HUMANIZING AND HANDLING SUITS FOR THE INSTITUTIONAL PLAINTIFF

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Humanizing the Institutional Plaintiff.

Not everyone you represent is going to be a widow, quadriplegic, orphan or boy scout. Ultimately, you are going to represent the institutional plaintiff. It may be a bank, insurance company, corporation, or partnership. This presents a challenge to the trial attorney.

As attorney for the institutional plaintiff you must humanize the entity to the greatest extent possible. As the trial starts, you may already be at a disadvantage because your client is not a human being, and in fact, may not have any sympathetic qualities. However, by the close of voir dire, you may be able to make inroads toward having the jurors care as much about your client as they do about your human opponent.

Your job in representing the entity is to humanize or personalize it. Every juror will have had some experience with an entity. Jurors will tend to remember their bad experiences and forget their good ones. This results in prejudice against entities in general. People become frustrated and angry with what they perceive as faceless bureaucracies.

Jurors may believe the entity can withstand an unfavorable judgment better than an individual. Or they may render a verdict against the entity in a borderline case, simply because they think the entity is not a person who has feelings.

Jurors have a natural tendency to align themselves with people pitted against large entities in litigation (the underdog mentality). This natural bias in favor of individuals must be directly addressed and overcome.

As the trial attorney you must take advantage of every opportunity to help the jurors recognize their prejudice towards entities and bias in favor of people.

From the moment you leave your house in the morning to start your trial until the jury returns with a verdict, you will humanize your client. Throughout voir dire, opening statement, direct and cross-examination, and final argument, you must take every opportunity to present your client in the most favorable light possible.

The law recognizes jurors' natural prejudice towards entities as well as biases towards people. In fact, there is a jury instruction that you may request to assist you in that regard:

> **BAJI 1.03 Entity Not To Be Prejudiced As Such.**
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> The fact that a [corporation, business association or a public entity] is a party must not prejudice you in your deliberations or in your verdict.
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> You may not discriminate between a [corporation, business association or public entity] and natural individuals. Each is a person in the eyes of the law. Each is entitled to the same fair and impartial consideration and to justice by the same legal standards.

The court may, if asked, give this instruction at the beginning of the trial. In any event, this theme should carry

through voir dire, opening statement, your examination of witnesses, and be emphasized in closing argument.

Special Considerations in Representing the Entity

You should ask your client if it has guidelines governing its relationship with outside counsel. If the guidelines are in writing, you should get a copy and familiarize yourself with them. The guidelines may set forth the chain of command, to whom you should direct your communication, what information your billings should contain, and so forth.

When you represent an entity, you may be interacting with more than one person. You may report to a particular individual, but have contact with several others who may be witnesses or custodians of records.

The attorney-client privilege will protect some, but not all, communications between the employee and counsel, and the California Rules of Professional Conduct may limit opposing counsel's rights to contact current or former employees of your client.

A. Attorney-Client Privilege.

Your client, whether it is a corporation, partnership, nonprofit association or trust, is nonetheless a client, and the attorney-client privilege protects confidential communications between you. Evidence Code section 175 provides that the term "person" includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity. Confidential communications are afforded the same protection under the attorney-client privilege as if your client were a natural person. See, Dickerson v. Superior Court, Santa

Clara County (1982) 135 Cal.App.3d 93; Upjohn Co. v. United States (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584; and Benge v. Superior Court (1982) 131 Cal.App.3d 336, 345.

Evidence Code section 952 sets forth the statutory rule concerning the attorney-client privilege for confidential communications and provides in part as follows:

> "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

In determining whether or not the attorney-client privilege applies in a corporate setting, the intent of the corporate employee is determinative. If the employee intends a communication to the corporation's attorney to be confidential, it will be.

When representing the entity as a party, it is a good idea to interview the various employees of your client separately. If you

interview them as a group, an argument may be made that the privilege was waived by the presence of third persons not necessary for the transmission of the confidential information. However, on the other hand, if all people present are there to further the interest of your corporate client, an argument may be made that Evidence Code section 952 applies to protect the communication.

B. **Rules of Professional Conduct**.

We are all familiar with the rule that an attorney may not communicate with a party he or she knows is represented by counsel. But when you represent an entity, certain rules may prevent your opponent from contacting some of your client's employees and former employees.

California Rules of Professional Conduct, Rule 2-100, provides in pertinent part as follows:

> **Rule 2-100. Communication With a Represented Party.**
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> (A) While representing a client, a member shall not communicate directly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
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> (B) For purposes of this rule, a 'party' includes:
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> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
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> (2) An association member or an employee of an association, corporation, or

> partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

This rule does not define the scope of the attorney-client privilege; rather, it bars attorneys from having ex parte communications with opposing parties regardless of whether the information sought, obtained or conveyed is privileged from disclosure.

Rule 2-100 also does not bar contact with all corporate employees. The officer or director covered by subsection (B)(1) may not be privy to information protected by the attorney-client privilege, while a lower level employee who is not shielded from contact under rule 2-100 may be in possession of substantial privileged information. However, this does not enable corporate counsel to automatically assert the privilege as to every corporate employee.

In order to be protected, the communication must occur in the course of the attorney-client relationship. The privilege does not protect disclosure of the underlying facts which were communicated, and it does not extend to independent witnesses. Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 143.

Note that the rule permits your opposing counsel to initiate ex parte contacts with unrepresented former employees of your client, and present employees other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability. Id. at 140.

Once a dispute arises, it is a good idea to contact former employees of the entity who were witnesses or who have key information. They should be alerted to the fact that a lawsuit has been filed, the nature of the lawsuit, and what is at stake. If the attorney-client privilege attaches to communications with the former employee, they should be so advised.

These are but a few of the considerations to keep in mind when representing the institutional plaintiff.