Sexual Assault and Molestation Claims Against Public Entities: Legal Updates, Liability, Exposure, and Defense Strategies

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Legal Theories for Plaintiff's to Recover for Claims of Sexual Assault And Molestation (SAM) Against the Public Entity

- Sexual Assault and Molestation (SAM)

Negligence

- Negligent Hiring (failure to properly screen the hire)
- Negligent Retention (failure to weed out a predator)
- Negligent Supervision (failure to monitor, supervise and address concerns)***
- Negligent Training (failure to train on harassment, mandatory reporting, inappropriate conduct, for self and others)***
- There are other causes of action (discussed later), but these are the most directed in SAM cases.

Negligence Continued….

The key issue for all SAM Negligence Cases will be whether or not there was NOTICE to the public entity of the employee's predatory conduct.

If the public entity HAD notice of the employee's predatory nature, then there is a good chance liability will be adverse.

If the public entity did NOT have notice of the employee's predatory nature, then there is a good chance for a defense judgment or verdict.

Negligent Hiring

- The standard is the failure to use due and reasonable care in the hiring process (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869.)
- Critical Issue is whether we followed legal obligations and policies:

1. Legal Obligations: Education Code § 45125.1, requires all employee applicants for schools to be fingerprinted and their arrests and conviction records checked. Government Code § 1043, requires all employees who handle confidential information to be fingerprinted with a background check. Even when it is not explicitly required by statute it is always best practice to perform routine background checks on all new employees.
2. Policies:
   - Did we check references and fingerprint?
   - Did we ask questions about crimes against children or violent crimes, other arrests or firings, and then follow up on the answers?
   - Social media checks: not required, but should we do them?

Negligent Hiring Continued….

- Bottom Line: Must have policies for background checks and must follow them.
- The failure to follow our policies, which leads to a predator getting hired when a background check would have revealed the issue, is negligent hiring, and the fact that we COULD HAVE found the predatory prior conduct with a proper background check provides the NOTICE to the entity. (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 142; see also *D.Z. v. Los Angeles Unified School Dist*. (2019) 35Cal.App.5th 210, 223, internal citations omitted; see also *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 865.)
- Ex: High School Track Coach

Negligent Retention:

- Did we have notice of SAM concerns of the employee, including after hiring, and fail to take employment action against the employee, leading to a future SAM?
  - The prior concern will likely constitute notice.
  - Depending upon the prior concern, various levels of responsive action could take place, but the risk of exposure for SAM once we have notice will always be present.
  - Ex: Prior Sustained Complaints

Negligent Supervision

- Did we fail to supervise the employee, which led to a SAM?
- The key issue will be PRIOR NOTICE: did we have notice of predatory conduct that should have reasonably required more supervision. (*Doe v. Department of Children* (2019) 37 Cal.App5th 675, 682-683; see also, *D.Z. v. Los Angeles Unified School Dist*. (2019) 35Cal.App.5th 210, 223, internal citations omitted.)
- The types of activities can be important in determining negligent supervision: were the employees scheduled to be alone; was it a nighttime activity; what was the male/female ratio; other circumstances.
- This is a main liability trigger for the plaintiffs. Once they establish prior notice, any SAM act raises questions of why the employee was not supervised.
- Ex: Bus Complaints

Negligent Training

- Did we properly train the employee?
  - Government Mandated Harassment?
  - Reinforced Annual Training?
  - SAM Warning Signs (this is a frequent area of deposition questioning)?
  - Mandatory Reporter Training Under (Ed. Code, § 44691)

Negligent Training Continued….

- Most depositions of employees start with descriptions of their trainings.
- Entities need to keep the logs showing proper training was given and received.
- Entities need to keep the logs showing rules, policies and manuals were received by employees.
- Entities are judged both on description of training and the quality of training.

