a plaintiff attorney. As we know, plaintiff attorneys can be charming, and they befriend unsophisticated people to try and get information out of them. Of course, these attorneys are also expert at chatting up less sophisticated

people, finding things in common, and causing them to let their guards down. In one of the examples we are going to talk about, plaintiff attorneys contacted paramedics and firefighters after an accident and put them all at ease by talking about how they the lawyers were former federal prosecutors, they found some people they knew in common, and without much effort, these municipal employees were willing to make serious statements adverse to the municipality. What's worse is the statements are not even accurate because the wise counsel of a supervisor or other advisor was not present to ensure the statements made were clear and accurate.

It is probably obvious what can wrong in these scenarios, but here are some examples. Attorneys or other representatives for third parties create a false sense of security for municipal employees and befriend them. The employees then make statements they would not make without counsel or advice from management, and the employees can be taken advantage of. As we know, lawyers and other representatives for third parties are advocates for themselves, not the municipal employee, and employees with their guards down can make statements which mischaracterize municipal policy, which can mischaracterize facts, and which can do damage to the interests of the municipal entity. This is all bad enough, but what's worse is we know plaintiff attorneys share information among themselves, so missteps created by unwitting employees can come back to haunt municipalities as such statements can be used in future litigation when we least expect it, and management may have no idea of the risk created if no one is monitoring the statements.

Examples of Risky Situations:

- 1) Contact by any attorney or investigator for third party.
- 2) Whether municipal entity is a party or not.
- 3) Ongoing litigation or substantial injury.
- 4) Attorney or investigator contacts employees directly without going through management channels.
- 5) Employee is on his/her own with no representation.

Case Studies

Case Study No. One: A valet driver in a downtown, urban area was involved in an accident with a pedestrian while valet driving a vehicle. The pedestrian was injured, and police, firefighters, and paramedics responded. Official statements were given in official reports including the police report and paramedic report. The narrative portion of the paramedic report stated that the patient was crossing the street while looking at her phone. The paramedic shows up for his deposition with no counsel. He testifies that Plaintiff attorney contacted paramedic months before and the paramedic had extensive unsupervised conversations with Plaintiff attorney on multiple occasions. The paramedic of course had no recollection of the incident which is the reason for creating the report. The paramedic testified at his deposition that he had no idea where the statement that the pedestrian was crossing the street while looking at her phone came from. The paramedic

said numerous people could have relayed the history, and that there are no rules or procedures for completing the narrative portion of the report.

Impact in Litigation Where Municipality was not a Party: Potential hearsay objection. Statements in the paramedic report are unreliable. What is impact to municipality?

Further Info on Case Study No. One: Plaintiff attorney has been busy and to further bolster the argument that the paramedic report was unreliable, plaintiff attorney contacts each of the three firefighters who responded to the accident and obtained not one, not two, but three formal declarations in which the firefighters state under penalty of perjury that the narrative portion could come from anywhere.

What is the Impact on the Municipality? The overall outcome is the integrity of the paramedic's report is at risk. This is of course not information we want floating around. We need to rely on the content of paramedic reports, and information which suggests the reports are developed in a way that lacks reliability is not good, particularly considering Plaintiff attorneys share information, and this municipality should be concerned that the next time they get sued by a patient, the statements made in this unrelated case may come back to bite them.

Case Study No. Two: Automobile vs. Pedestrian. Police and paramedics respond. The defense contended that the intersection was dark, the pedestrian was not in cross walk and the was wearing dark clothing. A statement in the police report indicated the intersection was dark. At his deposition, the police officer said when he indicated in the report that the intersection was dark, he meant that there was no light on top of the traffic signal. This officer actually went back to the intersection, saw there was a light on top of the traffic two years later, and changed his deposition testimony when he reviewed the transcript so say the intersection was not dark, in direct contradiction with his own report.

What is the Impact on the Municipality? The summary of this situation is that the Police officer lacked confidence in integrity of his report. The officer testified his report was inaccurate about a basic fact. (Was it dark or not?) This puts the integrity of police reports at risk.

II. Considerations Unique to Municipalities

When a public entity is represented, the entity should be able to rely on adverse counsel to ethically and properly make contact with the entity, which should mean that all communications are directed through counsel. Strict handling of such communications should reduce the potential for unsupervised statements.

The public entity must be on guard for the disgruntled employee. Such employees may be more likely to draw negative conclusions and make negative statements. When a disgruntled employee is known to be a witness or involved with a department at issue,

Careful thought should be given to managing the disgruntled employee in order to avoid negative impacts.

When a municipal employee makes erroneous statements, policies and procedures should immediately alert management so that clarifications can be made, which will reduce the impact of previously unsupervised statements. Corrective statements can go a long way when they are prompt and concise.

Wise public entities will designate a press person or a designated contact to handle contacts by outsiders. A strict policy that all outsiders will be directed to a press person or designated contact will reduce the opportunity for unsupervised statements.

III. Getting Control

It is critical that public entities get control over unsupervised statements. There are numerous approaches:

A. Establish Policies and Provide Employee Training

Public entities should consider establishing policies and provide direction to employees regarding inquiries from Media/Press – Central Media Contact, Public Records Act Requests – City Clerk, Investigators and Attorneys – Risk Management or Legal Dept. These guidelines should be strictly followed.

B. Employees should be instructed to NOT provide any information or make statements and to follow the policy outlined by the organization.

C. Statements by On-Site Employees are the most difficult to get control over. Wise entities will provide direction to employees on what to do if they are approached on-site during emergency response or repairs. If approached by an Investigator or Attorney, obtain their contact information and provide it to Risk Management or Legal Department in accordance with established policies. Avoid making any statements regarding history of similar issues/problems at same location. Employees should provide good customer service without making off the cuff comments that may be misinterpreted. Emphasize the importance of accurate and factual information in the formal reports.

D. Establish Policies and Provide Employee Training

Public entities should establish policies and provide direction to employees regarding inquiries from:

- a) Media/Press – Central Media Contact
- b) Public Records Act Requests – City Clerk

c) Investigators and Attorneys – Risk Management or Legal Dept.

E. Employees should be instructed to NOT provide any information or make statements and to follow the policy outlined by the organization.