

# South Carolina School Board Association

So You're Being Sued – Now What?

August 26, 2018

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

- *Getting Served*
  - Official v. Individual Capacity
  - Date of Service
  - Notifying School District and Insurer
  - Conflicts between/among Defendants
  - Who not to speak with (Plaintiff or Plaintiff;s Lawyer, News Media, etc.)

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

- *Attorney, Defendant, and Insurer*
  - Pre-Litigation
  - Litigation
  - Settlement/Summary Judgment/Trial
  - Appeal

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

- *Attorney*
  - **Assignment and Initial Assessment.**
    - Getting documents, speaking with parties/witnesses.
    - Answering Complaint.
    - Writing Initial Assessment.
  - **Litigation.**
    - Managing “Feedback” Loop among Attorney, Defendant, and Insurer.
    - EFFICIENT – use of associates, strategies designed to lower defense costs prudently.
    - EFFECTIVE – preparing case for Summary Judgment/ Settlement/Trial.

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

### ➤ *Defendant*

#### ➤ Setting Goals for Litigation.

- Organizing and preserving evidence/documents.
- E-discovery.
- Input into initial and ongoing assessments of exposure to liability.

#### ➤ Support to Litigation.

- Service of Process.
- Who is represented, and by whom.
- Managing access to documents and witnesses.
- Defining role in litigation team.

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

### ➤ *Insurer*

#### ➤ Litigation Intake.

- Making initial determinations of coverage.
- Assignments of counsel (who and how many).
  - They have NOTHING to do with coverage issues.
- Boundaries of relationships with agency as well as attorney.

#### ➤ Monitoring Litigation.

- Initial/periodic updates.
- Informing Agency re: goals in litigation – what outcomes are possible? What are probable?
- Access to Agency and Attorney.

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

- *Settlement*
  - Mediation.
    - Not always – but almost always – required.
    - Preparation PRIOR to mediation or other settlement conferences.
    - Using institutional knowledge of Agency and Insurer to inform decisions (i.e., selection of mediators).

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EXPERIENCE MATTERS

## So You're Being Sued – Now What?

- *Settlement*
  - Attorney-Defendant-Insurer.
    - Pre-settlement meeting not always required, BUT often a great idea.
    - Hashing out joint understanding of potential remedies – financial AND equitable.
    - LIMITING SURPRISES.

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- Who can be sued for money damages?
  - Individual state officials.
  - Counties and municipalities.
  - Individual county and city employees.
- Who **cannot** be sued for money damages?
  - State Agencies.
  - State officials in their “official capacity.”
  - Private actors.\*

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- Employment-related claims under § 1983
  - Constitutionally protected right.
    - *Speech*
    - *Religion*
    - *Association*
    - *Search and Seizure*
    - *Due Process*
    - *Equal Protection*

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EXPERIENCE MATTERS

## First Amendment

- Congress shall make no law respecting an establishment of **religion**, or prohibiting the free exercise thereof;
- Or abridging the freedom of **speech**;
- Or of the **press**;
- Or the right of the people peaceably to **assemble**, and to **petition** the Government for a redress of grievances.

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## Fourteenth Amendment

- **No state shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;
- Nor shall any state deprive any person of life, liberty, or property, without **due process** of law;
- Nor deny to any person within its jurisdiction the **equal protection** of the laws.

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## 42 U.S.C. § 1983

### ➤ First Amendment Speech Retaliation Claim – Essential Elements

- Plaintiff must demonstrate that his or her speech was **protected**.
- Plaintiff must demonstrate that the defendant's alleged retaliatory action **adversely affected** the plaintiff's constitutionally protected speech.
- Plaintiff must demonstrate that a **causal relationship** exists between [the] speech and the defendant's retaliatory action.

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## 42 U.S.C. § 1983

### ➤ First Amendment Retaliation Claim – **Is the speech protected?**

- “[W]hen a public employee speaks not as a citizen upon **matters of public concern**, but instead as an employee upon matters only of **personal interest**, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.”

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – **Is the speech protected?**
  - “[W]hen public employees make statements pursuant to their official duties, the employees are **not** speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – **Is the speech protected?**
  - Was the public employee speaking as a **citizen upon a matter of public concern** or as an employee about a matter of personal interest?
  - Even if the employee spoke upon a matter of public concern, was the employee’s interest in speaking upon the matter of public concern **outweighed by the government’s interest in managing the working environment?**
  - And finally, if the employee’s claim satisfies both of these legal criteria, the court turns to the factual question of whether the employee’s speech “**was a substantial factor in the employee's termination decision.**”

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## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – **Does the speech involve a matter of public concern?**
  - Generally, speech “involves a matter of public concern when it involves **an issue of social, political, or other interest to a community.**”
  - This is a “Question of Law” for the Court.
  - Was the speech made to further public debate, or only personal interest of an employee?

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## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – **Does the speech involve a matter of public concern?**
  - Was the speech a “personal complaint about the terms and conditions of employment”?
  - Who was the audience of the speech? Internal or external?