Mandatory/Mandated Reporter Violations

- Certain California jobs require the employee to report suspected child abuse to law enforcement (CPS) and be trained on mandatory reporting annually (Penal Code 11165.7)
- The list of mandatory/mandated reporters is extensive: (school employees, youth center employees, social workers, law enforcement officers, healthcare workers, public health employees, animal control, etc).
- The failure to report suspected child abuse under the act is, itself, a legal violation (criminal), and subsequent SAM acts after the failure to report result in liability.
- This allegation is made in most SAM cases as the failure to report is also a time of notice of prior conduct.
- Mandatory Reporting: Just report to law enforcement upon a suspicion of abuse, do not investigate to determine reasonableness.

Expansion of SAM liability in A.B. 218 (ccp 340.1).

- A.B. 218, or the California Child Victims Act, has amended the California Code of Civil Procedure, the Government Code, and Penal Code, resulting in the following:
  - An expansive Statute of Limitations to bring the SAM case claims;
  - Reviving SAM cases where the Statute has already run; and
  - Adding treble damages as a remedy for plaintiffs.

Expansion of SAM Liability in A.B. 218 (CCP 340.1) continued…

- Plaintiffs will have 22 years after they turn 18 to bring a civil claim for a childhood sexual assault. (CCP § 340.1(a).)
- Alternatively, a plaintiff would have 5 years from the date of discovery or when they reasonably should have known of the causal link between the assault and psychological trauma after the age of majority. (Ibid.)
- Furthermore, if there is a cover up relating to the supposed sexual assault that entity would be subjected to treble damages.(CCP § 340.1(b)(1).)
  - A cover up is a concerted effort to hide evidence relation to the childhood sexual assault. (CCP § 340.1(b)(2).)
- Plaintiffs over the age of 40 may not file suit against a non-perpetrating defendant, public entities, unless that entity had known, had reason to know, or was on notice of the alleged misconduct that creates a risk of childhood sexual assault and did nothing to avoid it. (CCP § 340.1(c).)
  - An example of knowing of the supposed conduct that would trigger the tolling of the statute of limitations would be, when an aunt was allowing her husband to baby sit her nieces knowing that her husband had prior convictions for sexually molesting minors. (*Joseph v. Johnson* (2009) 178 Cal.App.4th 1404, 1409.)

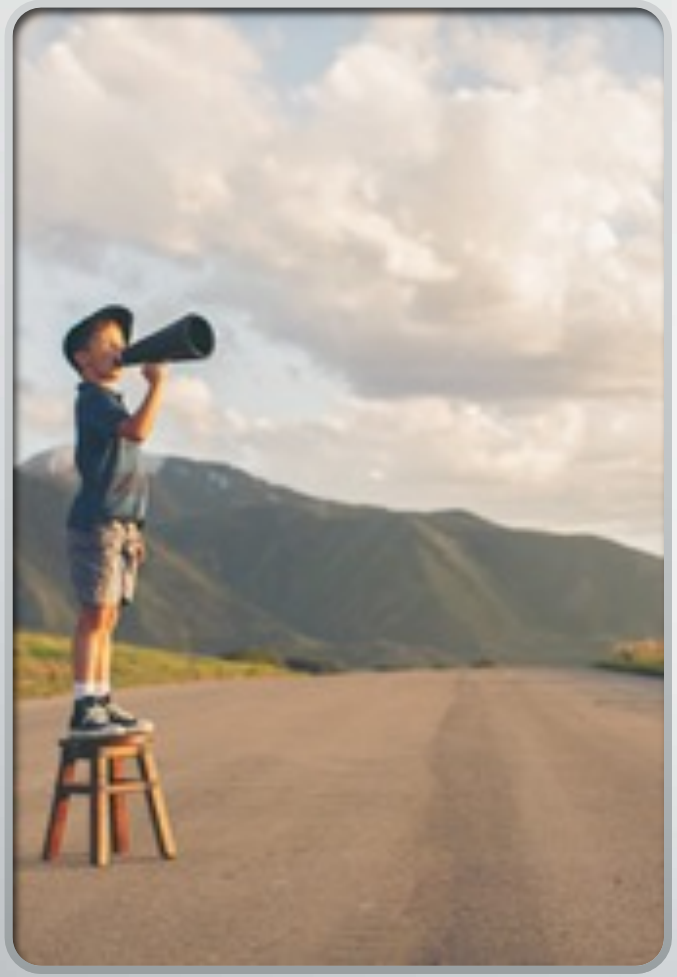
Currently Under California Supreme Court Review Treble Damages Against Public Entities

- Discussed in *Los Angeles Unified School Dist. v. Superior Court* (2021) 64 Cal.App.5th 549, treble damages are not compensatory in nature under A.B. 218. As such, there is an argument to be made that a public entity paying treble damages, as they are punitive in nature and punitive damages are not available against public entities and is actually tantamount to an unlawful gift that is violative of the California Constitution. (see Cal. Const. Art. 16 §6.)
  - Note: This case is only cited as persuasive (See Cal. Rules of Court 8.1105 and 8.1115(and corresponding Comment, par. 2, concerning rule 8.1115(e)(3)) as the California Supreme Court Granted Review.)
  - Argument against A.B. 218 treble damages aware against public entities:
    1. No punitive damages against public entities (Gov. Code § 818), and treble damages are punitive.
    2. Payments in excess of what a public entity is legal bound to pay is an unlawful gift of public funds.(*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 451-452, as modified on denial of reh'g (Aug. 20, 2002); Cal. Const. Art. 16 §6.)

Unruh Act Claims in SAM Cases, Currently Under California Supreme Court Review As To Public Entities

Unruh Civil Rights Act

- Unruh is California's Civil Rights Act, which states, "All persons within the jurisdiction of the state are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, bearable status, sexual orientation, citizenship, primary language, or immigration status are entitled to a full and equal accommodations, advantages, facilities, privileges, or services being all business establishments of every kind whatsoever." (Civ. Code § 51(b).)
  - Unruh Violations will also entitle the plaintiff to reasonable attorney's fees. (Civ. Code § 52.)



What Constitutes an Unruh Violation?

- The alleged discriminatory conduct must be either arbitrary or intentional. (see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149; see also *Hankins v. El Torito Restaurants, Inc*. (1998) 63 Cal.App.4th 510, 520.)
  - Interestingly, spoken words may even constitute a violation of the Unruh Civil Rights Act. (*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 150 [citation omitted].)

To whom does Unruh Apply?

- Multiple Federal District Court's have specifically found that the interpretation of the phrase "business establishments" in Section 51 of the Civil Code should be construed in the liberalist possible sense reasonable. (*Stevens v. Optimum Health Institute--San Diego* (S.D. Cal. 2011) 810 F.Supp.2d 1074, 1084 [citing to *Curran v. Mount Diablo Council of the Boy Scouts*, (1998) 17 Cal.4th 670, 696.)
- In fact, one court when as far as to state that the determination of whether a defendant is a "business establishment" is a question of law that ought to be decided by an appellate court. (*Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 152 [citations omitted].)

Currently Before the California Supreme Court For Review Unruh Does Not Apply to Public Entities

- An appellate court has found that public entities are not business establishments as described in CCP § 51, as their main purpose is not to generate profit, and therefore, the Appellate Court has decided that Unruh does not apply to public entities. (*Brennon B. v. Superior Court Contra Costa* (2020) 57 Cal.App.5th 367, 389. this is only persuasive at this time rather that legally binding on courts. (see Cal. Rules of Court 8.1105 and 8.1115.)
  - Factors the court consider include: (1) What is the business benefit one may derive from membership; (2) The number and nature of the paid staff; (3) Whether the organization has a physical facility; (4) What are the purposes of the organization; (5) The extent that the organization is open to the public; (6) Whether there are any fees or dues for participation or membership; and (7) Nature of the organization's structure. (*Harris v. Mothers Against Drunk Driving* (1995) 40 Cal.App.4th 16, 20 [46 Cal.Rptr.2d 833, 835], as modified (Nov. 30, 1995).)