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## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – **Does the government’s interest in managing the workplace outweigh the speaker’s free speech interests?**
  - “Efficient functioning of government offices” is a “paramount public interest.”
  - Does the speech –
    - Impair discipline by superiors?
    - Impede performance of duties?
    - Interfere with operations?
    - Is there any evidence that these things took place?

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## 42 U.S.C. § 1983

- First Amendment Retaliation Claim – Was the employee’s speech “**a substantial factor in the employee's adverse action**”?
  - Why was the employee fired (or demoted, or had his/her salary reduced)?
  - Think “legitimate, non-discriminatory reason” in a Title VII claim.

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- Qualified Immunity and the “I Believe” License Plate.
  - *Summers, et al. v. Adams, et al.*, 2009 WL 3785691 (D.S.C. Nov. 10, 2009).
  - SCDMV Executive Director sued in her individual capacity for allowing SCDMV to engage in actions preliminary to issuing the “I Believe” license plate.
    - Helping produce example of plate.
    - Posting example on the SCDMV website.

## 42 U.S.C. § 1983

- Qualified Immunity and the “I Believe” License Plate.
  - Adams asserts qualified immunity against Plaintiffs’ “individual capacity” claim.
  - We argued that Adams could not have reasonably known that the “I Believe” plate statute was unconstitutional.
  - Judge Currie didn’t agree. At all.

## 42 U.S.C. § 1983

- Qualified Immunity and the “I Believe” License Plate.
  - Judge Currie thought license plates are an “obvious effort to proselytize on behalf of a particular religion.”
  - Opinion implies that Adams should have requested an AG opinion before taking any action.
  - BUT there was “no prior controlling precedent specifically addressing application of the Establishment Clause to a religious message on a legislatively-approved plate.”

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- Qualified Immunity and the “I Believe” License Plate.
  - “More critically, there was, to the court’s knowledge, no precedent holding that actions *preliminary to distribution* of such a plate (such as the actions taken by Adams), without more, are violative of the Establishment Clause .”

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EXPERIENCE MATTERS

## 42 U.S.C. § 1983

- Qualified Immunity and the “I Believe” License Plate.
  - Lessons?
  - Consider concentrating on official’s actions as well as whether the alleged constitutional right has been clearly established.
  - Think about getting an AG opinion.

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## Defamation

- Libel – written defamation, or defamation accomplished by actions or conduct.
- Slander – spoken defamation.
- Elements:
  - A false and defamatory statement,
    - Made with either “implied malice” or “actual malice,”
  - That is not privileged,
  - That is “published” to a third party, and
  - That either (1) caused special harm, or (2) is “per se” actionable regardless of special harm.

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EXPERIENCE MATTERS

## False & Defamatory Statement

- *False.*
  - May be a question of fact for a jury.
  - Truth is an absolute defense, but must be raised and proved as an affirmative defense.
- *Defamatory.*
  - Statement tends to impeach plaintiff's reputation – *White v. Witherspoon*, 328 S.C. 179, 493 S.E.2d 345 (1997) (allegation that attorneys took most of settlement in civil right case for themselves “could impute a derogation from the ethical responsibilities of that attorney”).
  - The court initially determines whether “the publication is incapable of any reasonable construction which will render the words defamatory.”

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EXPERIENCE MATTERS

## False & Defamatory Statement

- *Insinuation as Defamation?*
  - Employee discharged immediately following a polygraph test, allegedly giving fellow employees and others “the feeling and belief that respondent had been discharged for some wrongful activity.”
  - “This...amounted to the publication of defamatory matter.”
  - “A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.”

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## Privilege

- Absolute Privilege
  - Pleadings
  - Judicial Proceedings
  - Depositions
  - Legislative
  - By Statute
- Qualified or Conditional Privilege
  - Communications made to protect a “common interest.”
  - “Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business.”
  - **BUT IT CAN BE LOST** - The publisher “must not wander beyond the scope of the occasion.”
  - Whether conditional privilege was exceeded can be question for a jury.

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## Civil Conspiracy

- *Elements of Civil Conspiracy.*
  - A combination of two or more persons
  - For the purpose of injuring the plaintiff
  - Which causes “special damages.”
- *“Combination.”*
  - Can be inferred from circumstantial evidence.
  - Agents of a corporation can conspire with each other.
  - BUT NOT when they are acting as agents of the corporation and on behalf of the corporation – the “Intracorporate Conspiracy Doctrine”

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EXPERIENCE MATTERS

## Civil Conspiracy

- *Intracorporate Conspiracy Doctrine.*
  - “No conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, **each acting within the scope of his employment.**”
  - Acting OUTSIDE scope of employment?

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EXPERIENCE MATTERS

## Civil Conspiracy

- Defending against Civil Conspiracy Claims
  - *Scope of Employment*
    - Did the individual defendant have a right to do what he/she did?
  - *Budget Proviso*
    - *Adding procedural hurdle to claim.*
  - *Personal Motive*
    - Is there evidence/allegation that the defendants acted with some ulterior purpose/intent to injure?
  - *Pleading*
    - Cannot merely mimic the allegations in other companion causes of action re: facts or “special damages.”

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