Bane Act Liability in SAM Cases (Civil Code Section 52.1)

- The Bane Act prohibits threats, intimidation or coercion, to stop anyone from the exercise of their legal rights.
  - Bane Act violators do not have to be acting under color of legal authority (unlike civil rights violations under 28 USC 1983).
  - Bane Act allows for the recovery of attorney's fees.

Bane Act Liability in SAM Cases (Civil Code Section 52.1), Cont…

- Plaintiff must show more than negligence (egregious interference with a constitutional right) for Bane Act violation (*Shoyoye v. County of Los Angeles* (2021) 203 Cal. App. 4th 947, 959).
- Some cases have asserted that a Bane Act violation requires that the act to deprive the constitutional right be intentional (*Simmons v. Superior Court* (2016) 7 Cal. App. 5th 1113, 1125).
- Distinction between intentional act of the perpetrator, and the negligence of the public entity (negligence is not enough for Bane Act Liability).
- Example of a public entity Bane Act exposure: Threatening a victim from reporting a SAM attack.
- Note: Bane Act assertions by SAM Plaintiffs have been infrequent, limited and have not held up well against defense motions.

Gender Violence Under Civil Code §52.4

- If there is a criminal offense under state law that is committed in part based on the gender of the victim, regardless if charges were ever filed, or if there is a physical intrusion of a sexual nature under coercive conditions took place, there may be a cause of action for Gender Violence. (Civ. Code §52.4.)
  - A gender violence cause of action, entitles the plaintiff to seek attorney's fees. (*Ibid*.)
  - Gender violence under Civil Code §52.4 should not be applied to a public entity, only individuals. (see *Doe v. Pasadena Hospital Association, Ltd.* (C.D. Cal. 2020) 2020 EL 1244357.)
  - If *Brennon B.* is affirmed, then there will be a legal bar to application to public entity.

Sexual Harassment Violations of Unruh Civil Code § § 51.9 &52

- Unruh Act does allow for attorney's fees for state law sexual harassment, with the recover of attorney's fees, but this statute should not be actionable against public entities:
  - Statute identifies only individual acts. (Civ. Code § 51.9.)
  - If the California Supreme Court upholds *Brennon B.* then this section does not apply to public entities.

SAM Claims Asserting Federal Title IX of Title VII

SAM Plaintiffs can assert gender discrimination claims in the appropriate context, including school cases.

Title IX of Title VII do allow for the recovery of attorney's fees.

We rarely see these causes of action because they allow the public entity to remove the case to federal court.

Defense to SAM Claims

- 1. The entity separates itself from the perpetrator: the acts of the perpetrator were not within the course and scope of work duties.
- 2. There is no vicarious liability (automatic liability by the employing entity for the acts of the employee) if the SAM Act was not within the course and scope of work duties of the perpetrator (Govt. Code Section 818; *Kimberly M. v. Los Angeles Unified School District* (1989) 215 Cal.App.3d 545, 549).
- 3. The employee committing the SAM violation may be liable, but the entity is not vicariously (automatically) liable for the intentional act of the employee absent a very specific connection to the job (ex: Police Officer using his authority, and abusing it, in the course of his assigned duties, to commit a SAM; see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 215).

Defense to SAM Claims Cont.

- Was an employee acting within the course and scope of their duties? (see *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1009.)
  - If not, the SAM act can have occurred, but no entity liability.

Defenses to SAM Claims, Cont.

- No Notice: Lack of notice is a major defense in most cases.
- If there was no notice to the entity of prior predatory conduct by the employee, then the lack of notice is a full defense to all negligence claims against the district. (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 903; see also *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591; see also *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 229.)
  - Lack of notice is often the biggest issue in a SAM Case against a public entity.
  - The SAM can have occurred, but the public entity can be found not liable if it had no notice of prior predatory conduct.

Types of notice

To satisfy the third element for a cause of action for Negligent Hiring, Retention, Training, and/or Supervision, plaintiffs must demonstrate that the public entity had notice. "Notice" entails:

1. Actual Notice: This notice requires that the public entity must have known of the employee's assaultive propensities. (*Doe v. Department of Children* (2019) 37 Cal.App5th 675, 682-683.)
   - This is a high bar and requires the plaintiff to show foreseeability rather than simply presenting circumstantial evidence.
   - For example, the Court found that the acts of a teacher giving a rose, Victoria's Secret card, and a note that actually stated "love, S" was insufficient to impute actual knowledge on to the district. (*Steven F. v. Anaheim Union High School District* (2003) 112 Cal.App4th 904, 907.)
2. Plaintiffs will typically argue to apply a form of constructive notice. Constructive Notice: This notice uses the standard that the public entity knew or should have known of the foreseeable risk of sexual abuse by an employee. (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35Cal.App.5th 210, 223, internal citations omitted; see *also C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 865, 138 Cal.Rptr.3d 1.)

Facts Giving Rise to Notice

Notice is fact specific, but many cases show that for an entity to be "on notice", the facts should be predator specific.

- Gifts: as discussed above, simply providing a student with a rose, a love note, and a Victoria's Secret card is insufficient to impute the actual knowledge onto the public entity. (*Steven F. v. Anaheim Union High School District* (2003) 112 Cal.App4th 904, 907.)
- Increasing Lewd Comments by an Employee: a public entity may be charged with notice if they had knowledge of inappropriate comments made towards students. (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 227 [the teacher was commenting to other female students about another student's breasts and inappropriately inquiring as to their sexual experiences.].)
- "Rule Breaker": Simply because an individual does not follow the unrelated rules would not be sufficient to constitute notice to the school district. The plaintiff must still demonstrate that there was a foreseeable risk of sexual abuse by an employee. (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35Cal.App.5th 210, 223, internal citations omitted; see *also C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 865.)
- Who must receive notice? Authorities suggest that knowledge for any district employee may be sufficient to constitute notice. (*C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 873; and Penal Code 11165.7 .)

Notice of Grooming

- The plaintiff can establish liability for SAM if the plaintiff shows evidence that the public entity had notice of "grooming". (see *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210;see also *Mark K. v. Roman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 607, as modified on denial of reh'g (Oct. 28, 1998);*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 867 and 873.)
  - Grooming examples include:
    - Friending and communicating on social media;
    - Non-sexual inappropriate contact; and
    - Activities which build a confidence between the perpetrator and the victim.

Notice of Grooming Cont.

- Unsettled and addressed case by case, is when grooming occurs in the course and scope of the job, but the SAM occurs off campus/property.
  - Plaintiff will argue that, by virtue of perpetrator's position, that they had special access to the minor, and as a result were able to commit the SAM act.
  - Public entities will treat this as out of the course and scope of employment and off property so there should be no liability.

Defenses to SAM Claims Cont….

- A defense can be raised that the SAM was committed off of the job, off of the public entity grounds and not during a work event. In this case, the perpetrator can be liable but the public entity not liable. (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 903; *M.P. v. City of Sacramento* (2009) 177 Cal.App.4th 121, 133.)
- Do immunities apply to the fact pattern (immunities specific to the facts, which is unlikely, but worth a check)?

Defenses to SAM Claims Cont…

1. Always look for other defendants to include for liability apportionment.
   - This is case specific, so pay careful attention to the facts and the individual actors in your case.
   - One person that will always need to be brought in to share liability is the perpetrator themselves.
     - *<u>The key here is to emphasize the intentional action of the perpetrator.</u>*
2. Civil Code of Procedure § 1431.2, (Proposition 51) does not allow for a perpetrator to have an offset if the conduct was intentional. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 29.)
   - It is unclear whether if the perpetrator was acting in course and scope of employment duties, if there will be an offset for these damages.

Defenses to SAM Claims Cont.

- Apportionment of Damages under Civil Code Section 1431.2: Argue that the damages should be apportioned to the perpetrator in a high percentage even if the entity is liable, and that the general damages are only collectable against the entity in the lower percentage of the entity fault (so if perpetrator is 80% liable for his intentional act, and the entity only 20%, then a $1 million pain and suffering award is only allotted against the entity for 20% or $200,000).
- This apportionment is a strong defense, as the perpetrator is usually at fault for a majority of the apportionment.

Defenses to SAM Claims Cont.

- Damages Defenses Include:
  - Was the pain and suffering (emotional distress) caused by this SAM, or potentially other conditions or incidents (CACI 430, 3927)?
  - Are future damages "reasonably certain" to occur, which is a heightened standard (past damages need only be reasonable) (CACI 3903A, 3905A; *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588)?
  - Medical and healthcare expenses reduced to amounts paid after write off (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541).

Defenses to Sam Claims, Cont.....

- The failure to mitigate damages (CACI 3930).
- Comparative negligence of the plaintiff (CACI 405)
  - Be very careful with this defense. Do not get caught blaming the victim.

Defenses to SAM Claims, Cont……

- The legal defenses to Treble Damages in A.B. 218, Bane Act Damages and Unruh all apply.
- No punitive damages against a public entity (Gov. Code § 818)

Strategies for the Defense of SAM Claims

- Expect the "reptile" theory from the plaintiff.
  - Plaintiff will attempt to play on sympathy for the victim and in range the jury with anger over the lack of compassion, and lack of safety measures and oversight, of the entity.
  - The goal of the plaintiff attorneys in SAM Cases is to trigger the emotion of the jury. The public entity does not want the plaintiff into that strategy by showing a lack of compassion or a failure to accept responsibility.

Strategies for the Defense of SAM Claims, Cont..

- The defense has to show sympathy to the victim. The sympathy has to be authentic.
- The defense has to accept responsibility for whatever fact they clearly should accept responsibility.
- By the way of example, we accept responsibility for having tired someone who committed to SAM, but we did not know the person was a creditor until this occurred, at which time we took responsibility and immediately fired the employee.
- Avoid blaming the victim. This plays into the reptile theory.

Strategies for the Defense of SAM Claims, Cont…

- Do we provide a defense for the perpetrator employee or not?
  - Some of this decision may be triggered by CBA terms.
  - If you provide the defense, without indemnity, you can be more sure that the perpetrator will present well and under control.
  - The plaintiff may attempt to get in front of the jury that the entity is providing the defense of the employee, and you have to move to exclude that fact from evidence.
  - You will want to push the highest percentage of liability to the employee, so the employee will need a separate attorney. The entity does not want to be seen as friendly with the perpetrator.

Strategies for the Defense of SAM Claims, Cont….

- Bring every motion to fight the allegations at every stage:
  - Demurrers, Motions to Strike, Motions for Summary Judgment.
  - The law can be on your side, but the facts presented to the jury may not be on your side. Knock out as much of the case as you can on legal grounds.
  - Conduct discovery with an eye toward a Motion for Summary Judgment.

Strategies for the Defense of SAM Claims, Cont….

- Avoid "Nuclear" Verdicts:
  - Do not play into the Reptile Theory by failing to show compassion or take the necessary responsibility (we feel for the plaintiff and we fired the perpetrator, to make sure this never happens again).
  - Take the required action to fix anything that we did not do correctly with the plaintiff in the case (training, warnings, oversight, etc), so the jury does not agree that it has to send us a message.

Strategies for the Defense of SAM Claims, Cont….

- Do not have public entity witnesses accept and adopt the term "red flags"; a phrase intend to alarm the jury.
  - Plaintiffs use this "red flags" to suggest that the entity missed obvious red flags.
  - The public entity should assert that it looked for suspicious of abuse, per mandatory reporting, not "red flags".

SAM Trends

- SAM Verdicts are rising.
- Juries are sensitive to SAM Acts by public employees.
- Cases are rising in numbers filed due to Prop 218.
- Old cases are now being filed due to the extended statutes of limitations.
- Avoiding Nuclear Verdicts by defending with the proper tone, of sympathy and responsibility with proper legal motions, is critical.


QUESTIONS?

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